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Essential Elements of Reform of the War Powers Resolution

Mark L. Krotoski

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ESSENTIAL ELEMENTS OF REFORM OF THE WAR POWERS RESOLUTION

Mark L. Krotoski*

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* 1989 by Mark L. Krotoski

While the ideas contained here are solely those of the author, grateful acknowledgment is extended to the following individuals who, through their dialogue, suggestions, and assistance, were instrumental in helping to shape many of the concepts that have now taken form in this article: Congressman Daniel E. Lungren, Dean John R. Kramer, Tulane University School of Law, Victor E. Arnold-Bik, Administrative Assistant to Congressman Lungren, Dr. Stanley I. Bach, Senior Specialist in the Legislative Process, Government Division, Congressional Research Service, Dr. Richard S. Beth, Specialist in the Legislative Process, Government Division, Congressional Research Service, William C. Mohrman, Assistant Counsel, Office of the Legislative Counsel of the House of Representatives, as well as others.

Many of the recommendations in this article are made in the context of The Hostilities Act, H.R. 3912, 100th Cong., 2d Sess., 134 CONG. REC. H250-59 (daily ed. Feb. 4, 1988), a bill which the author developed as a legislative aide for Congressman Daniel Lungren. Congressman Lungren is a former member of the House Committee on the Judiciary and the House Permanent Select Committee on Intelligence. Although several proposals made in this article depart from The Hostilities Act legislation, the comprehensive reform bill is the primary vehicle for consideration of many of the central issues involving war powers reform.
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I. Introduction

The conduct of foreign affairs in the United States has been referred to as “an invitation to struggle” between the executive and legislative branches “for the privilege of directing American foreign policy.” This timeless observation perhaps most aptly characterizes

1. Edwin Corwin, constitutional scholar, made the following observation:
   Where does the Constitution vest authority to determine the course of the United States as a sovereign entity at international law with respect to matters in which other similar entities may choose to take an interest? . . . What the Constitution does, and all that it does, is to confer on the President certain powers capable of affecting our foreign relations, and certain other powers of the same general kind on the Senate, and still other such powers on Congress; but which of these organs shall have the decisive and final voice in determining the course of the American nation is left for events to resolve.

   All of which amounts to saying that the Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to
the debate, implementation and practice of the exclusive and shared constitutional war powers of the political branches. Few other areas rival the manifest constitutional tension continually exhibited on decisions concerning war.

Since the founding of our nation, significant constitutional issues have persisted regarding the exercise of the divided war powers between the President and Congress. Legislative efforts since the late 1960s and early 1970s, principally through the enactment of the War Powers Resolution by the congressional override of President Richard Nixon’s veto, have attempted to clarify the relative scope of

struggle for the privilege of directing American foreign policy.


Professor Arthur Schlesinger, in describing the inherent conflict, noted that the issue was “how to reconcile democratic control of the warmaking power with the imperious requirements of foreign policy.” The War Power After 200 Years: Congress and the President at a Constitutional Impasse, Hearings Before the Special Subcomm. on War Powers of the Senate Comm. on Foreign Relations, 100th Cong., 2d Sess. 40 (1988) [hereinafter 1988 Senate Hearings].

2. In the famous Pacificus-Helvidius debate between Alexander Hamilton and James Madison, the war and foreign policy powers of the executive and legislative branches were argued. This 1793 dispute arose in the context of President George Washington’s proclamation of neutrality in the war between England and France. See 4 THE WORKS OF ALEXANDER HAMILTON 432-89 (H. Cabot Lodge 1904 ed.) (writing seven essays signed under the name of Pacificus) [hereinafter PACIFICUS]; 6 THE WRITINGS OF JAMES MADISON 138-88 (G. Hunt 1906 ed.) (writing five Letters of Helvidius as a response to the Pacificus essays) [hereinafter HELVIDIUS]. Hamilton argued that the neutrality proclamation was an act assigned to the executive branch. Madison responded that the positions taken by Pacificus constituted an encroachment upon legislative war and foreign policy authorities.


Based on earlier congressional consideration in 1973, it was not clear whether the House of Representatives would be able to secure the requisite two-thirds vote to override the veto. However, the Senate was well over the veto level in each of its votes. Although the House subsequently overrode the veto, the initial House vote on the bill fell 32 votes short of the requisite override number. House approval of the conference report was only four votes shy of the number necessary to override a veto, with 74 absentees. The Senate was 13 votes over the requisite two-thirds. Finally, the House narrowly overrode the veto by only four votes. See 119 CONG. REC. 25,119 (1973) (Senate passage of S. 440, 93d Cong., 1st Sess., 72 to 18); id. at 24,707-08 (House passage of H.R.J. Res. 542, 93d Cong., 1st Sess., 244 to 170); id. at 33,569 (Senate adoption of conference report, 75 to 20); id. at 33,873-74 (House adoption of conference report, 238 to 123); id. at 36,198 (Senate override of veto, 75 to 18); id. at 36,202-21 (House override of veto, 284 to 135).

The override of President Nixon’s veto on the War Powers Resolution was also “the first time in nine attempts [in 1973] that both houses had overridden a veto.” Madden, House and Senate Override Veto by Nixon on Curb of War Powers; Backers of Bill Win 3-Year Fight,
authority of the branches to act in matters concerning war or hostilities. Since 1973, this statute has served as the primary vehicle through which Congress has attempted to consider the legal and policy ramifications of U.S. military involvement in hostilities or imminent hostilities. However, it must be recognized that the War Powers Resolution was, in large part, a product of its time—a time that witnessed a legislative branch attempt to exert greater influence on foreign affairs matters (especially after the Vietnam experience).

N.Y. Times, Nov. 8, 1973, at 1, col. 8.

5. This view has been expressed in retrospect by, among others, Elliot Richardson, former Secretary of Defense and Attorney General. See, e.g., War Powers: Original Purposes and Applications: Hearings Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs, 100th Cong., 2d Sess. 141 (1988) [hereinafter 1988 House Hearings]. In his testimony, Mr. Richardson stated:

The WPR was the culmination of Congressional efforts to curtail Presidential authority to commit American troops into combat, beginning with the 1967 Senate Foreign Relations Committee Hearings and Report, [and] during this period, a more subtle and yet infinitely more important struggle was taking place—a struggle for control of U.S. foreign policy.

Id. at 143.

This point was also noted during the 1973 debate. "Beyond reflecting the low political estate to which President Nixon has fallen, the Congressional action [to override the veto] represented the most aggressive assertion of independence and power by the legislative branch against the executive branch in many years." Madden, supra note 4, at 20. Furthermore, one commentator remarked, "Congress dealt President Nixon his biggest legislative defeat of the year yesterday as it forced the war powers bill into law over his veto." Lyons, Congress Overrides Veto, Enacts War Curbs, Wash. Post, Nov. 8, 1973, at 1, col. 2.

During the veto override debate, Representative Green remarked that "[u]nfortunately, many have portrayed the upcoming vote on the President's veto as one part of the ongoing power struggle between the Congress and the President over war powers. In the heat of this confrontation, the merits of the war powers bill have been overshadowed." 119 CONG. REC. 36,204 (1973). Albert (Peter) Lakeland, former Minority Staff Director, Senate Committee on Foreign Relations, added that "the primary motivation of the War Powers Act was a perception of a dangerous and overweening strength in the presidency as regards matters of war, resulting in a profound disruption of constitutional imbalance." 1988 Senate Hearings, supra note 1, at 101. Former Secretary of Defense and Attorney General, Elliot Richardson, commented that "the War Powers Resolution grew out of a lack of trust" between the Congress and the President. 1988 Senate Hearings, supra note 1, at 197.

6. Senator Thomas Eagleton passionately made this point during the Senate debate stating:

This bill was not conceived in the abstract. It was not conceived in the ethereal. It was conceived in blood—50,000 dead and the whole litany of what occurred in Southeast Asia. That is why we are debating this bill today—not because it is a prosaic idea, but because of our recent tragic experience.

119 CONG. REC. 25,082 (1973). See also Lyons, supra note 5, at 1, col. 2 ("The law is the culmination of a three-year effort by Congress to prevent the nation from slipping into another Vietnam-type war.").

During the conference report debate, Senator Huddleston stated that the "original war powers bills were, in effect, the outgrowth of our involvement in Vietnam." 119 CONG. REC. 33,566-67 (1973). Senator Taft also noted that "this [war powers conference report] bill is unquestionably a product of the pain of our division over Vietnam." Id. at 33,567. Addition-
and a weakened President (particularly in light of the Watergate episode). The proponents of legislative reform were largely moved

ally, Senator Eagleton remarked that "[t]his [war powers] legislation was motivated by the most tragic mistake our Nation has made — the Indochina war." Id. at 33,555.

Similar sentiments were expressed during the House conference report debates. In particular, Representative Kemp noted:

As has been said in this body, time and time again, this legislation is reactive to the Vietnam war — nothing more, nothing less. . . . I cannot help but feel that this resolution is not being considered in the dispassionate air of reason, of a historical perspective, or of an adequate knowledge as to its consequences.

Id. at 33,866-67.

It was very apparent that the Vietnam war elicited a great deal of sentiment. During the House veto override debate, Representative Hanley suggested that the "[m]otivation for the bill stems from the controversial Vietnam war which unfortunately divided the American people, which in turn and justifiably so, produced overwhelming public demand that the Congress reassert itself in the all-important matter of war and peace." Id. at 36,205. Further, Representative Drinan believed that "[t]his resolution will prevent any Tonkin Gulf resolution," id. at 36,207, and Representative Flowers added that "it is of the greatest importance that we prepare now the legislative framework to guard against any future ‘Vietnams.’" Id. at 36,208. Meanwhile, Representative Edwards pointed out that "[t]he legislation we are considering today could have prevented the protracted involvement of the Vietnam war." Id. at 36,216.

Former Chairman of the Senate Committee on Armed Services, John Tower, expressed his opinion that "[t]he War Powers Act grew out of Congress’ frustration with the war in Vietnam and its desire to prevent such a situation from ever happening again." 1988 Senate Hearings, supra note 1, at 65. Others such as General David Jones, former Chairman, Joint Chiefs of Staff, concurred stating, "I am convinced that many Members of Congress voted for [the War Powers Resolution] because of the Vietnam environment." 1988 Senate Hearings, supra note 1, at 115. Similarly, Former Counsel and Legislative Assistant to Senator Barry Goldwater, Terry Emerson, added that the War Powers Resolution was enacted during "a very unusual moment in history" in the atmosphere of Vietnam and Watergate. 1988 Senate Hearings, supra note 1, at 131-32. Senator Jesse Helms also noted that "the war powers legislation was, in fact, a political protest by the Congress against American involvement in the Vietnam War." 1988 Senate Hearings, supra note 1, at 142. Finally, Professor Ronald Rotunda of the University of Illinois College of Law remarked, "I think all the commentators agree that the War Powers Act was a reaction to Vietnam, a war that lasted for about 7 years under two or three different administrations." 1988 Senate Hearings, supra note 1, at 227.

7. Senator William Spong was the floor manager of the war powers bill in the Senate in 1972. He described the political climate surrounding the override of President Nixon’s veto as follows:

Democrats had a political reason to override the veto to reassert their strength after the House had sustained five successive vetoes during 1973. The vote also had been converted into a test of congressional against executive power by the public dissatisfaction with the continued struggle in Vietnam and Cambodia. Finally, the dismissal of Watergate Special Prosecutor Archibald Cox, the resulting resignation of Attorney General Elliot Richardson, and the growing White House tapes controversy fostered partisanship among Democrats while leading some House Republicans to want to disassociate themselves from the President.


Senator Tower also voiced his concern that the override veto was the result of a partisan climate.
to redress a perceived imbalance in the war powers between the executive and legislative branches.  

The fact is that there is a partisan climate at this moment which argues well, unfortunately, for the passage of legislation of this kind, because this is, I guess we might call it, 'Kick the President Season,' and there is a mood here in Washington that is not conducive to cool consideration of the merits of legislation of this kind.

119 CONG. REC. 25,090 (1973). Senator Tower restated his concern during the veto override debate when he noted that "the President is at a low ebb in popularity now, and many people are calling for impeachment or resignation" and cautioned against acting to make executive foreign policy implementation "a victim of our emotions on Watergate." Id. at 36,179. Senator Percy supported the argument asking, "Is this vote today just a reflection of the attitude of Congress on Watergate? Is the President losing his clout with Congress because of that?" Id. at 36,193.

Similar concerns were raised during the House veto override debate. For example, Representative Dellums noted that "many people will regard this [veto override] as a victory against the incumbent President because of his opposition." Id. at 36,220. Furthermore, Representative Straton observed that "this is probably the most difficult time for us to debate a measure of this significance because what is involved here is not what we may happen to think of Richard Nixon or Watergate or the special prosecutor." Id. at 26,205.

Former Senator Thomas Eagleton explained, "Bear in mind that this was the only time in history [Congress] could have gotten such a bill because we were at the end of that horrible war in Vietnam and because there was in office a beleaguered President that we [could] clobber." 1988 Senate Hearings, supra note 1, at 16. Similarly, Robert Turner, Associate Director of the Center for Law and National Security, University of Virginia Law School, remarked, "[T]here is a general consensus among people who have studied this that the Resolution's supporters would not have had the votes to override had it not been for the anger at President Nixon over Watergate." 1988 Senate Hearings, supra note 1, at 315. W. Taylor Reveley, III summed up these statements, "But for Watergate at white heat, I don't think the Resolution ever would have passed." 1988 Senate Hearings, supra note 1, at 316.

On the other hand, Representative Martin noted institutional reasons for support of the veto override and commented "[M]y support of the war powers bill has nothing whatsoever to do with the current difficulties of the President." 119 CONG. REC. 36,205 (1973). Others, such as Representative Findley attempted to separate the vote to override the presidential veto as independent of the emotionalism surrounding Watergate and President Nixon. Id. at 36,206. Representative Dickinson noted that "[t]o enhance the argument to support the veto, some have made the spurious assertion that this is in some way a vote of loyalty for the President and this administration. This is just not the fact." Id. at 36,207. Clarifying his position, Representative Cleveland remarked, "I would not be surprised to find some Watergate votes cast today... I wish to make clear that my vote [to override the veto] is not one of them." Id. at 36,218. Additionally, Former Minority Staff Director, Senate Committee on Foreign Relations, Albert (Peter) Lakeland noted that "[t]he dwindling Vietnam war was specifically exempted from the Act's provisions." 1988 Senate Hearings, supra note 1, at 107.

8. Commenting on this perceived imbalance in the war powers, Representative Biester noted that the subcommittee bill is "realistic in its method of restoring a balance to shared executive-legislative war powers authority." 119 CONG. REC. 24,696 (1973) (emphasis added). Also noting an imbalance in the war powers, Representative Du Pont observed that "the war in Vietnam represents the culmination of a historical decline in the assertion of congressional prerogatives in warrning authority." Id. at 21,222 (emphasis added). Senator Bentsen also made note of the need to "repair this erosion of the delicate executive-legislative balance." Id. at 24,546 (emphasis added). Furthermore, Senator Hathaway remarked that the war powers measure "does not seek to alter the constitutional balance of power between Congress and the
A. Operation of the War Powers Resolution

The objective of the War Powers Resolution was to "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." While this goal of sharing in the decision-making process on many matters involving the use of United States Armed Forces remains as essential today as it was two centuries ago, the means for attaining it under the status quo have, with increasing evidence, become insufficient, ineffectual, and unduly confrontational. In fact, in light of recent developments, it now appears that the statute itself may be frustrating the attainment of the original purpose.

The War Powers Resolution is typically invoked when the President submits a section 4(a) war powers report within forty-eight hours of a reportable event, usually the introduction of United States Armed Forces into "hostilities." The President is generally obligated, under section 3 of the Resolution, to consult with Congress prior to this introduction of military forces. Significantly, the filing of the war powers report triggers a sixty-day clock. At the end of this sixty-day period, the armed forces must be automatically disengaged from the hostilities, pursuant to section 5(b), unless: (1) Congress has authorized the continued use of the armed forces, (2) Congress has extended this period, (3) Congress is physically unable to

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9. 50 U.S.C. § 1541(a) (1982) (emphasis added). This point was emphasized during the conference report debates when Senator Benston remarked, "There can be and there will be disagreement between the executive branch and the Congress but there should not be and must not be distrust. We have to insure that responsibility for future foreign policy decisions be shared." 119 CONG. REC. 33,555 (1973). Similar sentiments were expressed by Senator Stennis noting that "it is only as a result of both of these branches of the Federal Government working together and accepting their responsibilities that the nation should be committed to war." Id. at 33,560. Although Senator Javits expressed concern that the "underlying premise" of the bill is "that Congress and the President should be equally accountable for the consequences if our Nation should again make a commitment to go to war," id. at 24,543, Senator Dole described the war powers measure as establishing "a partnership" between the branches. Id. at 25,116. The same notions of partnership were evident in the House when House Foreign Affairs Committee Chairman Morgan remarked, "Congress must not play a junior partner role where decisions involving the commitment of American troops is involved. Neither should we attempt to force such a secondary role upon the President." Id. at 21,233.

10. 50 U.S.C. § 1543(a) (1982). See also infra note 106 where this section is reproduced and explained.

11. 50 U.S.C. § 1542 (1982). See also infra note 95 where this section is reproduced.
meet as a consequence of an armed attack, or (4) the President certifies that not more than an additional thirty days is needed as an "unavoidable military necessity respecting the safety" of the United States military forces. Prior to the termination of this sixty-day period, Congress can act under section 5(c) to adopt a two-house legislative veto (or concurrent resolution) mandating an earlier removal of the armed forces. The President is not afforded an opportunity to sign or disapprove this section 5(c) measure and has no role under section 5(b) legislation unless Congress sends a bill to the White House. Specified priority procedures enable Congress to consider section 5(b) or 5(c) legislation in an expedited fashion. On numerous occasions, Congress and the President have clashed over the applicability of the Resolution to particular situations involving United States Armed Forces.

B. The Chadha Decision

The most direct and significant impact on the Resolution since its enactment sixteen years ago resulted from the landmark 1983 Supreme Court decision in INS v. Chadha, wherein the one-house legislative veto in an immigration statute was found to violate both the Presentment Clauses and the bicameralism requirement of

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12. 50 U.S.C. § 1544(b) (1982). See also infra note 80 where this section is reproduced.
13. 50 U.S.C. § 1544(c) (1982). See also infra note 261 where this section is reproduced.
17. U.S. Const. art. I, § 7, cls. 2, 3 provide:
   Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; . . . Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States.
   See also Chadha, 462 U.S. at 946-48 (discussing the presentment clauses).
18. U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.")},
   § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; . . ."), § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and the House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").
   See also Chadha, 462 U.S. at 948-51 (discussing the bicameral requirement).
Many have concluded that the holding in this immigration case affects nearly 200 statutes, including the central enforcement provisions of the War Powers Resolution. At the very minimum, the Chadha decision has cast doubt on the vitality of the Resolution on a different constitutional plane. Instead of the inherent, historical debate over the constitutional allocation of the war powers between the President and Congress, the opinion has injected a question of infirmity on grounds of noncompliance with the separation of powers principles for the enactment of laws as prescribed by Article I of the Constitution.

While some argue that Chadha did not affect the War Powers Resolution, most have resolved that the two-house legislative veto...
in section 5(c) is now unconstitutional for violation of the presentment requirement of all legislation to the President.\textsuperscript{22} Notable, for example, was the overwhelming assessment by the legal witnesses testifying approximately one month after the Supreme Court decision before the House Committee on Foreign Affairs that \textit{Chadha} adversely impacted the concurrent resolution provision of the War Powers Resolution.\textsuperscript{23} Others have asserted that section 5(b) is simi-

author added, “The full implications of the June 1983 \textit{Chadha} decision for WPR implementation has yet to be realized. For the moment, a position that allows the possibility of minimal effects on section 5(c) is advisable both in terms of congressional prerogatives and executive compliance.” \textit{Id.} at 591. \textit{See also} Carter, \textit{The Constitutionality of the War Powers Resolution}, 70 VA. L. REV. 101, 129-34 (1984) (arguing that \textit{Chadha} does not affect section 5(c) because this provision is extraordinary legislative power deciding whether or not to go to war; section 5(b) is also unaffected since it is a legitimate exercise of Congress’ placement of a durational limit on authorization); Note, \textit{The Future of the War Powers Resolution}, 36 STAN. L. REV. 1407, 1432 (1984) (distinguishing the legislative veto in the War Powers Resolution from that invalidated in \textit{Chadha}); Note, \textit{A Defense of the War Powers Resolution}, 93 YALE L.J. 1330, 1350 (1984) (noting that the concurrent resolution is constitutionally valid “since Congress never delegated the presidential authority curtailed by such a resolution”); Note, \textit{The Concurrent Resolution Provision of the War Powers Resolution: Immigration and Naturalization Service v. Chadha and the Sources of Presidential War Making Power}, 45 OHIO ST. L.J. 983, 998-1000 (1984) (arguing that (1) the legal rights noted in \textit{Chadha} cannot be altered by the concurrent resolution provision since they are subject to congressional ratification, (2) presidential approval is not required since Congress has inherent power to end any military action, (3) Congress never delegated warmaking authority to the President, and (4) the concurrent resolution is “equivalent to express denial of the ratification that is necessary to constitutionalize the President’s action”).

22. \textit{See, e.g.}, 1988 Senate Hearings, \textit{supra} note 1, at 272 (remarks of Prof. Louis Henkin, Columbia University School of Law) (noting that the \textit{Chadha} decision “casts a heavy shadow on section 5(c)”); 1988 House Hearings, \textit{supra} note 5, at 146-55 (testimony of Elliot Richardson, former Secretary of Defense and Attorney General); Lowry v. Reagan, 676 F. Supp. 333, 335 (D.D.C. 1987) (noting in dictum, “In the aftermath of the Supreme Court's decision in [\textit{Chadha}], however, it is conceded that [section 5(c)] does not have the force and effect of law.”); Glennon, \textit{The War Powers Resolution Ten Years Later: More Politics Than Law}, 78 AM. J. INT’L L. 571, 577 (1984) (“Section 5(c) of the resolution . . . is clearly invalid after the Supreme Court's decision. . . . To be sure, arguments can be made to the contrary, but none is persuasive.”); Note, \textit{Congressional Control of Presidential Warmaking Under the War Powers Act: The Status of a Legislative Veto After Chadha}, 132 U. PA. L. REV. 1217, 1239-41 (1984) (concluding that the concurrent resolution of the War Powers Resolution after \textit{Chadha} is constitutional under only one of three constructions and that under the “most plausible” it is unconstitutional).

23. Particularly revealing is the analysis by Stanley Brand, General Counsel to the Clerk, House of Representatives, who argued the \textit{Chadha} case as well as two other legislative veto cases before the Supreme Court. Mr. Brand told the committee:

\begin{quote}
Taking the war powers resolution only as an example . . . assuming arguendo it is severable, Congress is faced with the very erosion of power sought to be restored by the resolution, for the President may either commit troops with impunity, resting on a legal position that the concurrent resolution veto is inoperative, or having reported the commitment as required by the reporting sections, ignore with equal impunity the war powers resolution’s requirements to recall those troops after 60 days, if Congress attempts to enforce the automatic termi-
\end{quote}
larly void under the principles enunciated in this case.24

Assuming that the "core" central enforcement provisions of the Resolution have in fact been impacted by the Supreme Court's invalidation of the one-house legislative veto in Chadha, Congress must ask itself what remains, other than a reporting and consultation statute. Moreover, while Chadha seems to have struck at the heart of the statute, a related question arises whether the impact of Chadha may also have tainted the whole.26 In other words, is the congress-

1983 House Legislative Veto Hearings, supra note 20, at 6. In addition, Edward Schmults, Deputy Attorney General, commented that section 5(c) does not comply with the presentment requirement as noted in Chadha. 1983 House Legislative Veto Hearings, supra note 20, at 52. Kenneth Dam, Deputy Secretary of State, added that section 5(c) "is clearly unconstitutional under the Supreme Court's holding in Chadha." 1983 House Legislative Veto Hearings, supra note 20, at 68. Professor Eugene Gressman, who argued the Chadha case on behalf of the U.S. House of Representatives, remarked, "As presently structured, the concurrent resolution contained in Section 5(c) of the War Powers Resolution would seem vulnerable under Chadha." 1983 House Legislative Veto Hearings, supra note 20, at 125. Finally, Professor David Martin expressed his belief that Chadha invalidates the legislative veto provision in the War Powers Resolution. 1983 House Legislative Veto Hearings, supra note 20, at 140.

24. Former Secretary of Defense and Attorney General, Elliot Richardson remarked, "I find intrinsic difficulty with the notion that there is entailed somehow a form of delegation to the President to deal with an emergency that can be withdrawn by the Congress." 1988 Senate Hearings, supra note 1, at 201. Similarly, Robert Turner, Associate Director of the Center for Law and National Security, University of Virginia Law School, stated, "This is a direct effort by Congress to exercise the 'Commander-in-Chief' power vested exclusively by the Constitution in the President." 1988 Senate Hearings, supra note 1, at 851.

See also 1988 House Hearings, supra note 5, at 155-58 (testimony of Elliot Richardson); Lungren & Krotoski, The War Powers Resolution After the Chadha Decision, 17 LOY. L.A. L. REV. 767, 782-86 (1984) [hereinafter After Chadha] (arguing that section 5(b) is unconstitutional under the Chadha decision since it is the functional equivalent of a one-house legislative veto); Turner, The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful, 17 LOY. L.A. L. REV. 683, 684 (1984) ("The idea that Congress can by silence or inaction deprive the President of a fundamental expressed constitutional power — in a time of national emergency, no less — is incompatible with our system of separation of powers."); Note, The War Powers Resolution: An Act Facing "Imminent Hostilities" A Decade Later, 16 VAND. J. TRANSNAT'L L. 915, 947 (1983) ("The constitutionality of this automatic termination provision . . . is questionable."); 1983 House Legislative Veto Hearings, supra note 20, at 21 n.3 (statement of Stanley Brand, General Counsel to the Clerk, House of Representatives) (suggesting that the reach of Chadha may also affect section 5(b)). But see 1983 House Legislative Veto Hearings, supra note 20, at 68 (statement of Kenneth Dam, Deputy Secretary, Department of State) (Section 5(b) "does not fall within the scope of Chadha. Its constitutionality is neither affirmed, denied, nor even considered in the Chadha decision.").

25. However, it should be noted that the War Powers Resolution contains a separability clause. 50 U.S.C. § 1548 (1982). Such an express provision generally establishes a rebuttable presumption of severability. See, e.g., Chadha, 462 U.S. at 931-35. See generally 1983 House Legislative Veto Hearings, supra note 20, at 17-21, 39-40 (statement of Stanley Brand, General Counsel to the Clerk, House of Representatives) (noting that many legislative veto statutes containing extensive delegations to the executive branch would not have been passed by the Congress in the absence of the legislative veto provisions).
sional position on war powers matters weakened by continual reliance on a statute containing a void provision and lacking an effective means of enforcement? If the provisions affected by Chadha are to be repealed, the debate should shift toward the goal of replacing them. And, if these central provisions in the War Powers Resolution are replaced, can the same objectives be attained through different means?

C. Other Elements Requiring Reform

Notwithstanding the constitutional issues raised by the Chadha decision, many questions also have been raised concerning the efficacy of those provisions left unaffected by Chadha. For example, many interbranch disputes have centered on the meaning of "hostilities," the statutory term which triggers the applicability of the Resolution. A pattern of "reluctant acknowledgement" on the part of the executive branch has been demonstrated with regard to the filing of war powers reports. Most agree that the consultation provision, as currently drafted, does not require meaningful or timely consultation with Congress by the President concerning the involvement of United States military forces in hostilities. Some have queried whether Congress should rely on its power of the purse both in order to assert its view on war powers matters and as an effective means of enforcement. The statute permits "window periods" of adjournment in which an adjourned Congress may be reliant on the President, rather than itself, for reassembling in order to deliberate on a war powers bill or report. There are even questions concerning the effectiveness of expedited procedures for considering legislation. Perhaps as the best indicator of the lack of a meaningful enforcement mechanism within the statute, members of Congress have sought, with greater frequency, declaratory and injunctive relief in the courts by suing the President and other members of the executive branch over the application of the Resolution.26

As a result of the divided nature of the constitutional powers involved, experience with the War Powers Resolution, and recent Supreme Court action rendering the primary enforcement provisions of the Resolution invalid, it appears all but inevitable that Congress and the President will once again clash in disagreement over their respective war powers. Some believe the only remaining uncertainty is when and where the next "constitutional showdown" will occur.27

26. For a discussion of these cases, see infra note 207.
27. See Carter, supra note 21, at 107 (noting with regard to the statute that "a constitu-
Although interbranch disagreement is, to a significant extent, an intrinsic byproduct of the shared constitutional war powers, until a more adequate reform measure is adopted, the possibility for greater, unnecessary confrontation between the branches regarding the introduction or involvement of United States troops into hostilities will endure.

After sixteen years of experience, the time for statutory reform appears ripe. Even some of the key congressional architects and central participants in the 1973 debate have recently called for reform. A Senate Foreign Relations Special Subcommittee on War Powers was established during the 100th Congress to begin to address the issue and held several days of hearings. In the other body, the House Foreign Affairs Subcommittee on Arms Control, International Security and Science also held hearings. This congressional activity may begin to form the foundation for statutory reform in this critical national area.

D. Overview

This article will explore several elements likely to be central to any debate concerning reform of the War Powers Resolution. The article does not try to take either a pro-congressional or pro-executive position at the expense of the other branch's authority. The premise underlying this article is that the constitutional war powers scheme works best when both political branches fully utilize their respective powers so that the institutional attributes of each may bear on war powers issues confronting the nation. A result-oriented approach favoring either branch cannot and should not be advanced in light of the sundry possible unforeseeable circumstances to which these powers might be applied. Neither a legislature subservient to the whims of an imperial executive, nor an overbearing Congress encroaching on presidential prerogative are desirable scenarios. Although the situation is frequently in flux, the desired constitutional equilibrium of the divided war powers is best established when neither branch plays a secondary role to the other in the decision-making process. Rather, the optimal locus is obtained when both branches vigorously contribute to the process consistent with their respective and unique constitutional roles. The underlying constitutional showdown seems inevitable in the not-too-distant future” and “the constitutional issue will come up again and again until it is finally resolved”).

29. 1988 House Hearings, supra note 5.
tional objectives are served by the Founding Fathers' declination to allocate most of these powers to one branch at the expense of the other. Instead, they assigned each branch a particular function on these sensitive national issues.

Particularly since World War II, many have viewed Congress as less than a full, co-equal partner with the executive branch on war powers matters. Some have suggested that in light of an assertive executive branch, institutionally more adept at expeditious action, Congress is without a meaningful forum for expressing its views on war powers matters. While the War Powers Resolution does not rely on the full breadth of constitutional authority available to Congress, as will be shown, there is sufficient room for an active congressional role that comports with the constitutional scheme. This article asserts that there is a strong constitutional basis for Congress to exercise its war powers authorities pursuant to a war powers statutory mechanism.

The statutory structure of the War Powers Resolution serves as an appropriate starting point for discussing reform since some provisions may only require slight modification. However, other aspects of the law appear to require significant points of departure and alteration if the original objective of "collective judgment" by the political branches is to be achieved in practice and fundamental concerns of unconstitutionality are to be resolved. To this end, this article will consider several areas in which the War Powers Resolution may be improved. In each proposed area of reform, a comprehensive review of the pertinent legislative history will first be explored in order to establish a foundation for consideration of substantive reform proposals. It is practical to consider whether suggested reforms measure up to the original objectives of Congress under the War Powers Resolution and where deviation from these goals is required. As will be seen, much of what was debated in 1973 is helpful in considering specific reform proposals today.

The areas of reform will focus on five central elements: (1) the requirement of providing a statutory mechanism that ensures flexible, tailored policy responses (a) by avoiding, where possible, unjustified arbitrary, substantive components that result in major policy changes solely by the passage of time, and (b) by focusing on procedural reform not substantive policy reform; (2) an improved working definition of "hostilities" to better delineate the circumstances

30. See infra text accompanying notes 61-66.
31. See infra text accompanying notes 80-104.
triggering application of the statute;\textsuperscript{32} (3) an effective procedural device, backed by the power of the purse, to replace the now defunct central enforcement provisions of the War Powers Resolution;\textsuperscript{33} (4) provision for the reassembly of Congress by legislative leaders, \textit{sua sponte}, to consider war powers reports or legislation after constitutional adjournments of more than three days;\textsuperscript{34} and (5) enhanced procedures for expedited consideration of war powers legislation.\textsuperscript{35}

Before beginning this inquiry, the relevant constitutional war powers of Congress and the President will first be noted in the context of the doctrine of separation of powers.\textsuperscript{36} Second, the necessity of establishing a statutory infrastructure, in light of existing congressional constitutional authority, will be explored.\textsuperscript{37}

\section*{II. The Divided War Powers of the Constitution}

As an incident of sovereignty, a nation is recognized as having the ability and means to commit the entirety of national resources to defend itself effectively and make war where necessary.\textsuperscript{38} In the governmental form of the United States, however, the war powers are divided between and shared by the two political branches. The Constitution commits to Congress the power:

To . . . provide for the common Defence and general Welfare of the United States;\textsuperscript{39}

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;\textsuperscript{40}

To declare War, grant Letters of Marque and Reprisal, and

\textsuperscript{32} See infra text accompanying notes 105-237.
\textsuperscript{33} See infra text accompanying notes 260-333.
\textsuperscript{34} See infra text accompanying notes 334-99.
\textsuperscript{35} See infra text accompanying notes 400-90.
\textsuperscript{36} See infra text accompanying notes 38-76.
\textsuperscript{37} See infra text accompanying notes 77-79.
\textsuperscript{38} In the words of Justice George Sutherland:
\textquote{It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.}
\textit{United States v. Curtis-Wright Export Corp.}, 299 U.S. 304, 318 (1936). \textit{See also} U.N. \textit{Charter} art. 51 (noting inherent right of self-defense); \textit{Pacificus, supra} note 2, at 457 ("Self-preservation is the first duty of a nation.").
\textsuperscript{39} U.S. CONST. art. I, § 8, cl. 1.
\textsuperscript{40} Id. cl. 10.
make Rules concerning Captures on Land and Water;\textsuperscript{41}
To raise and support Armies;\textsuperscript{42}
To provide and maintain a Navy;\textsuperscript{43}
To make Rules for the Government and Regulation of the land and naval Forces;\textsuperscript{44}
To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;\textsuperscript{45}
To 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 . . . .,\textsuperscript{46}
To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.\textsuperscript{47}

Additionally, Congress has the power of the purse, as embodied in the Common Defence and General Welfare Clause,\textsuperscript{48} the Spending Clause,\textsuperscript{49} and the Army Clause.\textsuperscript{50} This includes the power to place constitutional conditions or limitations on the use of funds or armed forces supplied by Congress.\textsuperscript{51} Finally, and often overlooked

\textsuperscript{41} Id. cl. 11. See 5 J. Elliot, Debates on the Adoption of the Federal Constitution 438-39 (1845) (debate of the Declare War Clause during the Constitutional Convention).

\textsuperscript{42} U.S. Const. art. I, § 8, cl. 12. For an excellent discussion of this congressional power, see Donahue & Smelser, The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787-1788, 33 Rev. of Politics 202 (1971) [hereinafter The Power to Raise Armies].

\textsuperscript{43} U.S. Const. art. I, § 8, cl. 13.

\textsuperscript{44} Id. cl. 14.

\textsuperscript{45} Id. cl. 15.

\textsuperscript{46} Id. cl. 16.

\textsuperscript{47} Id. cl. 18.

\textsuperscript{48} Congress has the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Id. cl. 1. The General Welfare Clause has been recognized as an independent, substantive power. See Fullilove v. Klutznick, 448 U.S. 448, 474 (1980); Buckley v. Valeo, 424 U.S. 1, 90 (1976); Helvering v. Davis, 301 U.S. 619, 640 (1937); United States v. Butler, 297 U.S. 1, 66 (1936).

\textsuperscript{49} The Constitution specifies that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7.

\textsuperscript{50} The spending power that "Congress shall have power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years," is particularly applicable in the war powers area. Id. § 8, cl. 12.

\textsuperscript{51} One Attorney General described the power to condition in the context of the congressional provision of military forces:

Inasmuch as Congress has power to create or not to create, as it shall deem
as an important power, Congress has Rulemaking authority to govern the manner in which it considers all legislation, including war powers measures. \(^2\)

The war powers assigned to the President include:

The "executive Power", \(^3\)

The power to serve as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;" \(^4\)

The power to "take Care that the Laws be faithfully executed", \(^5\)

Foreign Relations authority. \(^6\)

It is also clear from the Constitutional Convention debates that the President has "the power to repel sudden attacks." \(^7\)

To be sure, these constitutional authorities have been given both broad and narrow constructions, \(^8\) often depending on the context at

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54. Id. § 2, cl. 1.

55. Id. § 3, cl. 1.

56. Article II, § 2, cl. 2 provides, in pertinent part:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, . . . .

Section 3, of the same Article, provides that the President "shall receive Ambassadors and other public Ministers."

Alexander Hamilton, among others, asserted a broad construction of these clauses in the foreign affairs application. See PACIFICUS, supra note 2, at 438-39. But see HELVIDIUS, supra note 2 (James Madison criticizing this Hamilton construction).

57. 5 J. ELLIOT, supra note 41, at 438 (remarks of James Madison and Elbridge Gerry).

58. Exemplary of a broad interpretation of executive authority are the remarks of Monroe Leigh, former State Department Legal Advisor, stating that the President's war powers include among other things:

[The] power to introduce troops pursuant to a declaration of war, specific statutory authorization, or a national emergency created by an attack on the United States, its territories or possessions, or upon its armed forces, . . . to protect and rescue U.S. nationals abroad, to protect U.S. embassies and legations, and under certain circumstances to carry out our security commitments, . . . [and] to use
hand, public opinion concerning the war or combat situation, and the institutional perspective of the political branch in issue. However, it is clear that the Framers intended these collective powers to be broadly applied in order to meet unforeseeable circumstances. Largely for this reason, these divided powers were and are incapable of precise delimitation.

From this catalogue of constitutional authorities, the War Powers Resolution principally and expressly relies upon three legislative and one executive war powers. The congressional Declare War Clause is explicitly referenced in the statute in the purpose and policy section, the reporting requirement section, and the section requiring automatic disengagement of troops in the absence of congressional action. The Necessary and Proper Clause is also noted in the purpose and policy section as one of the constitutional authorities on which the statute is premised. A third congressional power, the Rulemaking authority, is implicitly utilized to expedite legislative.

American forces to forestall any direct and imminent threat of attack upon the United States, to suppress civil insurrection, and to implement the terms of an armistice or cease-fire designed to terminate hostilities involving U.S. forces.

War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 73 (1977) [hereinafter 1977 Senate Hearings]. A similar construction was recently echoed in the testimony of Abraham Sofaer, State Department Legal Advisor, noting that the enumeration of executive authority in section 2(c) of the War Powers Resolution omits the following:

[T]he protection or rescue from attack, including terrorist attacks, of U.S. nationals in difficulty abroad; the protection of ships and aircraft of U.S. registry from unlawful attack; responses to attacks on allied countries with whom we may be participating in collective military security arrangements or activities, even where such attacks may threaten the security of the United States or its armed forces; and responses by U.S. forces to unlawful attacks on friendly vessels or aircraft in their vicinity.

1988 Senate Hearings, supra note 1, at 1053. Compare 50 U.S.C. § 1541(c) (1982) (congressional view of the scope of executive war powers as stated in § 2(c) of the War Powers Resolution). For a reproduction of section 2(c), see infra note 64.

59. Alexander Hamilton noted, for example:

These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.


60. See, e.g., infra note 102.

61. 50 U.S.C. §§ 1541(c) (1982) (purpose and policy), 1543(a) (reporting requirement), 1544(b) (automatic termination).

62. Id. § 1541(b).
Finally, the purpose and policy section explicitly states the circumstances when Congress believes the Commander-in-Chief’s authority is lawfully employed. The Resolution also qualifies its application, stating that no provision "is intended to alter the constitutional authority of the Congress or of the President." From this review of the statute and the constitutional authorities already enumerated, it is apparent that Congress did not expressly rely upon its full constitutional authority in the war powers area in enacting the War Powers Resolution.

The constitutional scheme suggests that the federal war powers were intended to be separated among the branches. As a general principle, this broad divorcing of authorities serves to check the exercise of potentially abusive authority by diffusing it. Concerning the division of war powers, the Supreme Court long ago framed the constitutional issue with regard to the application of the respective war powers of the branches in this manner:

64. Section 2(c) of the statute provides:
   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.
   Id. § 1541(c) (1982).
   For a discussion of the nature of this statement of executive authority relative to the rest
   of the Resolution, see infra note 101.
66. Some commentators have noted the almost exclusive reliance of the statute on the
   legislative power to declare war. For example, Elliot Richardson, former Secretary of Defense
   and Attorney General, testified, “The War Powers Resolution appears to rest on only one of
   Congress’ powers: the power to declare war.” 1988 House Hearings, supra note 5, at 185.
   In comparison to the War Powers Resolution, one reform proposal, the Hostilities Act,
   specifies in a finding and purpose section most of the congressional war powers on which it
   relies. See H.R. 3912, §§ 2(b), (c), 100th Cong., 2d Sess. (1988), 134 CONG. REC. H250
   (daily ed. Feb. 4, 1988). See also 134 CONG. REC. H253-54 (daily ed. Feb. 4, 1988) (section-
   by-section analysis).
67. See, e.g., The Federalist No. 47, at 325 (J. Cooke ed. 1961) (J. Madison) (noting that
   “there can be no liberty where the legislative and executive powers are united in the same
   person, or body of magistrates”); Congress, the President, and the War Powers, Hearings
   Before the Subcomm. on National Security Policy and Scientific Developments of the House
   Comm. on Foreign Affairs, 91st Cong., 2d Sess. 206 (1970) [hereinafter 1970 House Hear-
   ings] (statement of John Stevenson, Legal Adviser to the State Department) (noting that “the
   Federalist papers show that the principle of shared authority grew out of a desire to restrain
   precipitous or impetuous entry into war”); 1988 Senate Hearings, supra note 1, at 189 (re-
   marks of former Secretary of Defense and Attorney General Elliot Richardson) (“The separa-
   tion of powers always recognized the potential for stalemate or paralysis. It was a conscious
   price paid for the avoidance of tyranny.”).
Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and the principles of our institutions. . . . But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.68

In practice, the contours of these divided powers are often opaque and frequently in fact shade into significant areas of overlap.69 This form of concurrent authority was characterized by Justice Robert H. Jackson as delineated by a "zone of twilight."70 Then Assistant Attorney General William Rehnquist echoed this theme before a Senate panel:

The Framers did not set up a checkerboard of rigidly marked alternately colored squares with one color assigned to the President and the other to Congress. They designed a more flexible plan for joint responsibility which left room for "play at the joints." Indisputably belonging to Congress alone is the decision as to how much money shall be appropriated to the raising and supporting of the United States military forces. Indisputably belonging to the President alone is the power to repel sudden attacks, the power to determine how hostilities lawfully in progress shall be conducted, and the power to protect the lives and

68. Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).
69. Generally, the separation of powers are not recognized as mutually exclusive. James Madison wrote that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." The Federalist No. 51, at 349 (J. Cooke ed. 1961). The Supreme Court has noted, the Framers "saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." Buckley v. Valeo, 424 U.S. 1, 121 (1976). See also Mistretta v. United States, 109 S. Ct. 647, 659 (1989) (noting that "the Framers did not require — and indeed rejected — the notion that the three Branches must be entirely separate and distinct") (citations omitted).
70. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("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.") (emphasis added).
safety of U.S. forces in the field. The middle ground is understandably less clearly delineated, but there are guideposts based both on historic usage and the language of the Constitution which shed light on the proper allocation of responsibility in particular cases.\textsuperscript{71}

With regard to the separation of powers, the Supreme Court has recently noted:

That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.\textsuperscript{72}

Under the general guidelines of the Constitution, Congress has the primary authority to supply and regulate the military instrumentalities,\textsuperscript{73} while the President essentially has the power to direct the


\textsuperscript{72} Bowsher v. Synar, 478 U.S. 714, 722 (1986). One author commented, “We will never be able to define with any precision the meaning of executive and legislative, or show where one branch fades and begins to blend into another.” L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 323-24 (1985).

This point is particularly apt with regard to the war powers. John Quincy Adams remarked, “The respective powers of the President and Congress of the United States, in the case of war with foreign powers, are yet undetermined. Perhaps they can never be defined.” J.Q. ADAMS, THE LIVES OF MADISON AND MONROE 58 (1850). Similarly, W.T. Mallison, professor of law, stated:

The most striking feature of a survey of presidential and congressional war powers is that the powers are so comprehensive that they overlap, and the most important and difficult area is this overlapping one. It is not reasonable or practical to expect that overlapping powers will be resolved by simplistic definitions.

1970 House Hearings, supra note 67, at 33 (emphasis added). Senator John Tower noted, with regard to foreign policy, that “the Constitution itself offers no clear definition as to where legislative authority ends and Presidential prerogative begins. . . . Nowhere in the Constitution is there unambiguous guidance as to which branch of government has the final authority to conduct external relations.” Tower, CONGRESS VERSUS THE PRESIDENT: THE FORMULATION AND IMPLEMENTATION OF AMERICAN FOREIGN POLICY, 60 FOREIGN AFF. 229, 231 (1981). Elliot Richardson, former Secretary of Defense and Attorney General, concurred noting that the war powers of the President and Congress “in a very real sense overlap or blend.” 1988 House Hearings, supra note 5, at 136. See also infra note 194.

\textsuperscript{73} One recent reform bill expressly relied upon this collective congressional authority by noting that “the United States Armed Forces are raised, supported, provided for, and maintained by the Congress in the exercise of its constitutional powers.” H.R. 3912, § 2(b)(4), 100th Cong., 2d Sess., 134 CONG. REC. H250 (daily ed. Feb. 4, 1988). Expounding on this authority, the measure further noted that “the Congress has a role in determining whether the United States Armed Forces it creates become involved in hostilities, and it may decide
use of such means and the deployment of the established armed forces and to make tactical command decisions. A separation was clearly intended, as James Madison noted:

Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws. 74

Thus, in the Constitution, there is an apparent division of labor with respect to the supplying and directing of the armed forces. 76

By virtue of the divided powers, it follows that there are particular authorities exclusively delegated to one branch and not the other. However, somewhere along a continuum of exclusive authority, anchored on one side by the President and on the other by Congress, lies the “zone of twilight,” as referred to by Justice Jackson, and the locus of the “invitation to struggle,” as characterized by Professor Corwin. The separation between the congressional responsibility for supplying the instrumentalities and the presidential responsibility for their direction establishes an inherent tension, ripe for interbranch conflict and confrontation. However, within this realm of concurrent authority there is also a legitimate and vital national need for comity and accommodation between the branches and for effective working relationships. Through accommodation, the branches will be better able to pursue the ultimate objective of permitting flexible and efficient war powers responses in times of national crisis, consistent of course with the respective authority and institutional advantage of each branch. It is upon this “field of confrontation and accommodation” that the nation proceeds to offensive or defensive war.

Under a governmental system of divided authorities, with the political branches in disagreement, war might be waged half-heartedly at best. The Vietnam experience is perhaps this country’s most
profound example of this scenario. When the same departments are in accord, the war effort could be prosecuted to its fullest potential, only constrained by the management of the available resources. Vital decisions are made against the backdrop of the divided war powers. The price paid for a system founded on important “checks and balances” is the potential for great discord. Senator Taft made this point in 1973 during the debate on the War Powers Resolution:

The events of the last 10 years in Southeast Asia have shown . . . that the question of war powers is more than a legal and constitutional question, more than a question of the perennial struggle for power between the three branches of Government: It is a question of whether, in times of crisis, our country will be united in the face of its enemies, or in a position to be divided against itself in bitter dispute.76

Because absolute solutions are difficult to achieve in this area, and because the branches are so interdependent on one another, comity is necessary to ensure sustained, effective national responses in the war powers area. Thus, in the face of legal or political disagreement, and out of respect for the institutional prerogatives of the other branch, the President and Congress must often cooperate and overlook disunity of principle in order to attain needed national policy ends. Toward this aim and against this background, reform of the War Powers Resolution is explored.

III. THE NECESSITY OF A STATUTORY INFRASTRUCTURE

Before discussing specific areas of legislative reform, it is useful to address the necessity of a war powers statute in the first place. The point is occasionally made that since Congress has ample constitutional authority over war powers matters, a statutory mechanism, such as the War Powers Resolution, is redundant.77 In this vein,

77. This viewpoint has most frequently been articulated by members of the executive branch. Former Secretary of Defense and Attorney General Elliot Richardson testified, “Our real protection must ultimately depend on the willingness of each Branch to respect the responsibilities and prerogatives of the other — and that is a spirit which does not lend itself to legislation.” 1988 House Hearings, supra note 5, at 185. State Department Legal Advisor, Abraham Sofaer, added:

[The War Powers Resolution] underestimates the power of Congress in the sense that it is not needed to make clear that Congress has substantial power under the Constitution in matters concerning war. And the Resolution is also unnecessary in that it can grant Congress no more power in such matters than the Constitution allows.

1988 Senate Hearings, supra note 1, at 1048. In addition, Secretary of Defense Frank Car-
some have urged the complete repeal of the statute.\textsuperscript{78}

Although the constitutional war power of Congress is certainly substantial, including the collective power to supply military means and the power of the purse, there are several arguments in favor of a strong War Powers Act. In fact, even President Richard Nixon’s veto message on the War Powers Resolution intimated some positive attributes obtainable from legislative enactment, particularly in the area of consultation.\textsuperscript{79}

\textbf{lucci remarked:}

I have come to the conclusion that no conceivable statutory scheme regarding war powers can improve on what we have had all along: an Executive which can act, plan, command and manage efficiently and successfully; and a Legislature which can use the power of the purse both to steer the broad direction of national policy and to terminate any Executive endeavor requiring an appropriation of funds to which the American people overwhelmingly object.

\textit{1988 Senate Hearings, supra} note 1, at 1166.

Some legislators, however, have also echoed this view. Senator Thurmond, during War Powers Resolution debate, noted that “the Congress has considerable authority in this area” through the power of the purse “and I see no reason for new legislation which would limit the President’s ability to meet emergency situations.” 119 CONG. REC. 25,104 (1973). Senator Hruska agreed, noting that legislation is not needed to restore balance to the constitutional war powers because the “Congress has been playing its role all along, through the use of the purse strings, regulation of the size of the military, and expressions of viewpoints either in accord with or in opposition to policies taken by the executive branch.” \textit{Id.} at 25,110. Further, Representative Kemp added, “[T]he enactment of war powers legislation such as that before us today is hasty and may be unnecessary. The Congress already has the power to control warfare, and in recent years has begun to use that power. . . . We are only as powerless as we make ourselves. . . .” \textit{Id.} at 33,866 (conference report debate).

During the veto override debate, Senator Bellmon reasoned, “Anytime the Congress genuinely wishes to force the withdrawal of American forces from any area of the world or from any combat situation we can do so by withholding appropriations as we did in the Cambodian bombing situation earlier this year.” \textit{Id.} at 36,195. Representative Buchanan added that a congressional role on war powers matters is not required by the House bill and “was illustrated in the role of the Congress through the appropriations process to cut off the bombing in Cambodia by August 15, 1973, which did, in fact, accomplish this result.” \textit{Id.} at 36,212.

78. Secretary of Defense Frank Carlucci testified that “the War Powers Resolution is a failure and should be repealed.” \textit{1988 Senate Hearings, supra} note 1, at 1147. He added: [T]he most prudent step the Congress can take to clarify the issue of war powers and to maximize the effectiveness and legitimate exercise of authority by all three branches of government is to repeal the War Powers Resolution and return to the only formula I know which will withstand the test of time, namely the Constitution.

\textit{1988 Senate Hearings, supra} note 1, at 1160. State Department Legal Advisor Abraham Sofaer voiced the concurring opinion of the State Department that the statute “should be repealed altogether. We particularly urge repeal of Section 2(b), 5(b), 5(c) and 8(a).” \textit{1988 Senate Hearings, supra} note 1, at 1067.

79. President Nixon made this point:

The responsible and effective exercise of the war powers requires the fullest cooperation between the Congress and the Executive and the prudent fulfillment by each branch of its constitutional responsibilities. House Joint Resolution 542 includes certain constructive measures which would foster this process by en-
First, to the extent that some of the war powers are independent or exclusive, this article presupposes that each co-equal branch will reserve for itself the capacity to vigorously exercise its assigned powers to their fullest potential. This is, in part, an acknowledgment of the divided nature of war powers and a recognition that each branch serves a unique role by performing its separate institutional functions. Accordingly, Congress may determine that a statutory mechanism in the war powers area may serve as a necessary and proper means for the better fulfillment of its independent constitutional authority. As will be seen, many of the proposed reforms may be adopted pursuant to Congress' rulemaking authority. To the extent such reforms will be confined to the internal, housekeeping matters of the legislative arena, Congress, *sua sponte*, is establishing procedures it concludes enable more effective legislative action. Therefore, some significant internal reforms might not need to comply with the standard Article I procedure for enactment of legislation, including the bicameral and presentment requirements.

For example, as part of an internal procedural infrastructure, Congress may wish to establish a formalized process by which it makes *sua sponte* determinations concerning whether a situation of hostilities exists in order to trigger congressional consideration of legislation and expedited procedures for examining such legislation. Additionally, where Congress adjourns for longer than the constitutional period of three days, Congress might provide a method for

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hancing the flow of information from the executive branch to the Congress. Section 3, for example, calls for consultations with the Congress before and during the involvement of the United States forces in hostilities abroad. This provision is consistent with the desire of this Administration for regularized consultations with the Congress in an even wider range of circumstances.


Moreover, with regard to the automatic termination provision under section 5(b), the veto message noted that:

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

*Pub. Papers* 894-95 (Oct. 24, 1973) (emphasis added). *See also* 119 *Cong. Rec.* 36,204 (1973) (*veto override debate*) (remarks of House Min. Leader Gerald Ford) (noting that President Nixon indicated in a telegram his interest in “designing . . . a constructive war powers bill . . . where there is a closer working relationship and a partnership between the” two branches) (emphasis added). *Accord 1988 House Hearings, supra* note 5, at 210 (remarks of Cyrus Vance, former Secretary of State) (noting that consultation “is especially important where there is shared power” between the branches).
reassembling itself *sua sponte* to consider war powers matters that arise during the adjournment period.

Second, because the exercise of war powers frequently involves "shared" or "concurrent authority," an effective statutory war powers mechanism might promote comity more effectively by fostering an improved legislative-executive branch environment for making war powers decisions. Resolution of many war powers issues, despite the potential for an interbranch constitutional "showdown," may ultimately result from accommodation or confrontation between the two political branches. Thus, the political departments may resolve that it is necessary and proper to establish procedural guidelines for making war powers decisions in this constitutional area, often involving concurrent authority or falling within the "zone of twilight."

Along these lines, improvements to the consultation and reporting requirements might provide enhanced communicative channels and dialogue between the branches on these delicate and time-sensitive matters, thereby minimizing possible conflicts. Interbranch communicative reforms will help distribute information essential for the meaningful exercise of each branch's constitutional function and will promote the goal of collective judgment over these shared powers. Experience under the statute also highlights a gap in statutory construction resulting from the application of divergent definitions of "hostilities." The branches may wish to utilize the legislative process to reach accord on a better statutory definition of this critical trigger term. Although the establishment of a definitive definition may not be fully possible, the branches may reach statutory agreement at least on the essential qualitative and quantitative elements to be relied upon in making these decisions.

An effective reform measure must take into account both the political and constitutional dimensions of the use of armed forces. For example, the congressional use of efficient and effectively designed expedited procedures may send a signal to the White House that congressional sentiment on a particular war powers measure is building. One proposal is to require forty-percent co-sponsorship of war powers legislation before such expedited procedures could be invoked. This would serve to focus congressional deliberation on specific measures and would inform the President of serious congressional support on specific proposals.

In sum, to the extent statutory reform seeks substantive modification, it is unnecessary in light of the already established allocation of the constitutional war powers. However, to the extent such reforms focus on procedural alteration to promote comity and an effec-
tive decision-making process, such a statutory infrastructure may provide attendant institutional benefits otherwise unobtainable in the absence of such a statutory scheme.

However, any such reforms must be carefully crafted since an inadequate statutory structure would be counterproductive and would unnecessarily aggravate the war powers decision-making process—a process already fraught with the inherent tension of the constitutional separation of powers. The War Powers Resolution, in its current form, is an example of a statute handicapping, rather than enhancing, effective war powers decisions. In several regards, the Resolution may now serve to provoke, rather than alleviate, confrontation resulting from, for example, the taint of Chadha-impacted provisions, the arbitrary sixty-day automatic disengagement provision, and uncertainty over the circumstances triggering “hostilities.” Thus, while statutory reform has the potential to inhibit the attainment of a more effective decision making process, a properly designed statutory mechanism or infrastructure may also formalize and improve the process of making substantive policy decisions. As we turn to this topic, preliminary consideration is given to the necessity of establishing a statutory infrastructure or process that permits the development of policy to be adapted to the unique and unanticipated “hostilities” situations that may be presented.

IV. ALLOWING FOR TAILORED RESPONSES

A requisite feature of any competent war powers measure is that it allow for flexible action by either the legislative or executive branch. Because it is not possible to foresee all potential uses of the war power, any reform legislation should be careful not to foreclose options or telegraph potential pre-established courses of action. In other words, any war powers mechanism should preserve for the political branches the capacity to administer responses that are “tailored” to their necessity. In this manner, such statutory reform would complement, rather than breach, the constitutional scheme.

The objective of establishing a statutory infrastructure that permits only policy action tailored to the merits of the situation may best be accomplished by two means. First, any reform measure should avoid, in the absence of substantial justification, blunt, arbitrary presumptions that may be too rigid or inappropriate for all circumstances. While the elimination of all arbitrary statutory limitations might not be attainable, any such statutory restrictions should first be justified by serving some identified, compelling need. Generally, this can be demonstrated by exploring less restrictive alterna-
tives for accomplishing the same governmental end, if available. Second, any war powers legislation should focus on the process for considering specific war powers measures, rather than on the adoption of substantive changes to the allocation of constitutional powers. Such efforts for substantive reform generally are guided by the desire to provide greater certainty to the concurrent authority within the “zone of twilight.” In light of the overlapping authority under the Constitution, any such exercise is fruitless. The emphasis should instead be on procedural, rather than substantive reform, by augmenting the process by which Congress and the President make decisions concerning the introduction and involvement of United States Armed Forces in hostilities.

A. Avoiding Arbitrary Elements

One of the prominent deficiencies of the War Powers Resolution is that it contains an inessential, arbitrary component that has major policy ramifications triggered by the mere passage of time. This is the sixty-day time limit for automatic removal of United States Armed Forces from hostilities under section 5(b) of the statute (in the absence of congressional authorization or presidential certification of the need for a thirty days extension concerning the safety of the United States Armed Forces). In fact, several original sponsors of the War Powers Resolution conceded that this time period was “arbitrary.” However, Senator Jacob Javits, one of the principal sponsors, noted that "Admittedly it is an arbitrary period." 81

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80. Section 5(b) of the War Powers Resolution provides:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

50 U.S.C. § 1544(b) (1982). H.R. REP. No. 547, 93d Cong., 1st Sess. 8 (1973) (conference report) noted that “[t]he termination period in the House joint resolution was 120 days; in the Senate amendment 30 days.” The conferees settled on a 60-day period for automatic disen- gagement of military forces.

81. Senator Eagleton noted, “Admittedly it is an arbitrary period.” 119 CONG. REC. 24,544 (1973) (emphasis added). See also id. at 24,541 (remarks of Sen. Javits); S. REP. No. 220, 93d Cong., 1st Sess. 28 (1973) (“The choice of thirty days [in the Senate bill], in a sense, is arbitrary.”) (emphasis added).
architects of the War Powers Resolution, noted that an early mandatory withdrawal period of the military forces was designed to (1) involve Congress early in a situation of “hostilities,” and (2) address the need for potential emergency action. Senator Javits also noted that the pre-established time period could be foreshortened or extended if Congress acted to do so. This blunt instrument does not satisfy the suggested “less restrictive alternative” standard since it establishes a statutory presumption in favor of major policy disengagement, without affirmative congressional action, and therefore may be inappropriate under the circumstances.

To be sure, this quantitative durational limit on the use of armed forces in hostilities came under attack during the debate on the War Powers Resolution. The criticisms presented in 1973 are useful and persuasive in showing that such arbitrary provisions, considering their major substantive consequences, should generally be left out of any statutory reform, unless a weighty countervailing justification is first established and in the absence of less restrictive alternatives. During the 1973 debate, it was argued that a statutorily built-in time limitation under section 5(b) would be “inflexible,” “could force Congress into a premature decision or end Presidential action before a full assessment could be made of the situation,”

The critics of this provision, including Senator Griffin, also noted its' arbitrariness during the 1973 debate. 119 Cong. Rec. 25,099 (1973). Senator Goldwater called the 30-day limit in the Senate bill “unrealistic and . . . dangerous.” Id. at 24,532. Likewise, Representative Kemp remarked, “An arbitrarily fixed time limitation on Presidential authority contributes nothing to the right of Congress to exercise its constitutional authority.” Id. at 33,865 (conference report debate) (emphasis added). Representative Frelinghuysen stated simply that “this is an arbitrary limitation.” Id. at 33,869 (conference report debate) (emphasis added). He added later, “I should feel less sensitive about the arbitrary cutting off of a President's powers if within the 60-day period there were some compulsion on Congress to take affirmative action” rather than by changing national policy by inaction. Id. at 36,209-10 (veto override debate) (emphasis added).

82. Id. at 24,541. See also S. Rep. No. 220, 93d Cong., 1st Sess. 28 (1973).
84. Id. at 24,661 (remarks of Rep. Frelinghuysen). See also id. at 25,093 (remarks of Sen. Ervin) (noting the provision was "impractical of operation").
85. Id. at 25,104 (remarks of Sen. Thurmond). Senator Thurmond explained, “It might increase pressure to escalate hostilities in order to achieve the objective within this limited time frame. It may precipitate a premature withdrawal of troops and cause more dislocations or possibly endanger their lives.” Id. Representative Kemp noted the time limitation “could seriously impede action or undermine negotiations in the future in a manner not desired by either the President or the Congress at that time.” Id. at 33,865 (conference report debate). Representative Cederberg described the possibility “in which a President had committed troops and at the end of 90 days he could not militarily get them out safely, and the Congress had not acted.” Id. at 26,212 (veto override debate). Representative Hudnut warned that the 60-day limitation “might well tempt some future aggressor to embark on a military collision course on a belief that the United States would be paralyzed and unable to respond.” Id. at 36,213 (veto
"could lead to a piecemeal strategy in countering an attack or threat of attack," and might also be "excessively restrictive of the President's power."

Senator Griffin observed that it was best not "to prejudge the circumstances in which our Armed Forces should be employed at some time in the future" and that "the [time] period could be much too long in some situations and too short in others." Congressman Stratton warned that other countries would be aware that executive action could be "negated in [60] days simply by inaction of the Congress" and such countries may consequently "not pay much attention to" the President. Some members of Congress even opposed the War Powers Resolution in part because they believed the limited time period constituted a "blank check," statutorily legitimizing ex-

86. Id. at 24,593 (remarks of Sen. Dominick). See also id. at 33,865 (conference report debate) (remarks of Rep. Kemp) (noting "the 60-day limitation on Presidential action would be unworkable as a practical matter and could generate pressures to escalate hostilities in order to achieve objectives by whatever means possible within 60 days"). Accord Veto of the War Powers Resolution, PUB. PAPERS 893 (Oct. 24, 1973), reprinted in 119 CONG. REC. 36,176 (1973) (veto override debate) (noting "the provision automatically cutting off certain authorities after 60 days unless they are extended by the Congress could work to prolong or intensify a crisis").

87. 119 CONG. REC. 25,104 (1973) (remarks of Sen. Thurmond). Senator Ervin concurred, noting that the bill precludes the President from "exercising his constitutional power . . . for more than 60 days without the consent of Congress." Id. at 36,195 (veto override debate). See also id. at 33,865 (conference report debate) (remarks of Rep. Kemp) (noting the need for executive branch flexibility); id. at 36,195 (veto override debate) (remarks of Sen. Bellmon) (same).

88. Id. at 25,100. Senator Eagleton imagined, "[T]hink of the first 90 days of the Vietnam War. What would have been the vote of Congress to bring [the military forces] out?" Id. at 33,557 (conference report debate). Representative Frelinghuysen noted "that circumstances may well require a longer period for the removal of our troops." Id. at 33,869 (conference report debate).

The former and now current National Security Advisor, General Brent Scowcroft, explained the impact of this provision:

If the Resolution is triggered, the President then has an incentive to get the action completed within 60 or 90 days, regardless of the natural pacing of whatever the issue is, and an opponent against whom the deployment is being made has an incentive, (a) to trigger the Act, and then, (b) to try to stall for 60 to 90 days to see whether the United States will have to pull out.

1988 Senate Hearings, supra note 1, at 118-19.

89. 119 CONG. REC. 24,664 (1973).

90. See, e.g., id. at 25,052 (remarks of Sen. Abourezk); id. at 33,560 (conference report debate) (remarks of Sen. Eagleton). Senator Eagleton explained that the section provides "an open-ended, blank check for 90 days of warmaking, anywhere in the world, by the President." Id. at 33,556 (conference report debate). Senator Eagleton further commented, "The bill gives the President . . . unilateral authority to commit American troops anywhere in the world, under any conditions [the President] decides, for 60 to 90 days." Id. at 36,177 (veto override debate). Representative Culver echoed that sentiment, noting that the bill gives the President
executive use of armed forces during the sixty days. Some were concerned that such language would give the President an even greater advantage in the exercise of war power. Thus, section 5(b), in its arbitrary disposition, may be unsuitable under many, if not most circumstances—conferring either too much time or not enough.

The exclusion of such fixed or predetermined constraints would allow greater policy flexibility in the war powers decision-making process. However, it is recognized that there are exceptions and at least some duration time limits serve a significant end, in the absence of less restrictive alternatives, and should be incorporated into a reform statute. Where such arbitrary predispositions might prove to be essential, the necessity must be held to a high standard and shown to be compelling. Statutorily arbitrary provisions, such as those of section 5(b), that lead to major policy alterations without

"a blank check to wage war anywhere in the world for any reason . . . for a period of 60 to 90 days." Id. at 36,221 (veto override debate).

91. Analyzing this provision, Senator Abourezk concluded, "The war powers bill establishes a 30-day limit [in the Senate bill] on 'undeclared' wars, initiated without congressional approval." Id. at 25,052. Further, Representative Buchanan noted that "[t]here is clearly a delegation for a 120-day period [in the House bill] to the President of the congressional warmaking authority under the committee measure." Id. at 24,671. Representative Abzug agreed, stating "I do not think we should give the President 120 days authority to conduct a war, a power he does not have constitutionally." Id. at 24,684. In fact, Representative Holtzman commented, "[T]he bill instead of limiting Presidential war powers enshrines the unilateral warmaking powers on the part of the President for 120 days" in the House bill. Id. at 24,698. According to Senator Eagleton, under this provision "all [the President] needs is a whim or pretext or an intuitive reaction" and such deployment is "authorized in advance for 90 days, courtesy of the Congress." Id. at 33,557 (conference report debate).

Similarly, Representative Frelinghuysen warned, that "the President, for this fixed period, has virtually untrammeled authority." Id. at 33,869 (conference report debate). During the veto override debate, Senator Eagleton concurred, stating, "If this becomes law we have given a predated declaration of war to the President and any other President of the United States, courtesy of the U.S. Congress." Id. at 36,189. Representative Young noted that the bill "allows the President unlimited warmaking powers for up to 60 days in the absence of a congressional declaration of war" which "is an even greater delegational of congressional responsibilities to the Executive than ever before in our history." Id. at 36,210. Representative Dellums added that the bill "allow[s] any President a free hand for 60 days to commit troops" and that ",[t]his is a very high price to pay for the pleasure of shaking our fist at the President." Id. at 36,220.

Senator Javits, however, pointed out that section 8(d) of the War Powers Resolution negates any inference of delegation. Id. at 33,558 (conference report debate). See also id. at 33,869 (conference report debate) (remarks of Rep. Fassell) (same); id. at 33,869-70 (conference report debate) (remarks of Rep. Fraser); id. at 36,209 (veto override debate) (remarks of Rep. Bingham).

92. Senator Eagleton, in the conference report debate, noted "the incredible powers of persuasion the President has at his command at all times, and especially during periods of crisis" and that the consequence of authorizing such emergency action "is a fait accompli," making "the authority of Congress to rescind [through automatic termination] shallow indeed." Id. at 33,557 (conference report debate).
affirmative action once the designated deadline has passed, may be distinguished, for example, from procedural time limitations that may be necessary to enforce deadlines for affirmative action. Illustrative of this second category are those time periods within which expeditiated congressional action is required, and those requiring that executive war powers reports be submitted within forty-eight hours of a reportable event under the Resolution. These specifications are admittedly arbitrary. However, they do not result in severe changes in policy and may be warranted as provisions integral to the enforcement of the Resolution and to the assurance of proper and timely consideration, thus meeting some compelling need. Therefore, some deadline soon after the specified event must be imposed for a war powers report to be meaningfully received and assimilated. Additionally, if Congress is to act expeditiously, it must prescribe similar time constraints on debate and committee consideration.

As another example in which such procedural reforms may be required, section 3 of the War Powers Resolution provides that "[t]he President in every possible instance shall consult with Congress before" the introduction of United States Armed Forces into hostilities. Some believe that this ambiguous trigger for consultation may have proven too inflexible, thereby precluding adequate consultation. Under at least one reform proposal, it has been recommended that consultation occur before the President's decision to introduce troops into hostilities, but in no event later than forty-eight hours after such decision. Therefore, some arbitrary limitations

95. Section 3 of the War Powers Resolution provides:
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.
(particularly those with primarily procedural effects) may be necessary in order to ensure and enforce expeditious action and timely exchange of information. These restraints appear warranted as an effective means of ensuring timely action, particularly in the absence of less restrictive alternatives.

In stark contrast to these justifiable limitations are the arbitrary restrictions, such as section 5(b) of the War Powers Resolution, that may result in drastic alterations in policy and without any compelling necessity and with less restrictive alternatives available. The statutorily mandated disengagement at the end of sixty days may represent a complete 180 degree change in the course of this nation's foreign policy, solely upon the passage of the specified time period.

The exclusion of the arbitrary statute provisions best permits policy to be tailored to the situation at hand. The avoidance of arbitrary time limits, where possible, provides both Congress and the President wider policy options and greater room for flexible response.

B. Reform Focuses on Process

The central issue posed by reform efforts concerns the actual decision-making process employed by the two political branches in the exercise of the war powers. Can a more capable statutory mechanism be established that is consistent with the respective constitutional authorities of Congress and the President and that allows the institutional advantages and attributes of each branch to bear on these vital issues? In answering this question, it is important that reform concentrate on the process for making policy decisions, rather than on substantive changes in the manner in which the war powers are exercised by the President and Congress.

During the War Powers Resolution debate, the Senate legislative effort concentrated on clarification of substantive war powers authority. Largely because of the perceived need to redress an imbalance in the exercise of the constitutional war powers, the Senate sought to statutorily define the respective powers of each branch. On two occasions, the Senate approved a measure that would have enumerated only three instances in which the President could act in the absence of a congressional declaration of war.97 These limited emer-
gency situations in the Senate bill allowed the President, without prior congressional authorization, to (1) repel an armed attack on the United States, (2) repel an attack against United States Armed Forces, and (3) protect United States citizens abroad. A fourth provision was considered "perhaps the most significant part of the bill" as it dealt with the delegation of congressional authority to the President, which power could not be held in the absence of legislative action. These were the only four specified executive war authorities the Senate would recognize as constitutional exercises of war power by the President.

Unlike the Senate version of the War Powers Resolution, the House approach was primarily designed to establish a procedural mechanism for decision-making between the branches on the use of the armed forces. As part of a compromise between these divergent efforts, the conferees adopted a provision in the purposes and policy section of the bill that purported to explain the congressional view of executive war powers, but which did not have the force of law.

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These measures were part of an effort to limit executive authority through definition. See, e.g., War Powers; Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs, 93d Cong., 1st Sess. 4 (1973) [hereinafter 1973 House Hearings] (statement of Sen. Javits) ("By carefully defining these powers we not only limit them, we also permit ourselves to assess the President's implementing action against a very specific benchmark citation."). See infra text accompanying notes 127-30 for further discussion on this "authority test" approach.


The first three categories are codifications of the emergency powers of the President, as intended by the Founding Fathers and as confirmed by subsequent historical practice and judicial precedent. Thus, [these provisions] delineate by statute the implied power of the President, in his concurrent role as Commander-in-Chief, with respect to emergency use of the armed forces.


99. Id. at 23.

100. See, e.g., 119 Cong. Rec. 21,220 (1973) (remarks of Rep. Findley) (noting that in contrast with the Senate approach, the "House Foreign Affairs Committee felt it would be unwise to draw such rigid lines between the President and the Congress" and that the committee sought "to preserve the maximum amount of flexibility in the War Powers Resolution").

101. H.R. REP. No. 547, 93d Cong., 1st Sess. 8 (1973) (conference report) ("Subsequent sections of the joint resolution are not dependent upon the language of [section 2(c)]."). Senator Fulbright commented that the compromise forged in section 2(c) "aroused the greatest controversy" among the Senate and House conferees. 119 Cong. Rec. 33,548 (1973) (conference report debate). Senator Eagleton criticized section 2(c) as "nonoperative." Id. at 36,189 (veto override debate). Senator Eagleton further criticized section 2(c) for containing "precatory words" because he felt that the "very heart of the Senate bill . . . has been placed in the 'whereas' section." Id. at 33,555 (conference report debate). Senator Javits simply noted that "subsequent sections of the joint resolution are not 'dependent' upon the language of
The objective of focusing on the process of decision-making, rather than on substantive reform, in order to allow for flexible, tailored responses, is consistent with the constitutional design in two respects. First, it comports with the fact that much of this area involves "concurrent" authority and "zones of twilight." Second, it takes into account that the Framers deliberately established comprehensive war powers that could be applied to a variety of unforeseeable circumstances. As Justice Joseph Story made this point:

"Every power ought to be proportionate to its object. The duties of superintending the national defence and of securing the public peace against foreign or domestic violence, involve a provision for casualties and dangers to which no possible limits can be assigned; and therefore the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community."

The primary objective of reform should be to improve the decision-making process. Thus, the focus should be on fundamental attributes that contribute to efficient and effective decision-making by taking into account the full constitutional powers and institutional advantages and needs of each branch. Such a procedural emphasis is less likely to lock-in constitutional questions or hurdles, particularly since many decisions in this area involve grey areas of institutional authority.

As an example, section 5(a) of H.R. 3912 proposes a procedural mechanism to be used by Congress in considering legislation that would impose limitations on the use of United States Armed Forces in actual, imminent, or potential hostilities, or legislation amending or repealing previously enacted hostilities legislation. Since only a process is established for consideration of such war powers legisla-

sub-section (2)(c)." Id. at 33,557 (conference report debate).

See supra note 64 for a reproduction of section 2(c) of the War Powers Resolution, 50 U.S.C. § 1541(c) (1982).

102. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 934, at 687 (1891 ed.) (discussing the General Welfare Clause). See also supra note 59.

Abram Chayes, Harvard Law Professor, remarked, "[T]he exact manner and circumstances in which these [war] powers were to be exercised [by the President and the Congress] was left, wisely in my view, to the exigencies and circumstances of the concrete occasions in which exercises of the powers would be sought." 1970 House Hearings, supra note 67, at 136. McGeorge Bundy, former special assistant for National Security Affairs, reasoned that "no single general rule [on the respective war powers authority] is likely to meet all our needs, and in particular I think it is dangerous to try to deal with the future." 1970 House Hearings, supra note 67, at 3.

tion, the policy particulars are deliberately left to be supplied at the
time of debate for the situation presented. Further, this proposed leg-
islation sets forth an illustrative menu of funding limitations that
could be imposed to backup the section 5(a) hostilities limitations,
but does not automatically implement any of the possible identified
spending restrictions.  

Most important, under this approach the focus is on policy.
This focus allows for greater resilience in the government's response
and for the likelihood that a particular measure will be suitably fit-
ted to a given situation. The emphasis is then placed more on the
adequacy of the policy response in the decision-making pro-
cess—where it should be—and less on the legitimacy of the exercise
of the constitutional authority of the President or Congress. While
the question of the legitimate use of authority cannot be eliminated
under the constitutional scheme of divided powers, it should not be
resurrected during each war powers debate. Although a specific ac-
tion by the President or Congress might conceivably be of questiona-
ble constitutionality under a particular application, a reform mecha-
nism focusing on the process of decision making would not be
facially unconstitutional, but only invalid (if at all) as applied to a
given context.  

Clearly, statutory reform should complement, not detract from
the constitutional objective of preserving war powers responses com-
mensurate with their need. An effective decision-making process can
therefore serve to highlight avenues of interbranch cooperation and
leave room for flexible policy actions tailored to the exigencies of the
moment.

V. DEFINING AND DETERMINING THE EXISTENCE OF
HOSTILITIES  

During a decade and a half of experience under the War Pow-
ers Resolution, the most hotly contested issue between the President
and Congress has been whether and when United States Armed
Forces have been introduced into "hostilities." This "hostilities"

104. H.R. 3912, § 5(b), 100th Cong., 2d Sess., 134 CONG. REC. H251 (daily ed. Feb. 4,
1988). See infra note 320 for the full text of section 5(b) of H.R. 3912.
105. Compare, e.g., WAR POWERS REPORT TO THE SPEAKER OF THE HOUSE OF REP-
RESENTATIVES (May 20, 1987) (noting with regard to the Persian Gulf missile attack on the
U.S.S. Stark that "[o]ur forces are not in a situation of actual hostilities, nor does their con-
tinued presence in the area place them in a situation in which imminent involvement in hostilities
is indicated, although we are mindful of recent Iranian statements threatening U.S. and other
ships under protection"), reprinted in STAFF OF THE SUBCOMM. ON ARMS CONTROL, INT'L

determination is a matter of great consequence since it is the primary triggering event that brings the central provisions of the War Powers Resolution into play, including the provision for potential congressional action following the introduction of troops into such hostilities. Although this statutory question takes place in the context of

SECURITY & SCIENCE OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 100TH CONG., 2D SESS., THE WAR POWERS RESOLUTION: RELEVANT DOCUMENTS, CORRESPONDENCE, REPORTS 92 (Comm. Print 1988) [hereinafter RELEVANT WAR POWERS RESOLUTION DOCUMENTS] with Letter from House Committee on Foreign Affairs Chairman Dante Fascell to Secretary of State George Shultz (Sept. 21, 1987) (noting that "there is a growing impression that the War Powers Resolution is not being taken seriously by the administration" with regard to the United States naval presence in the Persian Gulf). Id. at 94. See also Crockett v. Reagan, 558 F. Supp. 893, 897 (D.D.C. 1982), aff'd per curiam, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984), in which the district court stated:

[Although judicial] consideration of the merits [on whether the War Powers Resolution has been violated by aid to El Salvador] might reveal disagreements about the meaning of War Power Resolution terms such as 'imminent involvement in hostilities,' the most striking feature of the pleadings at this stage of the case is the discrepancy as to the facts [between the executive and legislative branch parties].

See also STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., THE WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE HOUSE COMM. ON FOREIGN AFFAIRS 233 (Comm. Print 1982) [hereinafter SPECIAL STUDY] (noting congressional sentiment that President Carter failed to comply with the statute concerning the 1978 Zaire Airlift).

106. Actually, there are three enumerated circumstances under which the President may invoke the statute. Under section 4(a), the President is required to submit a report within 48 hours where:

In the absence of a declaration of war, in any case in which the 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; and

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


However, according to Senator Javits' colloquy during the conference report on the War Powers Resolution, "Sections 4(a)(2) and 4(a)(3), which concern sensitive peacetime deployments of the Armed Forces, are not covered by the automatic termination provisions of section 5." 119 CONG. REC. 33,550 (1973). In addition, Representative Zablocki noted that "[t]he conference agreement eliminates the mandatory termination provisions on peacetime deployments but continues to require that the President report within 48 hours to Congress on deployments of U.S. Armed Forces under [hostilities] circumstances specified in the legislation." Id. at 33,859 (conference report debate). Senators Javits and Eagleton remarked that only section 4(a)(1) triggers the 60-day clock under section 5. Id. at 36,188-90 (veto override debate). See also H.R. REP. NO. 547, 93d Cong., 1st Sess. 9 (1973) ("The conference report requires presidential reporting on [peacetime] deployments but section 5(b) does not require their termination.").

Section 4(a)(2) was intended to apply to:

the initial commitment of troops in situations in which there is no actual fight-
the War Powers Resolution, it is only part of the larger, ongoing, historical debate between the branches over the application of their respective constitutional war powers.

It is difficult to ascertain when a state of war exists to warrant the exercise of the President’s or Congress’ constitutional war powers. In fact, one Supreme Court Justice once distinguished a state of “imperfect war,” describing “acts of hostility or reprisal” in which Congress has not recognized a state of war, from a state of “perfect war,” in which formal war is declared between two nations.107 Others have wrestled with this perplexing issue: where should the demarcation between executive and legislative war authorities lie? Such determinations are compounded not only by the fact that the war powers are divided between the branches, but also because, as former Secretary of Defense and Attorney General Elliot Richardson recently noted, “[i]n the real world there are no bright lines between acts short of war and acts amounting to war.”108

The contemplated utilization of section 4(a)(3) was described as follows:

While the word “substantially” designates a flexible criterion, it is possible to arrive at a common-sense understanding of the numbers involved. A 100% increase in numbers of Marine guards at an embassy — say from 50 to 100 — clearly would not be an occasion for a report. A thousand additional men sent to Europe under present circumstances does not significantly enlarge the total U.S. troops strength of about 300,000 already there. However, the dispatch of 1,000 men to Guantanamo Bay, Cuba, which now has a complement of 4,000 would mean an increase of 25%, which is substantial. Under this circumstance, President Kennedy would have been required to report to Congress in 1962 when he raised the number of U.S. military advisers in Vietnam from 700 to 16,000.

108. See 1988 House Hearings, supra note 5, at 139 (testimony of Elliot Richardson).

During the Senate Hearings, Mr. Richardson commented:
The real problem I think concerns situations that do not involve protracted conflict and fall somewhere in between specific, immediate actions, such as the strike against Libya or the somewhat larger scale operation against Grenada, and that entail substantial use of United States force over what looks on its face like a potentially protracted period. The commitment of U.S. naval forces to the Persian Gulf was that kind of situation.

1988 Senate Hearings, supra note 1, at 189. Alexander Hamilton, in his Pacificus Essays, quoted Burlemaqui, “There are a great many unjust acts which may kindle a war, and which,
Among the references to the war powers divided between the President and Congress in the Constitution, the terms "hostilities" and "imminent hostilities" are never used. Nonetheless, these are the standards employed under the War Powers Resolution in attempting to address the appropriate roles for each branch in the involvement of United States Armed Forces. During the Senate debates on the War Powers Resolution, Senator Thomas Eagleton framed the central issue posed by the legislation as follows: "What we are really talking about in this bill is hostilities. . . . How do we get in them? How do we avoid them? Who participates, and under what circumstances?" The essential question, then, is at what level of United States troop involvement and under what scenario should the congressional role be implicated. The hostilities trigger remains today as perhaps the most critical issue involving executive and legislative participation on war powers matters.

A. Current Law: Triggering the Statute

Two forms of hostilities are recognized under the War Powers Resolution: (1) actual hostilities and (2) imminent hostilities. Before either of these two states of conflict occurs, the Resolution requires the President to consult with Congress; within forty-eight hours of the introduction of armed forces into either actual or imminent hostilities, the President is also required to submit a report to

however, are not the war itself." PACIFICUS, supra note 2, at 448 (second Pacificus essay) (quoting Burlemaqui, vol. II, bk. IV, ch. III, §§ 4, 5).

109. For a listing of the constitutional war powers, see supra text accompanying notes 39-57.

110. 119 CONG. REC. 25,082-83 (1973). This statement was made in the context of Senator Eagleton's amendment to include CIA activity under the war powers bill by broadening the legislation terms "Armed Forces" to essentially include clandestine activities. Id. at 25,079 (amendment No. 366). See, e.g., id. at 25,080 (remarks of Sen. Eagleton) ("To leave out of [the Senate bill] the clandestine operations that a President may wish to carry out by using CIA or civilian personnel is to leave an enormous loophole . . . ."). This amendment failed in the Senate 34 to 53. Id. at 25,092.

111. Senator Robert Dole characterized the war powers question before the Congress in 1973 in this way: "If the contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include Presidential resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale." Id. at 33,564 (conference report debate) (emphasis added). See Also id. at 33,866 (conference report debate) (remarks of Rep. Kemp) (proposing various factual scenarios and asking "after all, who is going to determine if 'imminent involvement is clearly indicated?' "); 1988 Senate Hearings, supra note 1, at 28 (remarks of Sen. Sarbanes) ("The question is whether and what kind of a commitment you are going to allow without congressional involvement in the decision.").

Congress pursuant to section 4(a)(1) of the Resolution. Once a hostilities report is submitted to Congress, the "core" provision of the War Powers Resolution, section 5, is triggered. The statute also specifies "peacetime deployment" circumstances under subsections 4(a)(2) (involving the introduction of armed forces into foreign territories equipped for combat) and 4(a)(3) (concerning a substantial enlargement of United States combat forces in foreign territories), which do not implicate section 5.

Under section 5(b) of the statute, the filing of the section 4(a)(1) hostilities report with Congress starts a sixty-day clock, at the end of which disengagement of United States troops is mandated, in the absence of (1) subsequent congressional authorization for continued United States Armed Forces involvement, (2) an extension of time authorized by Congress, (3) an armed attack on the Congress that prevents it from meeting, or (4) presidential certification that thirty additional days are needed to ensure safe removal of the military forces. The sixty-day period commences "after a [hostilities] report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier." The language reading "or is required to be submitted" was included, according to the House report, in order to "take[] into account a situation in which the President for whatever reason may decide not to submit a report. In that case, the [sixty]-day period would begin after the [forty-eight] hour period referred to in [the reporting] section." As Senator Jacob Javits, a principal Senate architect of the War Powers Resolution, explained: "The 60-day clock begins to run from the time the report is due—48 hours after the causal event. Any delay in the submission of the re-

114. For a discussion that section 5, including the automatic withdrawal and concurrent resolution subsections, was intended as the central enforcement mechanism of the statute, see infra note 262.
115. For a discussion of the distinction between "hostilities" reports under subsection 4(a)(1) and "peacetime deployment" reports pursuant to subsections 4(a)(2) and (3), see supra note 106.
116. 50 U.S.C. § 1544(b) (1982). The 60-day period may be statutorily extended for up to 30 additional days upon certification by the President that "unavoidable military necessity respecting the safety of the United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces." Id. The extension period was "designed to specifically . . . meet a limited emergency contingency in which U.S. Armed Forces might be trapped or so heavily engaged in hot combat on the 60th day as to make their safe extrication by the 60th day impossible." 119 CONG. REC. 33,550 (1973) (conference report debate) (remarks of Sen. Javits).
quired report would be an infraction of the law and specifically would not extend the 60-day time period.” In this manner, the Resolution was intended to give Congress the opportunity to disagree with the President, whether the filed report was filed pursuant to the “hostilities” or the “peacetime deployment” provisions of section 4.

Section 5(c), which is now of questionable constitutional validity after the Chadha decision, contains a two-house legislative veto (or concurrent resolution) by which Congress can remove United States troops “engaged in hostilities.” Because the statute affords the President sixty days before mandating withdrawal (in the absence of other congressional action), it was intended that the “[u]se of the concurrent resolution device to foreshorten the time period [would be] restricted to the initial 60-day period provided in section 5(b).”

The existence of hostilities, as determined under some objective standard, is not a self-executing event which triggers the statute. A finding that United States Armed Forces have been introduced into hostilities must be made by one of the political branches, typically the executive branch. Under the terms and experience of the Act, however, Congress usually (1) waits for the President to either consult with it or submit a report before the sixty-day clock commences.

120. Senator Javits commented during the conference report debate, “[W]e have the right to determine, when [the President] sends a report, which he is obligated to do under three broad categories set forth in section 4(a), whether it is a report which comes under the 60-day time limit” as mandated under sections 4(a)(1) and 5(b). Id.

During the veto override debate, Senator Javits remarked, “If [the Congress] had some different interpretation it would be up to us to decide whether we agreed with [the President] or not, because the . . . 60-day limitation begins to run when he introduces the forces, not when he says they are in imminent danger of hostilities.” Id. at 36,188. In the conference report debate, he noted, “[W]e have the discretion when we get a report as to whether we consider it a report of hostilities under section 4(a)(1) or whether it is a report of peacetime deployment under section 4(a)(2) or 4(a)(3).” Id. at 33,558. Senator Javits concluded that “where the President does report, Congress may very well decide that the report is one covered by section 4(a)(1) . . . and therefore does trigger the 60-day [automatic termination] period, even though he may not think so.” Id. at 33,551.

121. For a discussion of the impact of Chadha on the War Powers Resolution, see supra text accompanying notes 15-25.
122. 50 U.S.C. § 1544(c) (1982).
123. 119 CONG. REC. 33,550 (1973) (conference report debate) (remarks of Sen. Javits). During the veto override debate, Senator Javits pointed out, “The 60 days can be curtailed by concurrent resolution of the House and the Senate.” Id. at 36,188. Representative Zablocki noted during the debate on the conference report that “the conference version retains the House-passed provision permitting Congress to terminate a Presidential action sooner than 60 days by passage of a concurrent resolution which would be immune from veto.” Id. at 33,859.
or (2) insists that the executive branch comply with the statute because Congress has determined itself that United States military forces have been introduced into hostilities.

B. Defining "Hostilities"

During consideration of the War Powers Resolution, different viewpoints were expressed on whether the term "hostilities" should be specified. Some legislators believed that hostilities should be defined in the statute, while others argued that such enumeration was impossible, inappropriate or would limit congressional options. Senator Barry Goldwater, who opposed the War Powers Resolution, argued that one of the bill's greatest deficiencies was its lack of definition. "[A]bsent a definition of 'hostilities,'" he noted, "there is no guarantee on the face of the [war powers] bill that

124. For example, Senator Dominick asked, "I wish someone would tell me how we would define these two words ['imminent' and 'hostilities'] within the time period necessary to give the President the authority to respond to a military threat." Id. at 24,593. Compare 1988 Senate Hearings, supra note 1, at 272 (remarks of Prof. Louis Henkin, Columbia University School of Law) (noting the difficulty in drafting a definition but suggesting the addition of "a section defining 'hostilities,' perhaps by linking them to acts of war under international war or 'activities that will probably involve U.S. forces in war or warlike activities'"); 1988 Senate Hearings, supra note 1, at 319 (remarks of Prof. Michael Glennon, University of California, Davis, Law School) (urging the necessity of a definition of hostilities).

125. Senator Jacob Javits, one of the primary authors of the War Powers Resolution, was one of the strongest congressional advocates against adopting a definition for "hostilities." See War Powers Legislation: Hearings Before the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. 28 (1971) [hereinafter 1971 Senate Hearings]. Senator Javits commented, "The bill does not endeavor to spell out a definition of the words 'military hostilities' but adopts them as words of basic understanding." Id. at 28. He explained, "The definition of military hostilities, I thought, should remain flexible because you can get involved in a big war even through an action which might conceivably involve legation personnel or a Military Assistance Group." Id. at 481.

Others also urged a non-definition of "hostilities" or like statutory terms. For example, Senator Taft commented with regard to his war powers bill S.J. Res. 18, "I have purposely not attempted to define 'deployment and commitment to combat.'" Id. at 273. Alexander Bickel, Professor of Law at Yale University concurred, stating:

"It is at this point that my urge to codify vanishes. There is no way in which one can define that term other than a good faith understanding of it and the assumption that in the future Presidents will act in good faith to discharge their duty to execute the law.

1973 House Hearings, supra note 97, at 185 (emphasis added). Former Senator Charles Mathias, Jr., explained, "It is hard to define the number, the character of these attacks on American interests or threats to American interests, because they can change with circumstances, change with generations, and I think the War Powers Act is right in being silent in any specific definitions." 1988 Senate Hearings, supra note 1, at 27-28.

Professor Charles Rice of the University of Notre Dame Law School concluded that the term "hostilities" is "incapable of satisfactory definition [and] would be better left to political, rather than to specified, statutory resolution." 1988 Senate Hearings, supra note 1, at 330.
American forces can be introduced in crisis situations without a divisive confrontation between Congress and the President, unless Congress agrees with the President in advance of each deployment.\textsuperscript{126}

1. Other Definitions

In order to understand the complexities involved in this separation of powers and statutory construction issue, and before considering the statutory terms "hostilities" and "imminent hostilities," it is useful to note other efforts made to articulate the point at which executive and legislative war powers may be statutorily applied. For example, the principal Senate author, Senator Jacob Javits, proposed a trigger that would have focused not on the existence of a state of "hostilities," but instead on the authority of the President. This "authority test" was adopted by the Senate during the 1973 War Powers Resolution debate, but did not survive the conference report.\textsuperscript{127} The Senate version of the War Powers Resolution would have enumerated recognized circumstances of executive emergency war powers authority.\textsuperscript{128} Such a standard would have focused debate between the branches on the issue of whether the President's use of armed forces was \textit{ultra vires}, as measured by the statutory specification. Many critics of the Senate's "authority test" were concerned primarily that this approach would constitute an independent statutory delegation of authority to the President.\textsuperscript{129}

In contrast, a quantitative approach was suggested by Senator

\textsuperscript{126} Goldwater, \textit{The President's Ability to Protect America's Freedoms—The Warmaking Power}, 1971 \textit{LAW \& SOC. ORD.} 423 (ARIZONA ST. L.J.) (emphasis added), \textit{reprinted in} 1973 \textit{House Hearings}, \textit{supra} note 97, at 433 n.79.

\textsuperscript{127} 119 \textit{CONG. REC.} 33,557 (1973) (conference report debate) (remarks of Sen. Javits). Senator Javits contrasted the "performance test" triggering mechanism in the House bill and incorporated in the conference report with the "authority test" under the Senate bill and rejected by the conferees. \textit{Id.} at 33,559. He noted that "unlike the Senate bill, the delineation of authority in section 2(c) [of the conference report] is not the triggering mechanism for the subsequent provisions of the bill." \textit{Id.} at 33,550. \textit{See also supra} note 97, for a discussion of the "authority test."

\textsuperscript{128} Section 3 of the Senate approved bill provided for the emergency use of the armed forces by the President in the absence of a declaration of war: (1) to "repel an armed attack against the Armed Forces of the United States, its territories and possessions," (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 rescue U.S. citizens and nationals abroad and on the high seas, or (4) "pursuant to specific statutory authorization." S. 440, § 3, 93d Cong., 2d Sess., 119 \textit{CONG. REC.} 25,119 (1973). \textit{See also S. REP. No. 220, 93d Cong., 1st Sess. 22-23 (1973) (explaining section 3 of S. 440).}

\textsuperscript{129} \textit{See e.g., supra} text accompanying notes 90-92. \textit{See also infra} text accompanying note 191 for a discussion of Justice Robert Jackson's separation of power analysis.
J. W. Fulbright, the Chairman of the Senate Foreign Relations Committee who was also one of the strongest critics of the "authority test." During Senate debate on the War Powers Resolution, Senator Fulbright proposed a provision for the congressional regulation of peacetime deployment of United States troops by the President. His amendment would have been triggered by the deployment of a "major unit of the Armed Forces of the United States," defined as "at least a squadron of aircraft or its equivalent," or "any two or more major combatant boats or vessels (other than ballistic missile submarines)" or "at least a brigade of troops or its equivalent."

Professor John Norton Moore also advocated a quantitative approach under his so-called "magnitude test," which would have required congressional approval for "the initial commitment to major and sustained hostilities," while leaving room for independent executive action "[b]elow that [specified] threshold." The objective of this approach was to be "more functionally responsive to the major policy decision of the Constitutional Convention to require congressional authorization before the Nation becomes committed to major hostilities abroad." As part of this proposal, Professor Moore suggested an "upper limit for independent presidential authority to commit the Armed Forces to military hostilities of commitments involving 25,000 or more troops." Others have also promoted such a quantitative-based approach, including, ironically, some of the

131. 119 CONG. REC. 25,086 (1973) (amendment No. 361, proposed section 8(d)). The amendment also contained a two-house legislative veto, which is now considered to be a violation of the separation of powers in the legislative process. See INS v. Chadha, 462 U.S. 919 (1983) and supra text accompanying notes 15-25. Senator Fulbright's amendment was rejected by the Senate. 119 CONG. REC. 25,092 (1973).
132. 1971 Senate Hearings, supra note 125, at 479 (statement of John Norton Moore, Professor of Law, University of Virginia). See also 1971 Senate Hearings, supra note 125, at 465 ("This [magnitude] test is a rough effort to separate major hostilities from those not involving substantial casualties and commitment of resources . . . ."); War Powers Legislation Hearings Before the House Foreign Affairs Subcomm. on National Security Policy and Scientific Developments, 92d Cong., 1st Sess. 99 (1971) [hereinafter 1971 House Hearings] (statement of John Norton Moore); 1970 House Hearings, supra note 67, at 124, 126-27 (proposing that "congressional authorization might be required 'in all cases where regular combat units are committed to sustained hostilities' ") (emphasis in original) (quoted in After Chadha, supra note 24, at 773).
133. 1971 Senate Hearings, supra note 125, at 466 (statement of John Norton Moore).
134. 1971 House Hearings, supra note 132, at 94.
135. See, e.g., 1970 House Hearings, supra note 67, at 349-50 (statement of Rep. Anderson); 1971 House Hearings, supra note 132, at 67 (remarks John Stevenson, Legal Advisor, Department of State) (proposing congressional approval required for executive use of more than 25,000 troops for more than 30 days); 1973 House Hearings, supra note 97, at 107
Framers during the Constitutional Convention. 136

It should be noted that any of these proposals will not be adopted without certain tradeoffs. A quantitative standard carries with it the benefits of certainty and straightforwardness in ascertaining when the congressional role should be invoked. However, the primary drawback of a purely quantitative approach is the exclusion from consideration of potentially significant qualitative factors that otherwise might be utilized in determining the existence of a state of “hostilities.” As Senator Eagleton noted, “[m]odern weaponry does not require large numbers of men. A war could be started with one pilot.” 137 Moreover, a quantitative approach may not only be overly simplistic, but also arbitrary and inflexible as applied to unforeseeable circumstances.

During consideration of the war powers legislation, Senator Eagleton, one of the early proponents of legislative reform but who ultimately opposed the conference report and supported the President’s veto, 138 urged a definition based on a determination of

(remarks of Rep. Leggett) (suggesting no state of war for less than 5,000 men “committed to armed combat outside the United States for less than 10 days unless expressly so declared by the Congress”); 1973 House Hearings, supra note 97, at 71 (colloquy between Rep. Findley and Sen. Eagleton) (suggesting 10,000 troop level).

136. Some of the participants during the Constitutional Convention advocated the adoption of a specific limitation on the size of the army in order to mitigate concerns over the establishment of a standing army. For example, Elbridge Gerry stated that he “could never consent to a power to keep up an indefinite number” of troops in the army and proposed to expressly limit this number to no more than two or three thousand. 5 J. ELLIOT, supra note 41, at 442-43. Mr. Gerry was joined by Luther Martin in formally offering the following amendment: “Provided, that, in time of peace, the army shall not consist of more than ______ thousand men.” 5 J. ELLIOT, supra note 41, at 443. This motion was unanimously defeated after some discussion that such a specific limitation was unnecessary. Roger Sherman also supported a “restriction on the number and continuance of an army in time of peace.” 5 J. ELLIOT, supra note 41, at 511. Ultimately, a two-year appropriation limitation on the congressional power to raise and support an army was adopted as a restraint on the creation of standing armies. 5 J. ELLIOT, supra note 41, at 511.

The concerns over the limitation of an army did not end with the conclusion of the Convention. Luther Martin noted that among his reasons for withholding his signature from the Constitution was that the congressional power to raise and support armies was “without any limitation as to numbers . . . .” 2 THE COMPLETE ANTI-FEDERALIST 58 (eds. Storing & Dry 1981) (Mr. Martin’s Information to the General Assembly of the State of Maryland) (emphasis in original). Subsequently, “In nearly every state ratifying convention it was proposed either to limit the number of troops which might be raised, or to require a two-thirds vote of the Congress to raise any at all.” THE POWER TO RAISE ARMIES, supra note 42, at 210.

137. 1973 House Hearings, supra note 97, at 71.

138. See, e.g., 119 CONG. REC. 33,555 (1973) (conference report debate) (noting that “[m]y opposition to this bill is one of the most difficult choices I have had to make as a U.S. Senator” in light of three years effort in support of war powers legislation). During recent Senate Hearings, former Senator Eagleton explained his opposition to the War Powers Reso-
whether troops have become involved in "combat activities." This version was analogous to the "armed conflict" standard originally employed by the House International Relations Subcommittee on International Security and Scientific Affairs prior to markup of the War Powers Resolution. Finally, Professor Raoul Berger suggested that hostilities are ascertainable under an "I know it when I see it" approach. While this latter test would be the most difficult to apply, it does serve to indicate that a subjective judgment is inherent in all such decisions. With these proposals in mind, this article will next consider the divergent constructions of "hostilities" as applied by Congress and the President under the War Powers Resolution.

2. The Congressional Position

Although the War Powers Resolution defines neither "hostilities" nor "imminent hostilities," the legislative history does offer some, albeit limited, background on what Congress intended to be considered those circumstances critical enough to trigger the statute. The House report accompanying the War Powers Resolution notes:

The word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was...
considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "Imminent hostilities" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict. 142

Ten years after this report, in 1983, the Senate Foreign Relations Committee contemplated these statutory terms in the context of authorizing the involvement of United States Armed Forces in the Multinational Force in Lebanon. Based on its experience under the statute, the committee implicitly addressed the efforts of others to restrict the definition of hostilities:

In short, the exchange of fire with hostile forces would indicate an outbreak of hostilities, and a high probability of such exchanges would suggest "imminent involvement." Brief non-recurring situations such as occasional sniper fire would not suggest the continuing dangers associated with an ongoing set of hostile circumstances.

Arguments have been made that a hostile situation was not indicated by the present circumstances because the Marines:

(a) Only returned rather than initiated fire;

(b) Acted only in self-defense;

(c) Remained essentially in one location, rather than taking offensive actions;

(d) Performed a mission of "peacekeeping," "presence," or "interposition."

However, there is nothing in the legislative history of the War Powers Act to indicate that any of these circumstances would alter the fact that "hostilities" are indicated. For the same reason, it is not conclusive that an area commander may have decided, as in the present situation, to make his men eligible for "hostile fire pay." Nor is it necessary or sufficient that fatalities occur in order to conclude that hostilities are involved. 143

It is clear from this legislative history, as well as from practice under the Act, that Congress intended a liberal, rather than restrictive, construction of the term "hostilities." This term was intended to

include and be more expansive than "a clear and present danger of armed conflict" or "exchange of fire with hostile forces." Moreover, the inclusion of the terms "imminent hostilities" assured that the statute could be broadly applied to situations even before full "hostilities" had developed.

3. The Executive Branch Position

Because the War Powers Resolution is not triggered until United States troops are introduced into "hostilities," it is not surprising that the executive branch, in contrast, has applied a narrow or strict definition of this statutory term. Indeed, there is a built-in incentive for the executive branch to apply a restrictive definition of hostilities in order to avoid commencement of the sixty-day clock, which may lead to automatic disengagement of United States Armed Forces. Thus, when the statute has not been invoked, the executive branch retains greater flexibility in its use of armed forces.

During the 1975 congressional oversight hearings, Monroe Leigh, Legal Advisor to the Department of State, and Martin R. Hoffmann, General Counsel to the Department of Defense, provided the following executive branch definition of "hostilities":

As applied in the first three war powers reports [by the executive branch], "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. In our view neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.

144. See, e.g., SPECIAL STUDY, supra note 105, at 201-02, 281 (discussing as one of three primary concerns over the future of the War Powers Resolution the executive branch efforts to restrict the scope of the statute by applying narrow definitions of "hostilities"); Note, A Tug of War: The War Powers Resolution and the Meaning of "Hostilities," 15 PAC. L.J. 265, 286 (1984) (noting that under the statute, "a narrow reading of hostilities places significantly more authority with the President in committing troops to foreign lands, rather than ensuring the collective judgment of both Congress and the President") (emphasis in original).

145. War Powers: A Test of Compliance Relative to the Danang Sealsift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on International Security and Scientific Affairs, House International Relations Comm., 94th Cong., 1st Sess. 38-39 (1975) [hereinafter 1975 House Hearings] (Letter of Monroe Leigh, Legal Adviser, Department of State, and Martin Hoffmann, General Counsel, Department of Defense, to House Committee on International Relations, Subcommittee on International Security and Scientific Affairs Chairman Clement Zablocki (dated June 3, 1975)) (emphasis added). The working definition was supplied at the request of House Sub-
The legal advisers added that in defining the term "hostilities," "there is of necessity a large measure of judgment which is required" and whether hostilities are present is "definable in a meaningful way only in the context of an actual set of facts." An example of an executive branch hostilities determination came in response to a committee question on the April 12, 1975 report concerning the evacuation from Phnom Penh, Cambodia. During that evacuation, the "last elements of the force to leave received hostile recoilless rifle fire." The executive branch legal advisors answered:

Whether or not this rifle fire constituted hostilities would seem to us to depend upon the nature of the source of this rifle fire — i.e. whether it came from a single individual or from a battalion of troops, the intensity of the fire, the proximity of hostile weapons and troops to the helicopter landing zone, and other evidence that might indicate an intent and ability to confront U.S. forces in armed combat. Our information concerning the source of this rifle fire is not sufficiently detailed to enable one to draw a conclusion as to whether this clearly amounted to "hostilities."

The Department of State has continued to rely on this interpretation, arguing that hostilities are not present during any exchange of fire that is not either sustained or "active." Thus, under this executive branch definition, the War Powers Resolution would not apply to "sporadic," "infrequent" or "isolated" armed exchanges.

committee Chairman Clement Zablocki. Id. at 36-37.
146. Id. at 38 (Letter of Messrs. Leigh and Hoffmann to Subcommittee Chairman Zablocki).
147. Id. (Letter of Subcommittee Chairman Zablocki to Messrs. Leigh and Hoffmann (dated May 9, 1975)).
148. Id. at 39 (Letter of Messrs. Leigh and Hoffmann to Subcommittee Chairman Zablocki).
149. For example, in response to Congressman William Broomfield's inquiry whether the statute applied to the sending of United States military training personnel in 1981 to El Salvador, the Department of State used the following definition:

The meaning of "hostilities" is not entirely clear in the context of a guerrilla insurgency. We would interpret it to apply to any armed confrontation between opposing forces involving an exchange of fire, whether in a conventional or a guerrilla conflict. However, it would not apply to irregular or infrequent violence, such as sporadic terrorist attacks, which happen to occur in a particular area. In any event, we have no reason at present to believe that U.S. military personnel are about to be exposed to attack of either description.


More recently, in response to questions from Congressman Dante Fascell, Chairman of the House Committee on Foreign Affairs, concerning United States Armed Forces involvement in the Persian Gulf, the Department of State noted, "Isolated incidents involving defensive
With regard to the hostilities question, the department also noted that "[t]he size of the force is not dispositive in determining whether [hostilities or imminent hostilities] has occurred."\footnote{150} Without enumerating the particular factors to be weighed, the department added that "the determination whether such involvement is so indicated depends on an assessment of all relevant facts and circumstances."\footnote{151}

4. Some Conclusions About These Constructions of "Hostilities"

It is clear that Congress and the President have been applying different constructions of the statutory terms "hostilities" and "imminent hostilities." As a result of these divergent definitions, several disputes have arisen between Congress and the President over the existence of hostilities.\footnote{152}

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\footnote{150} Relevaant War Powers Resolution Documents, \textit{supra} note 105, at 98.

\footnote{151} Relevaant War Powers Resolution Documents, \textit{supra} note 105, at 98.

\footnote{152} In fact, one General Accounting Office report noted that "[a] request to designate El Salvador as a hostile fire area [for purposes of entitling military personnel to hostile fire pay, pursuant to 37 U.S.C. § 310] was approved in early 1981 and then reversed to avoid the impression that the United States had combat forces in El Salvador." Letter from U.S. Comptroller General Charles Bowsher to Senator Edward Zorinsky (July 27, 1982), \textit{reprinted in General Accounting Office Report, Applicability of Certain U.S. Laws that Pertain to U.S. Military Involvement in El Salvador} (GAO/ID-82-53). \textit{See also}
The legislative history clearly establishes that Congress intended a broad interpretation of the hostilities trigger to be applied. There are three reasons for this conclusion. First, the House subcommittee expressly rejected the terms "armed conflict" as too narrow. "Hostilities" was intended to include, only as a minimum standard, circumstances involving troops in "armed conflict" and "exchanges of fire." Second, the legislative history states that exchanges of shots or fatalities were not circumstances necessary for the existence of hostilities. Moreover, hostilities might exist in a situation of self-defense or during a peacekeeping function. Third, the term "imminent hostilities" expanded the application of the statute to include circumstances involving "a clear potential" for "a clear and present danger of armed conflict" or for "actual armed conflict," or even a "high probability of an exchange of fire."

In contrast, the executive branch has employed a more restrictive definition with two components: (1) "an engagement in exchange of fire" (2) which is of some "active" or ongoing nature, but not "irregular," "infrequent," or "isolated." The modification of "active" to the "exchange of fire" standard would presumably exclude situations in which United States military forces did not return fire, a circumstance clearly contemplated by the legislative history. Even the determination of "imminent hostilities," under the executive branch view, is grounded in the potential of hostile fire. Moreover, the exchange of fire standard under the "imminent hostilities" test is modified by the requirement of a "serious risk." By way of comparison, the 1973 House report envisioned application of the statute to circumstances involving "a clear and present danger of armed conflict" but "in which no shots have been [necessarily] fired." The executive branch has not elaborated on the quantitative level of "armed exchange of fire" required to trigger the statute under its interpretation.

Perhaps the greatest disparity between the branches centers on


However, the executive branch has recently argued that such "imminent danger pay," pursuant to 37 U.S.C. § 310(a)(4), is a broader statutory standard than the hostilities language under the War Powers Resolution. See Letter from Assistant Secretary of State J. Edward Fox to House Committee on Foreign Affairs Chairman Dante Fascell (Mar. 30, 1988), reprinted in RELEVANT WAR POWERS RESOLUTION DOCUMENTS, supra note 105, at 98. Compare 1988 Senate Hearings, supra note 1, at 334 (remarks of Peter Weiss, Vice President, Center for Constitutional Rights) (proposing amendment "that the awarding of hostile fire pay to members of the Armed Forces constitutes prima facie evidence of the existence of hostilities or imminent hostilities").
whether "isolated acts of violence" are covered by the statute. The executive branch would exclude such acts under its construction. In keeping with the "active" versus "isolated" characterization of the confrontation, more recently, the Reagan Administration reported to Congress concluding that either certain incidents were "closed" or "further hostile action" was not anticipated. One must query at what point an "infrequent" exchange becomes a "frequent" or sustained confrontation. It is relevant that the 1983 Senate committee report acknowledged that "occasional sniper fire" exemplified a "non-recurring situation" that was not demonstrative of ongoing hostilities. However, in the absence of other illustrative examples, Congress should be concerned with whether the "isolated acts" exception employed by the executive branch might be large enough to swallow the general "hostilities" standard originally intended under the 1973 House report.

Further, as the executive branch has noted, several criteria come into play in making "hostilities" determinations. Some of the factors noted by the executive branch have included the size of the armed forces involved in the exchange, the proximity of hostile forces, and the nature of the confrontation. These factors have also been applied with the caveat that none of them alone was dispositive. However, a guideline of such factors has never even been illustratively catalogued. While it certainly would be difficult to undertake such an exercise in enumeration, in the absence of even exemplary ground rules, the status quo presents an invitation for disagreement between the branches, at least as to which factors should be utilized in making "hostilities" determinations.

Admittedly, the legislative history does not provide much lucidity on the question of the meaning of "hostilities" or "imminent hostilities" under the statute. However, it must be recognized that the subject of hostilities and armed conflict is not readily reducible to specificity. Nonetheless, it is evident that Congress contemplated a relatively expansive definition of "hostilities" when compared to that applied by the executive branch. In its more restrictive construction, the executive branch would exclude activity intended to be included by Congress. A central focus in the current reform debate should be on the definition of the trigger terms "hostilities" and "imminent hostilities" in order to better address the circumstances to which the statute is intended to be applied.

153. See infra text accompanying note 168.
C. Reporting History

While the legislative history highlights a statutory construction gap between the branches on the "hostilities" and "imminent hostilities" terms, the submission of section 4(a)(1) hostilities reports also reveals a significant divergence between the Congress and the President on when the statute should be invoked. For this reason, it is useful to review the filed war powers reports during the sixteen-year history under the Act.

There have been nineteen reports submitted by three administrations since the enactment of the War Powers Resolution. The first three of President Gerald Ford's four reports in 1975 concerned the evacuation from Vietnam, while the fourth involved the rescue of the U.S.S. Mayaguez. The sole report filed by President Jimmy Carter involved the rescue of hostages in Iran in 1980. Of the fourteen reports filed by President Ronald Reagan, six concerned United States military presence in the Persian Gulf in 1987 and 1988, three, during 1982 and 1983, related to the United States Marine participation in the Multinational Force presence in Lebanon, two concerned confrontations in Libya in 1986 (although the second of these reports did not reference the statute), one pertained to the Multinational Force and Observers in the Sinai in 1982, another in 1983 concerned the United States military assistance to Chad, and still another involved the United States action in Grenada in 1983.

To be sure, other incidents have occurred in which the executive and legislative branches have disagreed over the applicability of the section 4(a)(1) hostilities reporting provision. These interbranch disputes have included the United States military presence in El Salvador, Nicaragua, Grenada, and the Persian Gulf, as well as

157. See supra note 105 and infra notes 167-69.
in other locations.\textsuperscript{158}

1. \textit{Reluctant Acknowledgment}

In light of the reporting history under the War Powers Resolution, the effectiveness of the statute concerning the involvement of United States Armed Forces in "hostilities" or "imminent hostilities" has been seriously questioned.\textsuperscript{159} The executive branch has consistently demonstrated a great reluctance to indicate its compliance with the statute. Of "six military crises" during his administration, President Ford, who voted against the War Powers Resolution when he was House Minority Leader,\textsuperscript{160} stated retrospectively that "[i]n none of those instances did I believe the War Powers Resolution applied."\textsuperscript{161}

President Ford filed all four of his reports "[i]n accordance with [his] desire" to keep Congress "informed on this matter and taking note of" section 4 of the War Powers Resolution.\textsuperscript{162} During congres-
sional oversight hearings, members of the Ford Administration responded to an inquiry into whether the “taking note” language demonstrated less than full compliance with the reporting provision of the statute. According to these legal advisers, “[t]his phrase connotes an acknowledgement that the report is being filed in accordance with section 4 of the War Powers Resolution.” President Carter continued this trend of attempted executive detachment from the application of the statute in the sole report filed under his administration, noting his “desire that Congress be informed on this matter and consistent with the reporting provisions of the War Powers Resolution.”

President Reagan, serving longer in office than his two immediate predecessors, filed the most reports and continued the executive branch reporting pattern of reluctant acknowledgment of the War Powers Resolution. Most of the Reagan reports were submitted with the consistent with language initially employed by President Carter. The Lebanon reports also added that there was “no inten-

163. 1975 House Hearings, supra note 145, at 40 (Letter of Monroe Leigh, Legal Adviser, Department of State, and Martin Hoffmann, General Counsel, Department of Defense, to Subcommittee Chairman Clement Zablocki (dated June 3, 1975)). The legal advisers further noted:

No constitutional challenge to the appropriateness of the report called for by section 4 was intended. As you are aware, President Nixon in his veto message of October 24, 1973 indicated that portions of the War Powers Resolution, including section 5(b) and 5(c), are unconstitutional. No such position was expressed as to section 4.

164. Relevant War Powers Resolution Documents, supra note 105, at 40.


See also Letter of Assistant Secretary of State J. Edward Fox to House Foreign Affairs Committee Chairman Dante Fascell (Mar. 30, 1988), reprinted in Relevant War Powers Resolution Documents, supra note 105, at 99 (concerning congressional inquiry over the invocation of the War Powers Resolution, noting that “the President reported to Congress ‘consistent with the War Powers Resolution’ on October 20”) (emphasis added); 1988 Senate
tion or expectation that the[ ] members of the U.S. Armed Forces w[ould] become involved in hostilities,” although “isolated acts of violence” could not be ruled out.166 One Reagan Administration report even expressly found that the United States Armed Forces were not involved in hostilities.167 Other reports concluded that “we regard this incident as closed.”168 Some of the more recent reports concerning the presence of United States forces in the Persian Gulf, however, have taken a stronger tone, although noting an objective of a “spirit of mutual cooperation toward a common goal.”169 For example, in one of these reports concerning attacks in the Persian Gulf, President Reagan stated:

In accordance with my desire that Congress continue to be fully informed in this matter, I am providing this report consistent with the War Powers Resolution. While mindful of the histori-

Hearings, supra note 1, at 265 (colloquy between Sen. Brock Adams and Secretary of Defense Frank Carlucci, III) (noting that the Reagan Administration sent letters to Congress which were consistent with the Act but did not trigger the statute).

But see RELEVANT WAR POWERS RESOLUTION DOCUMENTS, supra note 105, at 88 (in Mar. 26, 1986 report concerning freedom of navigation exercises in the Gulf of Sidra, President Reagan noted his “desire that the Congress be informed on this matter” but not referencing the War Powers Resolution), at 92 (May 20, 1987 report concerning missile attack on U.S.S. Stark, and Secretary of State George Shultz noting the President’s “desire to keep the Congress fully informed” but not referencing the War Powers Resolution).

166. See RELEVANT WAR POWERS RESOLUTION DOCUMENTS, supra note 105, at 61 (Aug. 24, 1982 report), at 62 (Sept. 29, 1982 report), at 92 (May 20, 1987 report noting “we have no reason at this time to believe that Iraqi forces have deliberately targeted U.S. vessels, and no reason to believe that further hostile action will occur”).

167. The May 20, 1987 report of Secretary of State George Shultz concerning the Persian Gulf noted: “Our forces are not in a situation of actual hostilities, nor does their continued presence in the area place them in a situation in which imminent involvement in hostilities is indicated, although we are mindful of recent Iranian statements threatening U.S. and other ships under protection.” RELEVANT WAR POWERS RESOLUTION DOCUMENTS, supra note 105, at 92.

168. See H.R. Doc. No. 210, 100th Cong., 2d Sess. 1 (1988) (July 4, 1988 report noting where the U.S.S. Vincennes and U.S.S. Elmer Montgomery fired upon small craft and “fired in self defense at what [was] believed to be a hostile Iranian military aircraft” that “[t]here has been no further hostile action by Iranian forces, and although U.S. forces will remain prepared to take additional defensive action to protect our units and military personnel, we regard this incident as closed”) (emphasis added); H.R. Doc. No. 213, 100th Cong., 2d Sess. 1 (1988) (July 14, 1988 report noting that where small boats in the Persian Gulf fired upon United States helicopters, “[t]here has been no further hostile action by Iranian forces and, although U.S. forces remain prepared to take additional defensive action to protect our units and military personnel, we regard this incident as closed”) (emphasis added).

cal differences between the Legislative and Executive branches of government, and the positions taken by me and all my predecessors in office, with respect to the constitutionality of certain provisions of the [War Powers] Resolution, I look forward to cooperating with Congress in pursuit of our mutual, overriding aim of peace and stability in the Persian Gulf region.170

From the filing of the first to the nineteenth war powers reports, there has been a persistent effort of detachment from (or pattern of reluctant acknowledgement of) the statute by the executive branch. This propensity to avoid the submission of reports "pursuant to" the statute was perhaps most evident during the Multinational Force in Lebanon Resolution. Even when the two branches were able to reach a compromise in applying the statute, President Reagan qualified his signing statement:

We must not let disagreements on interpretation or issues of institutional powers prevent us from expressing our mutual goals to the citizens of our nation and the world. I therefore sign this resolution in full support of its policies, but with reservations about some of the specific congressional expressions.171

2. Reporting Pursuant to Which Subsection?

Another problem with the executive branch reports is that they have not always clearly stated which subsection of the War Powers Resolution the report has been filed "consistent with." This likely results from the fact that the sixty-day termination clock is triggered only by a section 4(a)(1) hostilities report and not by a section 4(a)(2) report (concerning the introduction of armed forces while equipped for combat), or a section 4(a)(3) report (regarding a substantial enlargement of U.S. combat forces in foreign territories).172 Of the nineteen filed reports, the specific subsection has been cited only four times, thrice consistent with subsection 4(a)(2),173 and once in accordance with section 4(a)(1).174 On three occasions the reports

172. For a discussion of this operation of the reporting provision, see supra note 106.
174. RELEVANT WAR POWERS RESOLUTION DOCUMENTS, supra note 105, at 45 (May
have only referenced subsection 4 of the statute, leaving to congressional speculation which of three possible reporting subsections may have applied under the circumstances. Twice the Act was not even mentioned. The more recent trend, begun by President Carter and followed eleven times, is to cite the statute without reference to any subsection. Of course, on other occasions, Congress and the President have disagreed whether a War Powers Resolution report should have been filed.

Under the early practice of the War Powers Resolution, the executive branch construed the reporting provision as only requiring "that 'a report' be filed in any of the subparagraph[s] . . . and that such report merely contain the information specified." Moreover, it is not always clear whether more than one of the subsections may apply to a given circumstance. Concerning the April 30, 1975 Saigon evacuation, the executive branch legal advisers informed Congress that "since the operation had terminated by the time the report was prepared, the question of possible congressional action under section 5 of the Resolution was moot; thus, a specific reference to [a] 4(a)(1) [hostilities report] was not needed to call attention to possible action under section 5." This interpretation of the reporting provision has been followed by the Reagan Administration. Legal Adviser Abraham Sofaer recently told the Special Senate Subcommittee on War Powers that "Section 4 does not require the President to state the particular subsection under which reports are made, and no President has felt compelled to do so." According to Sofaer, not only is this determination difficult to make upon the commencement of deployment of

178. See, e.g., supra text accompanying notes 105, 154-58, 167-69.
179. 1975 House Hearings, supra note 145, at 39 (Letter of Monroe Leigh, Legal Adviser, Department of State, and Martin Hoffmann, General Counsel, Department of Defense, to Subcommittee Chairman Clement Zablocki (dated June 3, 1975)).
181. 1988 Senate Hearings, supra note 1, at 1058. See also 1988 Senate Hearings, supra note 1, at 1395 (written responses of Abraham Sofaer to questions asked by Sen. Biden).
military forces, but this construction also avoids potential executive-legislative branch confrontation.\textsuperscript{182}

While Presidents have not felt obligated to specify the subdivision of the reporting section, their rationale may have been that the statute was also designed to allow Congress to determine which reporting subsection comes into play once the President submits a report.\textsuperscript{183} However, to date, Congress has not demonstrated a strong willingness to utilize this legislative vehicle to trigger the statute \textit{sua sponte}.

3. \textit{Reservation of Executive Authority}

While all nineteen executive war powers reports have been filed by "taking note of," "consistent with," in "the spirit of mutual cooperation," "mindful of executive and legislative branch differences," or "with no expectation of hostilities," Presidents have also been careful to expressly reserve their constitutional war powers under each submission. In each report, the deployment of forces has always been pursuant to the President's Commander-in-Chief authority, and usually also pursuant to the constitutional authority to conduct foreign relations.\textsuperscript{184} The Ford and Carter Administrations cited to the constitutional executive power.\textsuperscript{185} Reference to this authority was apparently abandoned by the Reagan Administration, however. While not a matter of direct constitutional authority, eight reports have noted that the specific use of armed forces was made pursuant to rights under international law, including the inherent right of self-defense recognized under Article 51 of the United Nations Charter.\textsuperscript{186}

\begin{footnotes}
\item 182. \textit{1988 Senate Hearings}, supra note 1, at 1058.
\item 183. See supra text accompanying notes 117-20.
\item 186. See \textit{Relevant War Powers Resolution Documents}, supra note 105, at 49 (Apr. 26, 1980 report pursuant to art. 51 of the U.N. Charter), at 90 (Apr. 16, 1986 report pursuant to art. 51 of the U.N. Charter), at 101 (Sept. 23, 1987 report "in accordance with international law"), at 102 (Oct. 10, 1987 report noting "[o]ur presence in the Persian Gulf has been fully within our rights under international law"), at 105 (Oct. 20, 1987 report pursu-
On two occasions, involving the transport of refugees from Danang in 1975 and the United States participation in the Multinational Force and Observers in the Sinai in 1982, the use of armed forces was made pursuant to statutory authority. Additionally, Congress eventually authorized United States participation in the Multinational Force in Lebanon, and, as part of a “compromise resolution,” statutorily extended this participation for eighteen months. As Justice Robert H. Jackson noted with regard to such statutory authorizations, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all the Congress can delegate.

4. Some Conclusions on the Reporting History

The war powers reporting requirement has established the principal forum for Congress and the President to debate the “hostilities” issue and the invocation of the statute in particular contexts. The primary problem is that the statute leaves the determination to trigger the statute largely in the hands of the executive branch. Given the status quo, Congress has essentially become an observer, insisting on executive compliance when the legislature believes the statute should come into play.

Given the reporting experience, it is also questionable whether the reporting requirement has attained the original objective of “a full and accurate report of events, combined with an authoritative statement by the President of his judgment about the direction in which the situation is likely to develop.” Many of the war powers
reports employ nearly boilerplate language, particularly those reports submitted by the same administrations. Most utilize similar format and text, with little variation other than the date and the incident involved. This "boilerplate" approach exemplifies the pattern of reluctant acknowledgment by the executive branch. The war powers reports resemble legal forms with the pertinent blanks left to be filled in on the proper occasion. Typically, the introductory paragraph of the reports briefly states the time, date and nature of the incident triggering the report. Usually, a short description of the course of action ordered by the President follows. Another section generally specifies the executive branch authority for the action, with a reservation of executive constitutional powers. Most reports also contain a disclaimer that the report is not being submitted "pursuant" to the War Powers Resolution, but instead "consistent with" the statute (or in other similar terminology as already noted). Perhaps most demonstrative of this "fill-in-the-blank" format were the last two Persian Gulf reports, which were virtually verbatim in the last two paragraphs. The only significant difference between the reports lies in the introductory paragraphs describing the facts of the hostilities circumstance.

This review of the reporting practice has demonstrated (1) the manner in which the divergent constructions of hostilities have been applied and (2) that Congress, under current law, has been generally dependent on the executive branch to file a war powers report.

D. Other Hurdles in Defining Hostilities

Based on this brief survey of the statutory construction and the practice under the sixteen-year old statute, it is useful to consider some additional factors affecting the parameters of any statutory definition of "hostilities" (or other such triggering mechanism based upon an armed exchange or state of conflict). Critically, the statutory questions associated with defining hostilities are interwoven with the broader constitutional issues concerning the war powers. It must be

Cong., 1st Sess. 8 (1973) (conference report) ("The objective is to ensure that the Congress by right and as a matter of law will be provided with all the information it requires to carry out its constitutional responsibilities with respect to committing the Nation to war and to use of United States Armed Forces abroad."); H.R. Rep. No. 287, 93d Cong., 1st Sess. 9 (1973) (noting the reporting requirement would "provide the Congress with adequate information on which to base its deliberations and possible action concerning the commitment of U.S. Armed Forces by the President").

recognized that interbranch disagreement over the existence of hostilities is often an inevitable and inherent by-product of the separation of the war powers between Congress and the President. Moreover, part of the problem in attempting a definition of hostilities is that the respective war powers of the branches are not subject to specification. As Justice Jackson noted, "there is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." Since many of the war power issues fall within this "zone of twilight," it is important to recognize preliminarily that interbranch disputes will never be completely eliminated as a result of the pre-established constitutional "invitation to struggle" between the branches to direct foreign policy.

A second significant attribute contributing to the complexity of statutorily defining "hostilities" is the fact-specific or fact-intensive nature of the inquiry. As already noted, one problem obviated by the experience under the War Powers Resolution is that the legislative and executive branches typically disagree over a common definition of hostilities. However, even assuming interbranch accord on a definition, there may nonetheless be disagreement over the application of that definition to a particular factual scenario. For example, each branch may disagree as to whether the definition should include hostilities that are sporadic, or only those that are sustained. As Monroe Leigh has noted, "hostilities" and "imminent hostilities" are "definable in a meaningful way only in the context of an actual set of facts."

Thus, any relevant definition of "hostilities" is subject to an ad hoc application, including an assessment of both quantitative aspects (such as the number of troops deployed or involved in the confrontation) and qualitative factors (including national security, foreign pol-

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194. See, e.g., 1977 Senate Hearings, supra note 58, at 78 (statement of Monroe Leigh) (noting that "neither this committee nor any other group of lawmakers or constitutional scholars could produce a single definitional statement that clearly and adequately encompasses every situation in which the President's Commander-in-Chief authority could be exercised").

195. Youngstown, 343 U.S. at 637 (Jackson, J., concurring) (emphasis added).

196. See, e.g., Crockett v. Reagan, 558 F. Supp. 893, 897-98 (D.D.C. 1982) (noting factual discrepancy between the pleadings by members of Congress and the executive branch over whether a state of "hostilities" existed in El Salvador), aff'd per curiam, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984). The case was found to be non-justiciable because of the judicial complexity of determining whether United States Armed Forces were involved in "hostilities." Crockett, 558 F. Supp. at 898.

197. 1975 House Hearings, supra note 145, at 38 (Letter from Monroe Leigh, Legal Advisor, Department of State and Martin Hoffmann, General Counsel, Department of Defense, to House Committee on International Relations, Subcommittee on International Security and Scientific Affairs Chairman Clement Zablocki (dated June 3, 1975)).
icy, diplomatic, situational, and geographic considerations). Further, in weighing these elements in attempting to apply a definition of “hostilities,” “[r]easonable men might well differ as to the implications to be drawn from any such hypothetical situation.” Perhaps Justice Jackson stated the matter best when he noted that where the President and “Congress have concurrent authority, or in which its distribution is uncertain[,] . . . any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”

Finally, in attempting to develop a definition of “hostilities,” one can never lose sight of the political component involved in this exercise. As the divided war powers embody the principles of separation of powers, it appears that the Framers left this question subject to resolution between the executive and legislative branches—the politically accountable departments in the government. Ultimately, there is no simple standard or formula to apply in deciding when a state of war exists. It must therefore be recognized that political judgment is a significant element of the determination. As General Von Clausewitz is quoted to have said, “War is the continuation of politics by other means.”

198. A recent consideration from the judicial perspective demonstrates this factual complexity:

[T]he factual evaluation of "hostilities [and] . . . situations where imminent involvement in hostilities is clearly indicated by the circumstances" is always hampered, to some degree, by a Court's lack of access to intelligence information and other pertinent expertise. This is exacerbated by the ever-changing intensity of "hostilities," especially when they are in their early stages.


199. 1975 House Hearings, supra note 145, at 38 (Letter of Monroe Leigh, Legal Adviser, Department of State, and Martin Hoffmann, General Counsel, Department of Defense, to Subcommittee Chairman Clement Zablocki (dated June 3, 1975)).


201. One court concluded from a review of the legislative history that “the very absence of a definitional section in the Resolution, coupled with debate suggesting that determinations of ‘hostilities’ were intended to be political decisions made by the President and Congress, suggest to this Court that fixed legal standards were deliberately omitted from this statutory scheme.” Lowry, 676 F. Supp. at 340-41 n.53 (emphasis added).

During recent Senate hearings, House Foreign Affairs Committee Chairman Dante Fascell noted that the constitutional term “war” was intended by the Founding Fathers to be left to application by “the political arena, not the judicial arena.” 1988 Senate Hearings, supra note 1, at 19. He concluded, “[w]e are fundamentally stuck with the political process.” 1988 Senate Hearings, supra note 1, at 34. Senator Jesse Helms agreed, stating, “[t]his is not so much a constitutional argument as a political argument.” 1988 Senate Hearings, supra note 1, at 227.

Courts considering the applicability of the War Powers Resolution have noted this political aspect. One recent judicial pronouncement observed:

[If a court] were to decide whether the President is required to submit a report to Congress . . . , the Court also would have to decide whether United States Armed Forces in the Persian Gulf either are engaged in "hostilities" or in "situations where imminent involvement in hostilities is clearly indicated by the circumstances."\textsuperscript{203}

This district court dismissed the action brought by members of the House, concluding that "the determination of 'hostilities' under the War Powers Resolution is a question for the executive and legislative branches," and that judicial intervention in this political process "would impose a consensus on Congress."\textsuperscript{204} Another district court confronted with the question of the applicability of the War Powers Resolution in El Salvador noted that as a consequence of the "subtleties of fact-finding," a determination of whether United States Armed Forces have been introduced into hostilities or imminent hostilities "should be left to the political branches."\textsuperscript{205} Perhaps only the exercise of political judgment can best reconcile such frequently close questions as whether a "hostilities" situation exists or should be classified as an "isolated" or "active" incident.\textsuperscript{206} As a result of the political nature of "hostilities" decisions, it is important that any definition be sufficiently flexible to accommodate the political exigencies of the moment.

Given the separation of powers dimension, the fact-intensive nature of the determination, and the political judgment component, it...
must be reconciled that there will never be complete resolution and accord between the branches on all hostilities determinations. In fact, each of these factors invites the opportunity for interbranch disagreement. However, in striving toward the objective of allowing for the exercise of the "collective judgment," none of these hurdles suggests that reform should not be pursued, or that it is insurmountable. As a matter of comity between the branches, the lack of complete agreement in every instance should not preclude efforts toward the establishment of working definitions and standards in order for the branches to effectively exercise their joint responsibilities.

E. Reform Proposals

1. Necessity for Reform

Experience under the statute clearly demonstrates the necessity for reform of the hostilities trigger provision. Not only have the branches employed divergent constructions of the statutory terms "hostilities" and "imminent hostilities," but a record of disagreement has been established over when these terms apply to a given situation. Accordingly, under the status quo, there is room for improvement in clarifying the type of "hostilities" invoked under the Act. The statutory objective of "collective judgment" is less likely to be fulfilled given the divergence of definitions of "hostilities" between the two branches. Moreover, to the extent that different standards are applied, unnecessary confrontation may be provoked between Congress and the President. In order to mitigate inessential clashes, the branches should at least strive toward a more acceptable general working definition.

Furthermore, Congress has been frustrated by some of the executive branch judgments as to when troops have been introduced into hostilities. In the view of many legislators, Congress has often been reduced to a sideline spectator waiting for the President to make a finding that United States troops have been introduced into "hostilities." The President has been reluctant to make this determination, however, given that submission of a "hostilities" report starts the sixty-day clock leading to possible automatic troop disengagement. Perhaps one of the best indicators of the need for statutory amendment and clarification is the fact that members of Congress have more recently begun turning to the courts to resolve these questions. 207 In the analysis of one district court, "effective enforcement

207. See, e.g., Lowry, 676 F. Supp. at 333. One hundred and ten House members
of the reporting requirement has been one of the primary problems plaguing the War Powers Resolution. One of the major war powers reform proposals in the 100th Congress would even provide for judicial review of war powers legislation.

Consequently, two primary reforms are needed. First, Congress must either establish an enhanced definition of “hostilities” or clarify the particular forms of hostilities that will invoke the statute. Second, Congress should provide statutory means for determining that United States Armed Forces have been introduced into “hostilities,” rather than waiting for the executive branch to trigger the statute.

2. Searching for an Improved Definition

The central question posed by the first reform asks when the statute should be triggered. Definition of the triggering event is important since it sets into motion executive consultation and reporting, and potential subsequent congressional action. Ultimately, the scope of the statute hinges on this trigger definition.

A host of issues is raised by this central question. What types of armed exchanges should be encompassed within the statute? Does Congress wish to become involved in minor conflicts that might be characterized as isolated incidents? If not, what test should distinguish active hostilities from isolated incidents? What factors should be assessed in making these determinations? For example, what sought a judicial declaration and injunctive relief that the hostilities report section 4(a)(1) was triggered on two occasions in the Persian Gulf. The “central issue” in the action was the meaning and applicability of the undefined statutory “hostilities” and “imminent hostilities” terms. Id. at 335 n.6. No constitutional issues were presented. Id. at 335 n.3. The action was dismissed under the equitable discretion and political question doctrines.

In Crockett, 29 members of the House sought declaratory judgments and injunctive relief on the applicability of the statute to military aid in El Salvador. The action was dismissed as non-justiciable because of the complex factfinding questions presented for judicial resolution and because Congress had not found that a hostilities report was required to be filed. Notably, 16 Senators and 13 members of the House opposed the action as amici curiae.

In Sanchez-Espinoza, 12 members of the House (in addition to 14 non-congressional plaintiffs) sought injunctive and declaratory relief, alleging, inter alia, that United States involvement in Nicaragua, Honduras, and El Salvador violated the War Powers Resolution. The district court declined to exercise jurisdiction on grounds that a non-justiciable political question was presented.

208. Lowry, 676 F. Supp. at 339 n.42.
209. S.J. Res. 323, § 4(c), 100th Cong., 2d Sess. (1988) proposes:
Any Member of Congress may bring an action in the United States District Court for the District of Columbia for declaratory judgment and injunctive relief on the ground that the President or the United States Armed Forces have not complied with any provision of law described in paragraph (1) or (2) of section 6(a).
qualitative and quantitative elements should be part of the hostilities equation? Congress may wish to consider whether it wants to maintain the distinction between “peacetime deployments” of section 4(a)(2) & (3) and “hostilities” under section 4(a)(1). Resolution of these questions will significantly advance efforts to establish a general working definition of “hostilities,” one that will be more consistently applied by both branches.

While it is true that no single “hostilities” definition is capable of resolving all disputes between the political departments, clarification of a more acceptable working definition of hostilities would better promote the goal of mutual cooperation repeatedly suggested by the Reagan Administration and the original objective of “collective judgment” specified in the statute. Concurrent authority between the President and Congress on many war powers matters makes the establishment of any definition difficult at best. In an area already involving “zones of twilight,” any legislative definition should avoid contributing to a further blurring of the lines of authority. It turns out that Senator Goldwater was prescient. The absence of a clear working definition invites greater interbranch conflict on the issue of the applicability of the statute to certain hostilities situations.

One proposal, the Hostilities Act, H.R. 3912, seeks to conform the “hostilities” definition with existing legislative intent. The bill attempts to codify the broader definition of hostilities intended by Congress in the War Powers Resolution in the form of an illustrative definition of the term. This legislation states that:

the term “hostilities” includes (but is not limited to) any armed conflict plus any other situation —

(A) in which fighting has actually begun,

(B) in which there is a state of confrontation, in which no shots have been fired, but where there is a clear and present danger of armed conflict, or

(C) which involves the exchange of fire with hostile forces.

210. For a discussion of the distinction between “hostilities” and “peacetime deployment” reports, see supra note 106.
211. See supra text accompanying note 126.
214. H.R. 3912, § 9(2), 100th Cong., 2d Sess., 134 CONG. REC. H253 (daily ed. Feb. 4,
In this manner, "hostilities" is expressly "intended to be broader in scope than armed conflict."216 Moreover, "imminent hostilities" are intended to include (but are not limited to) a situation where there is:

(A) a clear potential either for

(i) a state of confrontation in which no shots have been fired, but where there is a clear and present danger of armed conflict; or

(ii) actual armed conflict, or

(B) a high probability of exchanges of fire with hostile forces.216

These illustrative definitions represent a step toward asserting the original intent of the "hostilities" terms under the War Powers Resolution. Thus, it becomes clearer under this proposal that Congress intends the application of the more expansive interpretation of hostilities, rather than the restrictive construction of the executive branch.

Nonetheless, Congress may wish to explore the possibility of establishing greater guidance on the application of the hostilities trigger by identifying those quantitative and qualitative factors that should be weighed in making a "hostilities" determination. Since many factors should be considered, perhaps a "totality of the circumstances" test would provide a better standard than that under current law. Further, the scope of the statute could be broadened if Congress more vigorously applied the existing "imminent hostilities" standard.

Another area of clarification concerns the troop logistics in which "hostilities" are triggered. The War Powers Resolution reporting requirement is invoked "[i]n the absence of a declaration of war, in any case in which United States Armed Forces are introduced" into hostilities or specified peacetime deployment situations.217 The statute is presumably not implicated when previously stationed military forces become involved in hostilities, as opposed to being introduced into such circumstances. Accordingly, the terms "introduction or involvement of United States Armed Forces" should

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be substituted to account for both scenarios.\(^\text{218}\)

While recognizing there is no perfect statutory definition, in its
effort to reform the War Powers Resolution, Congress should hold
comprehensive hearings to examine the constituent factors that
should be used in deciding when “hostilities” exist. Under current
law, the absence of a definition or clarification invites dispute. Ulti-
mately, greater agreement on a working definition would serve to
advance comity between the branches.

3. Congressional Determination
   a. Invocation

Because the hostilities report provision is not self-executing, it
requires the exercise of judgment by one of the two political
branches. As noted, the current statute is structured in favor of the
executive branch making such determinations. However, the execu-
tive branch has demonstrated a strong disinclination to trigger the
central enforcement features of the War Powers Resolution. In order
to overcome the executive pattern of reluctant acknowledgment of the
statute and the history of legislative dependence on the President to
trigger the statute, Congress should establish a mechanism for invok-
ing the Act *sua sponte*. Accordingly, the statute should be amended
to allow Congress to make its own finding that “hostilities” exist and
that the statute is thereby invoked. In large part, a true test of con-
gressional authority is measured by its willingness to act. Any statu-
tory reform vehicle should be crafted to reflect this fact by providing
the mechanism by which Congress can take an affirmative stand on
the existence of hostilities.

The courts that have addressed the applicability of the War
Powers Resolution have dismissed actions brought by members of
Congress on jurisdictional grounds. One of the bases for denial of
relief in these cases has been that members of Congress did not pur-
sue legislative remedies available to them. Thus, in *Crockett*, where
the district court was presented with the applicability of United
States involvement in El Salvador, the court noted that “Congress
[had] taken absolutely no action.”\(^\text{219}\) In *Lowry*, which involved the
use of military forces in the Persian Gulf, the district court pointed
out that “Congress ha[d] debated and voted on the subject of this

\(^\text{218}\) This reform is proposed in The Hostilities Act legislation. See H.R. 3912, § 9(1),

lawsuit,” but had not invoked the section 4(a)(1) hostilities report provision.\textsuperscript{220} Generally, then, although Congress has disagreed with the President over the invocation of the statute, it has usually lacked the will to challenge the President by going on the record to trigger the statute. However, these courts have noted that a completely different scenario is presented where Congress passes legislation expressly finding that United States troops have been introduced into “hostilities” and which the President refuses to acknowledge. In this situation, a constitutional impasse could be presented for possible judicial resolution since Congress would have fully exercised its authority by exhausting available legislative remedies.\textsuperscript{221}

Congress originally intended to be able to determine (1) when a war powers report should be filed upon the introduction of military forces into hostilities and (2) which reporting subsection of the statute should be triggered.\textsuperscript{222} During consideration of the War Powers Resolution, the language “or is required to be [filed]” was added to provide for the circumstance in which “the President for whatever reason may decide not to submit a report.”\textsuperscript{223} However, Congress has rarely sought to exercise this contemplated authority and this provision has lacked an effective enforcement mechanism.

On one occasion, Congress invoked the War Powers Resolution in the absence of an executive hostilities report pursuant to section 4(a)(1). On September 29, 1983, in the Multinational Force in Lebanon Resolution, “Congress determine[d] that the requirements of section 4(a)(1) of the War Powers Resolution became operative on August 29, 1983” and further “authorize[d] the continued participation of the United States Armed Forces.”\textsuperscript{224} While this is the only occasion in which Congress actually triggered the statute, Congress

\textsuperscript{221} For example, the Lowry court noted:
If Congress had enacted a joint resolution stating that “hostilities” existed in the Persian Gulf for purposes of section 4(a)(1) of the War Powers Resolution, but if the President still refused to file a section 4(a) report, this Court would have been presented with an issue ripe for judicial review.
\textit{Id.} at 341. \textit{See also} Crockett, 558 F. Supp. at 899 (noting constitutional impasse scenario); \textit{accord} Sanchez-Espinoza v. Reagan, 770 F.2d 203, 211 (D.C. Cir. 1985) (Ginsburg, J., concurring) (“Congress has formidable weapons at its disposal — the power of the purse and investigative resources far beyond those available in the Third Branch. But no gauntlet has been thrown down here by a majority of the Members of Congress.”).
\textsuperscript{222} \textit{See supra} text accompanying note 120.
\textsuperscript{223} H.R. REP. No. 287, 93d Cong., 1st Sess. 10 (1973). For further discussion of this language, \textit{see supra} text accompanying notes 117-20.
has more recently considered similar action on other occasions, and other legislators have introduced bills to apply the statute to a given circumstance.

The congressional ability to determine when troops have been introduced into hostilities has also been judicially recognized. One district court concluded that when the legislative and executive branches disagree over the existence of hostilities, a "second trigger is needed to bring the [statute] into play." Moreover, in the absence of such a legislative determination, it is difficult to determine whether such inaction reflects congressional sentiment that the statute should be invoked, and if so, when the sixty-day clock for auto-


The questions as to the nature and extent of the United States' presence in El Salvador and whether a report under the War Powers Resolution is mandated because our forces have been subject to hostile fire or are taking part in the war effort are appropriate for congressional, not judicial, investigation and determination.

The court further explained, "If Congress doubts or disagrees with the Executive's determination that U.S. forces in El Salvador have not been introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes." Id. at 899. Finally, the court noted that "if Congress itself requires a report, the 60 days for consideration of whether or not to authorize the action would begin at that point." Id. at 901. Accord Sanchez-Espinoza v. Reagan, 770 F.2d 202, 211 (D.C. Cir. 1985) (Ginsberg, J., concurring) (noting that if Congress does not confront the President over a War Powers Resolution dispute, the court is disinclined to do so); Conyers v. Reagan, 578 F. Supp. 324, 326 (D.D.C. 1984) (in action questioning war powers clause under the Constitution was infringed by United States involvement in Grenada, noting doctrine of equitable discretion "is designed to prevent those plaintiff legislators who have collegial or in-house remedies available to them, from asserting their constitutional or legislative claims in court") (citations omitted), appeal dismissed as moot, 765 F.2d 1124 (D.C. Cir. 1985).

228. Crockett, 558 F. Supp. at 900.
Rather than wait for executive action, Congress should become a more active participant on war powers matters by making determinations *sua sponte* that the statute should be invoked. With this decision exercised by the legislative branch, issues concerning executive reluctance to acknowledge the application of the statute and to determine which subsection applies are virtually eliminated. Moreover, if the President believes that Congress is likely to make a "hostilities" determination, the executive branch may be more inclined to report, consult, and share information with Congress. In this way, the executive branch may persuade Congress that the situation is not as urgent as may be perceived and immediate legislative action is unnecessary. More importantly, clearer lines of communication between the branches may be promoted by the adoption of these proposals.

b. *Potential Hostilities*

In addition to providing greater clarification on the type of "hostilities" to be covered by the Act, Congress should also play a greater role in this area by making *sua sponte* determinations on what type of "hostilities" exist. A greater congressional role could be provided by establishing a third category of hostilities termed "potential hostilities." Under this proposal, Congress could impose limitations on the use of armed forces when it determined a particular use "would likely result in hostilities if United States Armed Forces were introduced." This approach is proposed under the Hostilities Act reform legislation and is intended, in part, to afford Congress a statutory role "before [Armed Forces] are introduced into or become involved in actual or imminent hostilities."

The title of H.R. 3912, The Hostilities Act, suggests that the congressional and executive war powers may be utilized for different forms of hostilities along a continuum, none of which are separated

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229. *Id.* at 901.


Under the proposed Hostilities Act, the expedited procedures for consideration of "actual" or "imminent" hostilities legislation are triggered by forty percent co-sponsorship of such legislation. H.R. 3912, § 5(d)(1)(A). However, a fifty percent co-sponsorship requirement is imposed for invoking expedited consideration of "potential" hostilities legislation, H.R. 3912, § 5(d)(1)(B), since such determinations are not deemed to be "as urgent as a situation as one involving actual or imminent hostilities." 134 Cong. Rec. H256 (daily ed. Feb. 4, 1988) (section-by-section analysis).
by a bright line, but instead which blend into each other. Under this conceptualization, three forms of hostilities could be statutorily recognized, the first two borrowed from the War Powers Resolution: (1) actual hostilities, (2) imminent hostilities, and (3) likely (or potential) hostilities. The President would be allowed to apply the statute under the first two categories. Congress could invoke the statute for any forms of hostilities, including the potential hostilities category for those situations Congress deemed worthy of imposing a prior restraint on the possible use of armed forces. This proposal recognizes that the distinction between the three forms of hostilities is often a difference of degree, not kind. The proposal also acknowledges that “hostilities” determinations are the product of political judgment. It also gives the legislative branch—as one of the two political departments—a statutory vehicle to make these decisions affirmatively.

Further, by allowing Congress to trigger the war powers statute, it may no longer be necessary to require an executive war powers report submission to invoke the statute. In fact, the executive branch probably would not demonstrate great reluctance to file a hostilities report if such a report did not trigger the existing durational clock. The Senate version of the War Powers Resolution in 1973 did not provide that the President’s war powers report would start the clock for automatic termination. However, this approach was rejected in favor of the House version connecting the filing of an executive hostilities report with the durational clock. Rather than wait or argue for an executive branch report, Congress instead can and should affirmatively invoke the statute sua sponte. Since Congress can only act through the will of a majority in both chambers, calls by a few members of Congress to apply the statute would not be meaningful in the absence of a full congressional finding that “hostilities” exist. If Congress has the votes to challenge an executive branch “hostilities” determination (or lack thereof) then it should have a mechanism to make such judgments independently.

There are several constitutional bases for “potential hostilities” determinations by Congress. First, the Constitution assigns to Congress the prerogative to declare war. A congressional limitation on

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234. U.S. Const. art I, § 8, cl. 11. See also Helvidius, supra note 2, at 153 (Letters of Helvidius, No. 2) (“The declaring of war is expressly made a legislative function. The judging of the obligations to make war, is admitted to be included as a legislative function.”).
the use of armed forces in "potential hostilities" is a dimension of that power, enabling Congress to determine matters of war and, concomitantly, matters short of war. Additionally, Congress is delegated the responsibility to provide the national military means. As recognized under the proposed Hostilities Act provision, "if only Congress can raise and support an army or provide and maintain a navy under the Constitution, Congress may determine that in supplying such forces it does not want them provided in certain situations, which in its judgment may result in potential hostilities."285

Pursuant to its constitutional authority, Congress has imposed geographic or other limitations on the use of armed forces. For example, in the Selective Training and Service Act of 1940, a condition was provided that "[p]ersons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands."238 In the Multinational Force in Lebanon Resolution, the United States Marines were consigned to the Beirut area and, inter alia, could only engage in self-defense.287

In the final analysis, it is up to Congress to assert its constitutional authority. The statutory mechanism proposed here can facilitate congressional involvement, but it cannot supply the essential ingredient: congressional willingness to participate directly in this decision-making process.

4. Summarizing Hostilities Reform

The existence of a state of war or hostilities is not easily ascertained. This state of conflict is more aptly characterized as a point along a continuum varying in shade between actual, imminent, and potential hostilities. Ultimately, "hostilities" determinations—by either the executive or legislative branches—are essentially political judgments, depending in large part on the unique facts presented.

The War Powers Resolution has fashioned a "hostilities" standard by which the two branches may try to judge the application of the statute. For reasons already noted, the existing statutory test has proven ineffective, provoking confrontation between the branches

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235. 134 CONG. REC. H256 (daily ed. Feb. 4, 1988) (section-by-section analysis). See also supra text accompanying notes 39, 42-43, 48-51, and 73, discussing the supporting constitutional authorities for the provision of armed forces by the Congress and the imposition of conditions on their use.

236. Pub. L. No. 76-783, § 3(e), 54 Stat. 885, 886.

when cooperation or comity is needed in order for this nation to address effectively national security matters. Certainly, such inter-branch disputes are an inherent by-product of the separation of powers. Nonetheless, experience under the statute suggests that the Resolution invites further confrontation than is necessary.

The proposals do not completely discard the present statutory mechanism, but instead seek to improve upon it. Comity would best be promoted by the establishment of a common definition of hostilities. Moreover, in recognition that "hostilities" determinations are influenced by significant political components and are often sensitive to concurrent authority shared by Congress and the President, the proposal would allow either of the "political" branches to invoke the statute.

These proposals have attempted to take account of the shared authority of the two branches in the war powers area, the fact-specific nature of "hostilities" determinations, and the political judgment component surrounding these decisions. Until the existing statutory construction gap is reconciled, undue confrontation may result where comity is perhaps needed most.

VI. ENHANCING THE PROCEDURAL MANNER IN WHICH CONGRESS CONSIDERS WAR POWERS LEGISLATION THROUGH THE CONGRESSIONAL RULEMAKING AUTHORITY

In addition to the substantive war powers delegated to Congress by the Constitution,\textsuperscript{238} another potent, yet seemingly innocuous constitutional power is the congressional rulemaking authority.\textsuperscript{239} Through this authority, Congress could legitimately exercise a greater participatory role in the area of war powers. This procedural power is one of only six exceptions to the "single, finely wrought and exhaustively considered, procedure" for enacting legislation,\textsuperscript{240} which

\begin{itemize}
\item \textsuperscript{238} For a discussion of the constitutional war powers, see \textit{supra} text accompanying notes 39-57.
\item \textsuperscript{239} U.S. Const. art. I, § 5, cl. 2 provides, in pertinent part, that "[e]ach House may determine the Rules of its Proceedings."
\item \textsuperscript{240} INS v. Chadha, 462 U.S. 919, 951 (1983). \textit{See also} U.S. Const. art. I, §§ 1, 7 (bicameral requirement); id. § 7, cls. 2, 3 (presentment requirement).
\end{itemize}

The six exceptions to the regular requirement that all legislation comport with the Presentment Clauses and the bicameral requirement of article I of the Constitution are as follows:

(1) The power of the House to initiate impeachments. \textit{Id.} art. I, § 2, cl. 5.
(2) The Senate power to conduct impeachment trials. \textit{Id.} § 3, cl. 6.
(3) The Senate authority to approve or disapprove Presidential appointments. \textit{Id.} art. II, § 2, cl. 2.
(4) The Senate power to ratify treaties. \textit{Id.}
mandates "passage by a majority of both Houses and presentment to the President."241

Where congressional "action . . . ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons . . . all outside the Legislative Branch,"242 Congress is barred from using the rulemaking power to bypass the constitutional requirement of presentment of legislation to the President. However, pursuant to this congressional rulemaking authority, "[e]ach House has the power to act alone in determining specified internal matters."243 Therefore, the rulemaking power is a "narrow, explicit, and separately justified" exception to the "step-by-step, deliberate and deliberative process" of bicameral passage and presentment of all legislation to the President.244 The scope of the congressional rulemaking authority is "closely circumscribed [to the] legislative arena" and "only empowers Congress to bind itself."245 But where the effect of the rulemaking action is limited to the House or the Senate or both, Article I mandates no participatory role for the executive. Consequently, in order to successfully argue that Congress exceeded its authority under the rulemaking exception, the executive branch would have to establish that the congressional act was not binding solely on the legislative chambers, but was an act "essentially legislative in purpose and effect."246

While the President has sole constitutional authority to serve as Commander-in-Chief, the Article I lawmaking process and rulemaking authority in the war powers context derives its utility, in large part, from the interdependence of the two branches on each other. The symbiotic relation between Congress and the President in the war powers area has two sources. First, the two branches share procedural responsibility for the enactment of any war powers legislation. "It is beyond doubt that lawmaking was a power to be shared by both Houses and the President."247 Second, substantive authority,

(5) Proposed constitutional amendments passed by a two-thirds majority in each chamber. Id. art. V. See also Chadha, 462 U.S. at 955 n.21.
(6) The rulemaking authority of each chamber. U.S. CONST. art. I, § 5, cl. 2.

For a recent discussion by the Supreme Court of these exceptions, see generally Chadha, 462 U.S. at 955 n.21.
241. Id. at 958.
242. Id. at 952.
243. Id. at 956 n.21.
244. Id. at 956, 959.
245. Id. at 955 n.21.
246. Id. at 952.
247. Id. at 947. See also id. at 948 (noting that "[t]he bicameral requirement of Art. I, §§ 1, 7, was of scarcely less concern to the Framers than was the Presidential veto and indeed
resulting from the divided war powers, places executive branch dependence on Congress for the military resources over which the President commands and directs. For example, only Congress can send the President an appropriations bill, raise and support an army, and provide and maintain a navy. Both the procedural and substantive components of the relationship are grounded in the separation of powers. It is when the procedural and substantive aspects of this interdependence are conjoined that Congress is able to legitimately exercise its greatest influence on issues pertaining to the war powers.

Accordingly, as an internal and procedural housekeeping matter, the rulemaking authority can be used by Congress to monitor its own manner of exercising its substantive authority on war power legislation. Without the review or consent of the President, the House and Senate may adopt special rules for the consideration of legislation pertaining to war powers, including authorization and appropriation bills. Congress employed this power in the Legislative Reorganization Act of 1970. There, the House and Senate made major changes both to their committee system and the manner in which they conduct their business. The House report accompanying the Act noted that “the rulemaking power of the Senate and House is a fundamental power, basic to the operation of the two Houses as a separate branch of the Government and expressly stated in the Constitution of the United States.” Nearly a century ago, the Supreme Court noted with regard to the rulemaking power:

The Constitution empowers each house to determine its rules and proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are

the two concepts are interdependent”).

248. See, e.g., supra text accompanying note 73.
249. U.S. Const. art. I, § 8, cl. 1 (Common Defense and General Welfare Clauses); id. § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law.”).
250. Id. § 8, cl. 12.
251. Id. cl. 13.
252. The Court in INS v. Chadha, 462 U.S. 919, 946 (1983) noted, for example, that the lawmakers “provisions of Art. I are integral parts of the constitutional design for separation of powers.” The Court added that the Constitution “enjoins upon its branches separate-ness but interdependence, autonomy but reciprocity.” Id. at 962 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).
open to the determination of the house, and it is no impeach-
ment of the rule to say that some other way would be better,
more accurate or even more just. . . . It is a continuous
power, always subject to be exercised by the house, and within
the limitations suggested, absolute and beyond the challenge of
any other body or tribunal.254

In reliance on this authority in the war powers context, Con-
gress has substantial discretion to conclude, both as an exercise of its
constitutional rulemaking authority and as a means necessary and
proper to fulfill its express substantive constitutional war powers,255
that matters concerning the use of United States Armed Forces
abroad mandate special rules for congressional consideration. Fur-
thermore, by exercising this power, the goal of "collective judgment"
under the War Powers Resolution may be better fulfilled and Con-
gress may be able to more effectively exercise its war powers.256
Significantly, pursuant to this constitutional authority, Congress can
make significant reform to the War Powers Resolution sua sponte.
Executive branch participation is not required, because these reforms
only modify internal congressional procedures by altering the mode
by which Congress exercises its substantive powers.

The following three subsections of this article suggest means by
which Congress may modify its rules based on this constitutional
procedural power in order to better attain these stated objectives.
First, Congress should develop a more effective enforcement mecha-
nism by combining its power of the purse with its rulemaking au-
thority.257 Second, the legislative branch should retain authority to
reassemble sua sponte after adjournment to consider war powers leg-
islation or reports through its adjournment and rulemaking author-
ity.258 Finally, Congress should use the rulemaking power to develop
improved expedited procedures for consideration of war powers
bills.259

254. United States v. Ballin, 144 U.S. 1, 5 (1892) (emphasis added).
255. For the full text of the Necessary and Proper Clause, see supra text accompanying
   note 47.
256. See supra text accompanying note 9.
257. See infra text accompanying notes 260-333.
258. See infra text accompanying notes 334-99.
259. See infra text accompanying notes 400-90.
VII. PROCEDURAL ENFORCEMENT MECHANISM

A. Background: The War Powers Resolution

The primary means by which Congress intended to enforce its position pursuant to the War Powers Resolution was through section 5(b).260 This section mandates the removal of United States Armed Forces involved in hostilities after sixty days, unless Congress authorizes their continued presence or the President certifies that the safety of the troops requires an additional thirty days. Section 5(c) also provides important enforcement authority.261 That section requires troop removal through the two-house legislative veto (or concurrent resolution). These enforcement provisions were considered the “core” or “heart” of the war powers statute.262

However, it is now almost uniformly accepted that the Chadha...
decision rendered at least section 5(c) of the War Powers Resolution unconstitutional as a violation of the requirement for presenting all legislation to the President for review.\textsuperscript{263} Others have argued that section 5(b) is also of questionable constitutional validity after this decision.\textsuperscript{264} If Congress is to establish an alternative and effective central enforcement mechanism, it must develop a procedure that attains the objectives sought by sections 5(b) and 5(c), but through constitutionally legitimate means consistent with the principles enunciated in Chadha. Before exploring a substitute, it is therefore useful to first examine the original legislative intent behind these provisions.

During the House debate on the War Powers Resolution, President Richard Nixon sent a telegram to then House Minority Leader Gerald Ford notifying him that the Resolution would be vetoed if it contained the automatic removal and concurrent resolution provisions.\textsuperscript{265} Although several legislators during the 1973 debate questioned the constitutionality of the concurrent resolution,\textsuperscript{266} the proponents of these provisions wanted to establish a legislative vehicle for the exercise of congressional war powers through a simple majority vote of both houses. They also sought to establish a procedure to ensure that congressional actions taken could not be rescinded if

\footnotesize{263. This view was held by at least two Supreme Court Justices who noted the Chadha decision would, inter alia, adversely affect the War Powers Resolution. See, e.g., supra note 20. For a discussion of the effect of Chadha on section 5(c), see supra text accompanying notes 15-23.}

\footnotesize{264. Concerning the effect of Chadha on section 5(b), see supra note 24.}

\footnotesize{265. As read by then House Minority Leader Ford, President Nixon's telegram noted in part: "I am unalterably opposed to and must veto any bill containing the dangerous and unconstitutional restrictions found in [then] section 4(b) [automatic removal of troops] and 4(c) [concurrent resolution] of this bill." 119 Cong. Rec. 24,663 (1973). In fact, these objections of President Nixon were included in his veto message. See Veto of the War Powers Resolution, Pub. Papers 893 (Oct. 24, 1973), reprinted in 119 Cong. Rec. 36,175-76 (1973) (veto override debate).}

\footnotesize{266. Committee member Representative Dennis commented, "One of my quarrels with the committee bill is that it locks that constitutional question [concerning the validity of the concurrent resolution] into law and there is no escape from it." 119 Cong. Rec. 24,655 (1973). Committee member Representative Mailliard noted that the concurrent resolution provision "does not comply with the constitutional requirement that anything with legislative effect be presented to the Chief Executive for his approval or disapproval," id. at 21,212, and Senator Griffin raised the same issue, commenting that the concurrent resolution provision appears to bypass the presentment requirement in the legislative process. Id. at 25,087-88. During the veto override debate, Representative Dennis pointed to the "fatal defect" of the bill in "bypass[ing] the normal constitutional legislative process by the use of a concurrent resolution, an effort I predict will never be sustained." Id. at 36,209. Representative Frelinghuysen concluded, "[Then] Sections 4(b) and 4(c) do not aid in clarifying a twilight zone of authority between Congress and the President. Rather they succeed in raising a host of new problems." Id. at 21,216.}
Congress subsequently failed to override a presidential veto. Senator Jacob Javits characterized this problem as "the barrier of a Presidential veto." The primary concern was that one-third of the members plus one of either the House or Senate would be sufficient to prevent a veto override and thereby thwart the clear majority of both chambers of Congress. These apprehensions were also echoed

267. Representative Findley explained that the War Powers Resolution would "require the President to disengage from hostilities at any time by a simple majority of both Houses." Id. at 21,218 (emphasis added). Representative Du Pont noted, "Nowhere in the Constitution do I see a requirement that two-thirds of both Houses are required to make a President disengage from hostilities that he initiated unilaterally, without prior consent of Congress." Id. at 21,223 (emphasis added). Representative Mailliard noted his concern that 50 Senators out of 535 total members of Congress could sustain presidential action by denying a veto override. Id. at 24,657. Representative Biester praised the automatic removal provision which avoids a situation where "a minority of either House could continue the combat commitment which originally had been rejected by a definite majority in both Houses." Id. at 24,695-96 (emphasis added). During the veto override debate, subcommittee member Representative Bingham argued that President Nixon's veto message "insists that he must be free to act so long as one-third plus one of either House agrees with him" and that the war powers bills were introduced "to correct this situation." Id. at 36,208 (emphasis added).

268. Id. at 33,548-49 (remarks during conference report debate). See also id. at 21,212 (remarks of Rep. Zablocki) (noting that the automatic disengagement provision cannot be negated by a presidential veto and that the provision "closes that 'little loophole' of a veto that the President can use in vetoing actions of the majority of the Congress").

269. Regarding the automatic removal provision in section 5(b), floor manager Representative Zablocki noted that "a veto [should] not negate the outcome of a majority of Congress." Id. at 21,212. He added, "I do not think that one-third of either body . . . should control the constitutional question of war powers." Id. at 24,689 (emphasis added). Representative Zablocki noted that the absence of the automatic disengagement provision “would give one-third of either House the opportunity to continue the commitment of troops,” permitting “[t]he will of the majority [to] be thwarted.” Id. at 24,654 (emphasis added). Committee member Representative Findley explained that the provision would “require the President to disengage from hostilities at any time by a simple majority of both Houses.” Id. at 21,218 (emphasis added). Representative Morgan, chairman of the House Committee on Foreign Affairs, supported the automatic removal provision noting that “nowhere in the Constitution is there any provision that the Congress can only exercise its war powers by a two-thirds vote of both Houses . . . [u]nder the Constitution, the Congress can use its war powers by a majority vote and make it stick.” Id. at 24,705 (emphasis added). Senator Javits commented that "the veto power gives the President an enormous tactical advantage" enabling him "to make war with the support of only one-third of either House of Congress." Id. at 24,538 (emphasis added). During the conference report debate, Senator Mathias recalled, "As the experience of Vietnam has shown, it has been difficult for the legislature to terminate our involvement once U.S. forces are engaged requiring a two-thirds vote to overcome a Presidential veto." Id. at 33,567 (emphasis added). Representative Holtzman commented in favor of the 60-day automatic cutoffs provision over appropriations cutoffs which are "lengthy, time consuming and subject to a veto." Id. at 36,220.

With regard to the concurrent resolution provision in section 5(c), committee member Representative Du Pont argued in support of the concurrent resolution provision stating “if we have the power under the Constitution to declare war by a simple majority, then we have the power under the Constitution to stop it by a simple majority.” Id. at 24,666 (emphasis added). See also id. (colloquy between committee members Representatives Du Pont and Biester).
during efforts, which proved unsuccessful, to require affirmative congres- 
sional action by joint resolution allowing the President to sign or veto any war powers measure.  

As Senator Thomas Eagleton explained the operation of this central enforcement provision, "Congress could stop the President by a simple majority vote rather than having to use the power of the purse and being forced to muster a two-thirds majority to override a Presidential veto." Accordingly, under section 5(b) of the War Powers Resolution, mere inaction by Congress would mandate disengagement by the end of the designated period. Similarly, the concurrent resolution embodied in section 5(c), intended to be used during the initial sixty-day period after troops were introduced into hostilities, would go into effect without presentment of the legislation to the President. Under this statutory structure, Congress sought to place the burden on the President to obtain legislative authorization. Congress could merely allow the automatic removal provision to be triggered without any action on its part at all. Congressman Clement Zablocki, Chairman of the House Foreign Affairs Subcommittee on National Security Policy and Scientific Development and

During the conference report debate, Senator Brooke noted that the bill provides for a concurrent resolution "to demand a halt to military action" which "will not be subject to presidential veto." Id. at 33,568. And during the veto override debate, Representative Green explained that "the bill employs a concurrent resolution . . . because [this device] is not subject to a Presidential veto." Id. at 36,204.

270. With regard to the requirement of a congressional vote after 90 days submission of a presidential combat report, as proposed under the Representative Dennis substitute amendment, Representative Biester commented, "[T]he majority will of the Congress, unless it could muster a two-thirds majority, would not be able to prevent the Presidential war." Id. at 24,660. Committee member Representative Fascell argued against Representative Eckhardt's substitute amendment providing for joint resolution for disengagement of forces:

The Congress might be unable to get a two-third majority to override the veto. Therefore, a one-third majority could thwart the will of the majority, thus leaving us in the exactly same position that we are in — with one big exception, however — [the Eckhardt] amendment would be cited ad infinitum as congressional authority for the President to act as he saw fit.

Id. at 24,680.

271. Id. at 33,556 (conference report debate).

272. See supra text accompanying note 123.

273. Representative Biester remarked, "The burden of proof is on the President. He must demonstrate that the continuation of such action beyond sixty days is warranted." 119 Cong. Rec. 24,696 (1973) (emphasis added). Representative Findley explained:

Realizing that the standards are vague, the House bill requires the President to explain and justify to Congress why he has assumed the power to commit troops to hostilities. If Congress approves of the assumption of power, it may ratify it. If it does not approve, it may let the powers lapse after sixty days, or terminate them sooner by concurrent resolution.

Id. at 21,220 (emphasis added).
one of the primary authors of the legislation in the House, referred to these two subsections as establishing a "two-barrel [shotgun] approach."\(^\text{274}\)

Chadha, decided ten years after the enactment of the War Powers Resolution, made clear that this approach, at least that of section 5(c), is an unconstitutional violation of the Presentment Clauses. In the aftermath of Chadha, perhaps the best enforcement mechanism would result from combining Congress’ procedural rulemaking authority with its substantive power of the purse. To the extent that internal housekeeping rules would bind the legislative arena and Congress could assert its plenary appropriations power, the legislative branch would thereby enhance, through constitutional means, its ability to assert its position on war powers questions. Before this approach is explored, a similar proposal in the agency rulemaking field under the Grassley-Levin bill is reviewed.

**B. S. 1145, Section 807: The Grassley-Levin Model**

One measure that will serve as a useful model in drawing upon the congressional rulemaking authority and power of the purse, is section 807 of S. 1145, the Rulemaking Procedures Reform Act of 1985.\(^\text{278}\) This measure is referred to as the Grassley-Levin bill after the measure’s two principal Senate authors.\(^\text{278}\) It is designed to es-
establish a constitutional replacement for the now defunct legislative veto over the executive branch rulemaking process.\(^{277}\)

Operationally, section 807 would establish a special mechanism for Congress to exercise its power of the purse whenever it disapproved an agency rule. The bill would allow a point of order to be raised against any appropriations bill which does not prohibit funds for the implementation of the agency rule after a disapproval resolution of the rule was passed. As the provision was drafted, the point of order could be raised whether or not the President had received, signed, or vetoed the disapproval resolution. Congress could also decide not to allow the point of order to be raised if it changed its original position and decided to expend the funds for the agency rule. This may be accomplished if Congress waives the point of order or by a majority vote.

In order for this proposal to pass constitutional muster, it must be shown to be a valid exercise of congressional rulemaking authority that does not run afoul of the objectives served by the Presentment Clauses, something the one-house legislative veto in *Chadha* failed to accomplish. It is therefore useful to review the rationale underlying the Presentment Clauses and to consider whether the Grassley-Levin device infringes the executive authority contained in those constitutional provisions.

1. **Considerations Involving the Presentment Clauses**

   During the Constitutional Convention, James Madison noted that if the presentment requirement were limited to “bills,” Congress

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277. Former Representative James Broyhill, an advocate of S. 1145, testified that the measure would “fill the void that was left by the Supreme Court’s [*Chadha*] decision” in the agency rulemaking area. *Hearings on S. 1145, supra* note 275, at 18. Upon introducing the same bill in the 100th Congress, Senator Grassley remarked, “This congressional review mechanism is carefully drawn to meet the Supreme Court’s objection to the legislative veto, as expressed in the 1983 case, INS versus Chadha.” 133 CONG. REC. S10,850 (daily ed. July 29, 1987).
might innovate substitute legislative vehicles that would avoid executive review. In order to protect against any such bypassing of presidential consideration, the Framers amended the proposed Constitution to close up this potential loophole. Accordingly, every “Bill,” “Order, Resolution, or Vote to which the concurrence of the Senate and House of Representatives may be necessary” must be presented to the President.

The Chadha Court considered that three primary functions were to be served by providing for this executive role in the lawmaking process. First, the President would be afforded a defense against the Congress. Second, the chances of enacting bad laws or improvident legislation would be lessened by the presentment requirement. Finally, presidential review would “assure that a national perspective is grafted on the legislative process.”

The only potential constitutional challenge to the proposal embodied in section 807 of S. 1145 is that it violates the requirement of presentment. With this background in mind, we turn to consideration of the presentment issue.

2. Does Section 807 Contravene the Presentment Clauses?

James M. Spears, Acting Assistant Attorney General, Office of Legal Policy of the Department of Justice, testified that with some technical amendments, S. 1145 would comport with the constitutional requirements for legislative enactment referenced in Chadha. Nonetheless, Mr. Spears suggested that the conjoining of

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280. *Id.* cl. 3.

281. However this defensive protection was not absolute, but rather qualified, as “[t]he President’s unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person.” Chadha, 462 U.S. at 951.

282. *Id.* at 948. *See also* id. at 951 (summarizing that “[t]he President’s participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws”).

283. *Id.* at 948. *See generally* After Chadha, supra note 24, at 779-82 (discussing Presentment Clauses as debated in the Constitutional Convention and the underlying rationale for these clauses).

284. *See* Hearings on S. 1145, supra note 275, at 29-30, 40, 41. *See also* Hearings on S. 1145, supra note 275, at 23 (noting the Department of Justice’s position that “the joint resolution of disapproval mechanism proposed in Senate bill 1145 is constitutional”).

This article only considers section 807 of S. 1145 as a model and does not consider other provisions of the Grassley-Levin bill, including section 804, to which the Department of Jus-
the procedural point of order with the appropriations power in the Grassley-Levin bill might "be construed as an attempt to circumvent the presentment clause" and therefore "any enforcement procedure must not come into play until the legislative process on the agency rule—of which Presidential action is obviously a major component has been completed."1286

This argument is essentially predicated on the timing of the point of order and the authority of Congress to invoke an internal point of order at various stages in the legislative process. There are three points at which the point of order could be raised: (1) before the disapproval resolution has been formally presented to the President, (2) after presentment but during the regular ten-day period for presidential action on a measure,1286 and (3) after the full period for review by the President has expired. The Justice Department's contention is that only a narrow window of opportunity (usually ten days) exists for the executive to review legislation which Congress has approved. According to the department, congressional action through the invocation of a point of order before the President could sign or veto the bill would encroach upon the ability of the executive to exercise its presidential functions.

First, as a practical matter, it is unlikely that Congress would consider an appropriations bill denying certain funds to the executive prior to presentment of the joint resolution of disapproval, since appropriations are generally part of an annual cycle. More importantly, pursuant to its constitutional rulemaking authority, Congress clearly has the prerogative to decide when it may permit points of order to lie on appropriations bills at any juncture in the legislative process. Because the point of order is an internal rule affecting the congressional procedure for considering spending bills, the Present-
ment Clauses are not infringed by the section 807 model. As part of this rulemaking authority, Congress may decide that the point of order should be triggered upon the occurrence of certain events—before or during presentment or even after a veto. Accordingly, the Grassley-Levin device qualifies as an action within one of the “narrow” exceptions to the bicameralism-presentment process.\footnote{See INS v. Chadha, 462 U.S. 919, 955-56 (1983) (noting exceptions to the regular lawmaking process).}

In order to remove the point of order from this constitutional exception, the point of order mechanism would have to be shown to be equivalent to a “legislative act,” thereby mandating presentment to the President.\footnote{Id. at 952.} However, the point of order mechanism is clearly not a “legislative act” which requires presentment because its effect is confined to the legislative branch (since no “legal rights, duties, and relations or persons” outside of the House or Senate are impacted by its use).\footnote{Id.} The device is simply a procedural one as it is only binding on the “legislative arena”: as designed in the Grassley-Levin bill, a member of the House or the Senate can raise a point of order against an appropriations bill only upon the triggering event (after a disapproval resolution has first been passed by both chambers). Once raised, the point of order only affects congressional consideration of the appropriation measure.

Moreover, the point of order is not automatic as it may be waived, or, even if asserted, may be overcome by a majority vote. As Stanley Brand, former counsel to the House of Representatives, noted: “The full measure of [section 807’s] totally intramural compass is substantiated by the fact that once an appropriation or bill has passed, a point-of-order having been waived against it or not asserted, the point-of-order has no bearing on the validity of the enacted law.”\footnote{Hearings on S. 1145, supra note 275, at 74.} Further, the executive branch cannot enforce this internal rule if Congress fails to follow it.\footnote{It is difficult to imagine a scenario where the executive branch, obtaining a sought after appropriation, would not expend the funds because some aspect of the procedural point of order was not properly satisfied.} The use of the point of order involves congressional rulemaking authority. Consequently, the presentment requirement need not be complied with when and if the point of order is invoked.\footnote{Others considering the point of order mechanism in section 807 of S. 1145 have concluded that it comports with the constitutional requirements for consideration of legislation. Eugene Gressman, constitutional law professor, University of North Carolina, noted, for ex-}
Not only does the point of order device fall within the rulemaking exception, but none of the presentment functions are circumvented by its use. First, the President need not defend against the raising of the point of order because, as noted, its use affects only the consideration of legislation within the congressional arena. Significantly, the President will get an opportunity to review the appropriations bill on which the point of order is raised if Congress ultimately sends him the measure. Second, there is no need at the point of order stage for the President to minimize the chance of enactment of "bad laws or improvident legislation" since the raising of the point of order does not even result in legislation. The device merely affects the manner of congressional consideration of spending legislation. Finally, the President does not need to bring a national perspective on the matter on which the point of order is exercised since the device is a procedural housekeeping rule of the Congress and the President will ultimately get an opportunity to approve or veto the final spending measure adopted by the House and Senate. Accordingly, the use of the point of order is a legitimate exercise of Congress' rulemaking power and does not encroach upon the presentment objectives of the President.

The key issue raised by the point of order device is what legislative event or act should serve as a trigger. One suggestion has been made to trigger the point of order if the President vetoed the joint resolution of disapproval. Expanding on this proposal, the point of order could be invoked as one of the last legislative events prior to presentment, for example, during the enrollment of legislation. Example, that section 807 "is probably constitutional, for Congress has virtually unlimited appropriation powers." Hearings on S. 1145, supra note 275, at 87. Stuart Eizenstat, former Chief Domestic Policy Advisor to President Jimmy Carter, expressed his view that "the appropriations provision [is] clearly constitutional." Hearings on S. 1145, supra note 275, at 91. He explained that "the appropriations provision is a matter of internal congressional procedure ... [and is] fully constitutional," Hearings on S. 1145, supra note 275, at 55, and concluded that the point of order "is purely internal." Hearings on S. 1145, supra note 275, at 92. Stanley Brand agreed, noting that section 807 comports with congressional rulemaking authority. Hearings on S. 1145, supra note 275, at 74.

293. Stuart Eizenstat, former Chief Domestic Policy Advisor to President Jimmy Carter, recommended:

The process might be set in motion if the President vetoed a joint resolution of disapproval, and Congress, seeking to avoid the route of overriding the veto and its attendant requirement of a two-thirds vote, tried to accomplish the same result by passing an appropriations measure that prohibited promulgation of the rule — one that would require but a majority vote. It is much less likely that a President facing a major appropriations bill with hundreds of items in it would veto it on account of one provision.

Hearings on S. 1145, supra note 275, at 66.
rollment occurs after the Senate and House have approved an identical measure. It is the process during which the accuracy and similarity of measures approved by both chambers is examined and the signature of the Speaker of the House and the President of the Senate are placed on the bill so that it can be officially presented to the President.294 Thus, the Committee on House Administration and the Secretary of the Senate, both delegated the task of examining legislation to see that it is properly enrolled, could be ordered to withhold approval of the enrolled legislation unless the point of order was overcome or otherwise waived. Therefore, assuming the validity of Mr. Spear's concerns over encroachment on the presentment function, under this reasoning much of the department's challenge to the provision would be mitigated by ensuring that the invocation of the point of order occurred only upon some final act within the legislative arena.

The legitimacy of the point of order under Congress' rulemaking authority is further established when compared with similar internal congressional rules that restrict the substance of legislation considered by the Congress. For example, under existing House and Senate procedure, there is a general prohibition against consideration of amendments to appropriation bills that "change[] existing law" or involve "new or general legislation" during floor debate (so-called legislative "riders").295 This restriction, like that under consideration above, is asserted through a point of order and may be waived by established procedure in chamber. It therefore constitutes an analogous type of housekeeping rule that Congress may impose on its consideration of legislation.296 Under this rule, new legislation authoriz-

294. In the House of Representatives, the Committee on House Administration is assigned the task of examining approved legislation. H.R. Rule X, cl. 4(d), CONSTITUTION, JEFFERSON'S MANUAL & RULES OF THE HOUSE OF REPRESENTATIVES, § 697a, H.R. Doc. No. 279, 99th Cong., 2d Sess. 401 (1987) [hereinafter JEFFERSON'S MANUAL]. Interestingly, under House precedent the signature on enrolled bills may be cancelled to correct enrollment errors. "By unanimous consent where errors are found in enrolled bills that have been signed, the two Houses by concurrent action may authorize the cancellation of the signatures and a reenrollment, and in the same way the signature may be cancelled on a bill prematurely enrolled." Id. § 575, note, at 279-80 (citations omitted).

Under Senate Rules, the Secretary of the Senate is assigned the examination duty prior to the signing of the enrolled bill by the President of the Senate. S. Rule XIV, cl. 5, SENATE MANUAL: CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. Doc. No. 1, 100th Cong., 1st Sess. 12 (1988) [hereinafter SENATE MANUAL].

295. See, e.g., H.R. Rule XXI, 2(c) & (d), JEFFERSON'S MANUAL, supra note 294, at 573-74; S. Rule XVI, SENATE MANUAL, supra note 294, at 14-16.

296. See Hearings on S. 1145, supra note 275, at 92 (remarks of former Rep. Levitas) (discussing House parliamentary procedure in defeating the motion for the committee of the
ing a President's proposal for the use of troops or placing specific congressional restrictions on their use could not first be considered during floor debate on an appropriations bill.

As another illustration, the House Committee on Rules serves as a "traffic cop" for legislation to be debated on the House floor. In this capacity, the committee may propose a Resolution restricting the manner of floor consideration, including, *inter alia*, the number and type of amendments to be heard on any measure. While the committee-proposed Resolution could be defeated by a majority vote in the House, this committee function (as an internal regulatory process of the House) regularly has a powerful influence on the ultimate form and substance of legislation to be deliberated. In fact, the proposed Resolution of the House Rules Committee (establishing time and amendment limits for a particular bill), has a determinative effect on legislation considered in the House.

Another example is the procedural practice established during the Eisenhower Administration requiring approval by the authorizing committee before any funds could be appropriated for certain public buildings.\(^{297}\) Under this Public Buildings Act, unless committee approval was first obtained, Congress could not appropriate the funds.\(^{298}\) In comparison to this procedure, the trigger requirement for the point of order in the Grassley-Levin bill is stricter. Unlike the easier committee approval requirement in the Public Buildings Act, the Grassley-Levin bill requires bicameral approval as a condition precedent to a member raising the point of order.

As each of these examples demonstrates, the executive presentment authority is not infringed by such internal congressional rules

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297. *See, e.g.*, *Hearings on S. 1145*, supra note 275, at 75 (statement of Stanley Brand) (discussing this practice and noting that "[a]pparently, the Executive conceded the validity of this response").


> [N]o appropriation shall be made to construct any public building or to acquire any building to be used as a public building involving an expenditure in excess of $100,000, and no appropriation shall be made to alter any public building involving an expenditure in excess of $200,000, if such construction, alteration, or acquisition has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively, and such approval has not been rescinded as provided in subsection (c) of this section.

(emphasis added). *See also S. REP. NO. 694, 86th Cong., 1st Sess. 6-7 (1959)*, *reprinted in 1959 U.S. CODE & CONG. ADMIN. NEWS* at 2295-96; *H.R. REP. NO. 557, 86th Cong., 1st Sess. 9 (1959).*
as section 807 of the Grassley-Levin bill. Each imposes limitations on the mode of consideration of legislation on the floors of Congress. These rules create a procedural presumption that a house of Congress will operate in a particular manner during deliberation of a particular bill or subject area. Significantly, this presumption can be overcome by a majority vote or other waiver process. No rights or duties outside the legislative arena are affected by these housekeeping rules. Accordingly, section 807 is a legitimate exercise of the congressional rulemaking authority and does not require compliance with the Presentment Clause. Congress can establish an internal rule affecting its procedure and manner of consideration of a bill even though the trigger for the internal rule is that prior legislation has been presented to the President. As will next be shown, the point of order procedure also advances and reinforces the functions the House and Senate perform in the legislative process independent from and prior to presentment.

3. The Bicameral Requirement of the Lawmaking Process

To become the law of the land, legislation generally must receive the concurrence of the House, Senate, and President, or, in the absence of executive approval, a two-thirds approval by both the House and the Senate. Each of the three lawmaking institutions clearly has a distinct function to serve in the constitutional lawmaking equation as each brings a different representational perspective to the consideration of proposed legislation. Under the constitutional design, the House is said to represent the people, the Senate the States, and the President the nation. The House and Senate, products of the Great Compromise during the Constitutional Convention, are constituted by membership with different bases and terms of representation. The rules, practices, customs and constitutional requirements of each chamber also create significant differences in each body, despite the subtle appearance of these distinctions. In fact, because each lawmaking institution represents different constituencies and is distinct in composition, concurrence among the lawmaking institutions is not always easily attained and might only result after reconciliation and compromise. As the Supreme Court has

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299. U.S. CONST. art. I, §§ 1, 7 (bicameralism requirement), § 7, cls. 2, 3 (presentment requirement and veto process).
301. See generally id. at 950.
302. In fact, under the Grassley-Levin proposal, the point of order may not be triggered until both the House and Senate first concur on a disapproval resolution.
noted, "[t]he bicameral requirement . . . was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent." As will be demonstrated, within the formulation of the lawmaking procedure set forth in the Chadha decision, the point of order device may alternatively be said to fall clearly within and promote the objectives of the bicameral phase of the lawmaking process.

The Chadha Court recognized two primary purposes advanced by the bicameral requirement of Article I. First, it is to provide "that the legislative power would be exercised only after opportunity for full study and debate in separate settings." The elected representatives have the chance to completely and carefully deliberate on the wisdom and necessity of legislation prior to sending it to the President. This reviewing function by each chamber is similar to that assured the President under the Presentment Clauses. Second, the bicameral requirement serves to diffuse legislative authority. The legislative power is divided into two independent, but similar, branches, thereby ensuring that legislative power is not unduly concentrated and maintaining separate review by bodies representing different constituencies and institutions.

The effectiveness of the congressional power to legislate depends to a large extent on the sequential nature of the lawmaking process. Because presentment must be preceded by bicameral consideration, the President can only exercise the power to review legislation after the two legislative chambers have concurred. Although the President has the power of the veto, which affords him considerable

303. Chadha, 462 U.S. at 948.
304. Id. at 951.
305. Id. at 950 (discussing "need to divide and disperse power in order to protect liberty").
306. See generally id. at 948-51.
307. The Constitution clearly contemplates a sequence to be followed in the enactment of legislation. Congress must positively act before the constitutional role of the President may affirmatively commence (although the threat of a veto may have an influential impact on legislation considered by the Congress). The Constitution provides that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." U.S. Const. art. I, § 7, cl. 2 (emphasis added). See also id. cl. 3. Should both Houses or either House disapprove a measure, then the presentment requirement is not triggered. The 10-day constitutional clock for executive review, see supra note 286, does not commence until both legislative chambers take identical action. The sequential nature of the lawmaking process is reiterated in the event of a veto, where the measure must be returned to the originating House for reconsideration before it can be debated in the other chamber. Id. cl. 2. Although the President obviously shares a role in the appropriation and authorization process, his role cannot interfere with the bicameral process.
influence in negotiations with Congress, he is unable to dictate to the co-ordinate lawmaking branch the particular form a legislative package will take. Only Congress determines the language to be sent (or which is not sent) to the White House. While it is largely through the threat of executive veto that Congress finds it desirable to reach an accommodation with the President, importantly, the presentment review may not take place until after the bicameral requirement is satisfied.

So long as the President is given an opportunity to approve or veto a measure that has completed the bicameral phase, the President is not denied his constitutional role in the consideration of legislation. Even assuming arguendo that the section 807 device was not within the rulemaking authority of Congress, it is nonetheless clearly in compliance with the bicameral requirement (or pre-presidential phase of the lawmaking process) and does not infringe the executive role under the Presentment Clauses. Significantly, both the original disapproval resolution triggering the eligibility of the point of order, and the subsequent spending bill subject to the point of order, would be presented to the President under section 807.

As noted, the primary objection to section 807 held by the Department of Justice is that the point of order mechanism should not be eligible for invocation until after the President has had a complete opportunity to review the first disapproval measure, presumably for the full ten-day period. However, the complete acceptance of this contention would deny Congress the ability and discretion to exercise fully its bicameral obligation during this period. Nothing in the Constitution precludes Congress, in fulfilling its bicameral function, from first sending the President a disapproval resolution shortly followed by an appropriation measure (which is consistent with the congressional position taken in the original disapproval resolution) before the President has finally acted within the ten-day presentment window period on the first disapproval resolution. Congress need not wait for the President's approval or disapproval before referring to the executive branch a spending bill to accomplish the same end. Simply as a matter of congressional prerogative, the legislature may decide prior to presentment that submitting two bills to the White House—the latter grounded on the plenary power of the purse—is

308. See, e.g., After Chadha, supra note 24, at 788 (quoting Mr. Wilson during the Constitutional Convention noting that the "silent operation [of the then proposed absolute veto in the executive branch] would therefore preserve harmony and prevent mischief [by the Congress"] (quoting 5 J. ELLIOT, supra note 41, at 152).

309. For this argument, see supra text accompanying notes 284-85.
the best way to signal the executive branch that Congress is firm and insistent on its position.

The bicameral aspect of the section 807 point of order is further demonstrated by the fact that this device is also an exercise of Congress' plenary power of the purse. The Constitution expressly provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law."310 Clearly, the President does not have an entitlement to receive certain spending bills or spending measures containing certain provisions within them.311 Most significantly, the President's presentment function is not "circumvented," nor could it be, since the executive branch can veto or approve both the initial disapproval resolution and the follow-up spending prohibition after the bicameral obligation has been fully exercised in both instances. Nothing about section 807 denies the President the full ten-day period to review each measure.

After presentment, and in the event the President vetoes the disapproval measure, the bicameral branch is confronted with a strategic choice. It can either (1) attempt to override the veto, requiring approval by the constitutional super-majority, (2) decide to back-up its former position through the power of the purse, or (3) negotiate a compromise with the President. Each of these options is part of the give-and-take, dynamic nature of the Article I legislative process. The particular avenue ultimately pursued is largely determined by the prerogatives and imponderables of the moment. Therefore, even assuming the unlikely argument that the section 807 device did not qualify under the rulemaking power—an exception to the regular lawmaking process—it nonetheless would comport with the bicameral phase of the "single, finely wrought and exhaustively considered, procedure" for the enactment of legislation.312

4. Conclusions on the Grassley-Levin Model

It appears without question that the Grassley-Levin approach embodied in section 807 qualifies as a valid exercise of the congressional rulemaking authority and does not violate the Article I lawmaking requirements. No rights, duties or relations of any person

310. U.S. Const. art. I, § 9, cl. 7 (emphasis added). For a listing of the congressional spending powers, see supra text accompanying notes 48-51.
311. Because of the sequential nature of the legislative process, "[t]here would seem to be little doubt," Stanley Brand has noted, "that Congress can deny itself, through its rulemaking authority, the power to enact legislation and thereby deny to the Executive the ability to act." Hearings on S. 1145, supra note 275, at 75.
outside of Congress are affected by this device. Moreover, the proce-
dural device merely concerns the manner in which Congress consid-
ers designated legislation.

However, even assuming arguendo that presentment were re-
quired, the section 807 procedure comports with the bicameral re-
quirement. This procedural mechanism clearly qualifies as an exer-
cise of the congressional power of the purse. Moreover, the President
is afforded a chance to review both the original disapproval measure
triggering the point of order as well as the subsequent spending bill
subject to this procedural device. Therefore, the section 807 mecha-
nism does not circumvent the Presentment Clauses.

As a legitimate exercise of legislative authority, the proposed
Grassley-Levin section 807 device affords Congress greater constitu-
tional leverage than it exerts under current law. Although Congress
presently has the constitutional power to accomplish the objectives
secured under the point of order mechanism without the adoption of
this device, section 807 establishes an internal statutory infrastruc-
ture. It is a flexible procedural tool, considering it may be waived.
Its flexibility allows Congress to choose not to invoke the point of
order on a particular spending bill. If established as a formal process
"[t]he real congressional leverage resides in the threat of" its use,
"promis[ing] to achieve its goal as much through its specter as
through its actual exercise." Section 5 of the War Powers Resolu-
tion contains an automatic removal provision and two-house legisla-
tive veto, once referred to as a "two-barrel [shot gun] approach." Ir-
conically, the Grassley-Levin measure, intended to replace the un-
constitutional legislative veto in the executive agency rulemaking
area, has been similarly termed a "‘shotgun behind the door’ — a
prod to make agencies act more responsibly." As Stanley Brand
has stated, "[t]he appropriation cut-off provision [in section 807]
could prove to be the sleeping giant" within the bill. As Stuart
Eizenstat has observed in the agency rulemaking context, "[t]here is
no reason why Congress should not use all the institutional means at
its disposal to enforce its will." With its constitutional legitimacy

313. *Hearings on S. 1145, supra* note 275, at 54 (statement of Stuart Eizenstat). *See also* S. Rep. No. 492, 99th Cong., 2d Sess. 4 n.5 (1986) ("In fact, as with past veto legislation, the real Congressional leverage will reside in the threat of a veto, which will normally persuade an agency to withdraw or modify an arbitrary rule.").

314. *See supra* text accompanying note 274.


316. *Hearings on S. 1145, supra* note 275, at 71.

affirmed, and in light of the need to reform the War Powers Resolution, it is proposed here that a similar vehicle be substituted for the constitutionally infirm enforcement provisions of the War Powers Resolution.

C. H.R. 3912, Section 6(a): The Lungren Hostilities Act

1. Operation of the Proposal

Section 6(a) of H.R. 3912 draws upon the Grassley-Levin model and provides a point of order mechanism by which Congress could impose funding limitations on the use of armed forces. The point of order device cannot be invoked until the House and Senate first approve legislation providing specific limitations on the use of armed forces in hostilities pursuant to section 5(a). While the sec-

318. Section 6(a) provides:
(a) Amendment In Order. — If the Congress has passed a bill or joint resolution imposing limitations described in section 5(a) (authorizing congressional restrictions on the use of Armed Forces) and that bill or joint resolution has been enrolled or is eligible for enrollment but has not become law, it shall be in order at any time after the enrollment of that bill to consider, any Rule of the House of Representatives or the Senate to the contrary notwithstanding, the text of such bill or joint resolution in the House of Representatives or the Senate as a provision of or amendment to any bill or joint resolution making appropriations for the Department of Defense, except that this section —
(1) shall cease to apply if that bill or joint resolution is enacted, and
(2) shall not apply in a House of Congress if that House agrees to a resolution stating that this section shall not apply with regard to that bill or joint resolution.


319. Section 5(a) provides:
(a) Legislation Subject to Special Procedures. — This section applies with respect to any bill or joint resolution introduced in either House of Congress which would, if enacted —
(1) impose limitations on the use of United States Armed Forces —
(A) which (as determined by the Congress in that bill or joint resolution) have been introduced into or have otherwise become involved in hostilities;
(B) which (as determined by the Congress in that bill or joint resolution) have been introduced into or have otherwise become involved in situations where imminent hostilities is clearly indicated by the circumstances; or
(C) in any situation which (as determined by the Congress in that bill or joint resolution) would likely result in hostilities if United States Armed Forces were introduced; or
(2) amend or repeal —
(A) an act or joint resolution described in paragraph (1) which has been enacted under the procedures contained in this section, or
(B) the provisions of a bill or joint resolution described in paragraph (1) which have been included in a bill or joint resolution making appropriations for the Department of Defense pursuant to section 6 of this Act.
This section shall not apply if a bill contains any provision other than a provi-
tion 5(a) hostilities legislation is intended to be applied on an ad hoc basis as the situation may warrant, some of the possible limitations include duration, troop size or composition, and spending level.\textsuperscript{220} The point of order is not conditioned on a presidential veto. In fact, the section 6 point of order applies to a "bill or joint resolution [which] has been enrolled or is eligible for enrollment."\textsuperscript{221} Therefore, the point of order operates whether or not the President signs the original bill containing the limitation on the use or participation of armed forces. Instead, the contingent event is the prior passage of section 5(a) legislation by both chambers. Congressman Daniel Lungegren, who introduced H.R. 3912, explained the intended operation of these provisions, considered the "heart" of the reform proposal:\textsuperscript{222}

Once the Congress approves section 5(a) legislation imposing limitations on the use of armed forces, it is in order for Congress to consider whether to include similar funding restrictions on defense appropriation measures [by use of the point of order]. . . . [S]ection 6 establishes a new parliamentary procedure where Congress can determine whether it should utilize its power of the purse on questions involving the use of armed

\textsuperscript{1} Id. § 5(a), 134 CONG. REC. H251 (daily ed. Feb. 4, 1988).

\textsuperscript{2} For a discussion of the three forms of hostilities — actual, imminent, and potential — under section 5(a), see supra text accompanying notes 211-16, 230-37.

320. Section 5(b) provides four examples of possible limitations:

(b) Examples of Types of Limitations. — The types of limitations on United States Armed Forces which a bill or joint resolution described in subsection (a) could impose include (but are not limited to) limitations on —

(1) the duration of involvement of United States Armed Forces;
(2) the size and composition of the United States Armed Forces involved;
(3) the amount of appropriated funds which may be expended for involvement of United States Armed Forces; and

(4) the period during which appropriated funds will be available for expenditure for involvement of United States Armed Forces.


The section-by-section analysis accompanying this legislation notes that "[t]his exemplary list is not intended to be exhaustive" and that "[t]hese examples are clearly part of Congress' constitutional authority to provide Armed Forces . . . and part of Congress' power of the purse." 134 CONG. REC. H256 (daily ed. Feb. 4, 1988). A comprehensive listing of past examples where similar funding limitations were enacted is also provided. See id. at H257.

\textsuperscript{2} Id. § 5(b), 134 CONG. REC. H252 (daily ed. Feb. 4, 1988).

\textsuperscript{3} As noted in the section-by-section analysis accompanying the legislation:

Sections 5 and 6 are the heart of the Hostilities Act since they enable Congress to act under its constitutional war powers or rulemaking authority to impose limitations on the use of U.S. Armed Forces in situations of hostilities or enable Congress to use its power of the purse to include these limitations in appropriation measures.

forces in hostilities.  

Under this proposal, any section 5(a) hostilities legislation that does not become law (by veto or congressional failure to overrule a veto) establishes an opportunity to raise a point of order on any subsequent defense funding bill that permits an appropriation inconsistent with the previously approved hostilities legislation.

This parliamentary procedure, allowing Congress to backup the limitations passed under section 5(a) with its power of the purse, can be avoided in three situations: First, the procedural device would not apply if the original section 5(a) legislation became law, either by executive approval or veto override. If the President approves the initial section 5(a) hostilities legislation, then it becomes unnecessary for Congress to use the point of order mechanism. This procedural device enables Congress to reinforce its position where the two law-making branches are not in accord. Second, Congress can adopt a concurrent resolution overcoming the point of order, either if Congress changes its mind or under other circumstances (including concern over the safety of United States military forces in the field). Finally, under existing rules of the House, the Committee on Rules may waive section 6, subject, as always, to approval of a majority of the House. Because the Senate lacks a similar waiver procedure, section 6(b) of H.R. 3912 provides the Senate a similar mechanism whereby it can decide not to invoke the funding limitation provision. Therefore, at all times the will of the majority in both houses will prevail and either implement the spending restriction through the point of order or overcome the funding limitation imposed by the point of order device.

2. Discussion

The section 6 proposal conforms with the Article I requirements set forth in Chadha. This proposal is expressly intended to fall within the rulemaking power of the House and Senate, one of the "narrow, explicit, and separately justified" exceptions to the Ar-

323. Id. at H248 (remarks of Rep. Lungren).
324. See id. at H258 (section-by-section analysis) (discussing 3 modes of waiving the point of order procedure).
326. Section 8 of the measure explicitly provides that sections 5 and 6, inter alia, are enacted as an exercise of the article I rulemaking power of the House and the Senate. H.R. 3912, § 8, 134 Cong. Rec. H253 (daily ed. Feb. 4, 1988).
article I legislative procedure.\footnote{INS v. Chadha, 462 U.S. 919, 956 (1983).} It is simply a parliamentary device available for use by Congress to bind itself during consideration of specified authorization and appropriation measures involving the use or participation of armed forces abroad. Only when Congress has approved section 5(a) hostilities legislation which failed to become law is the funding limitation provision eligible for implementation. Even if the funding limitation is invoked, Congress is able to change its mind and, therefore, not adopt the limitation by one of the three waiver mechanisms.

The funding limitation device is restricted to the legislative arena and, therefore, does not implicate the presentment requirement.\footnote{As an exercise of the congressional rulemaking authority, no rights, duties or relations of persons outside of Congress are affected. See id. at 952. Moreover, as the Chadha majority recognized, the rulemaking "‘exception’ [to the article I legislative process] only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances." Id. at 956 n.21.} This provision merely amends existing procedures used by Congress in its consideration of appropriation and authorization measures concerning the use or participation of armed forces.

Moreover, the procedural proposal also clearly comports with the bicameral requirement of the lawmaking equation as Congress exercises its power over appropriations or authorizations. First, all proposed laws must be approved by both houses of Congress. Second, the Constitution expressly provides that all appropriation measures must first pass both chambers.

Because the use of armed forces abroad is often such a sensitive matter, and because the Constitution assigns Congress a specific role in considering such issues, Congress might decide that the funding limitation provision may be a necessary and proper means for it to call attention to the involvement of armed forces in hostilities \textit{after} both houses have voted to condition the use of troops. Therefore, the establishment of special rules, like those contained in section 6, is warranted. In this regard, the funding limitation provision acts as a check on congressional consistency. Once triggered, the funding limitation brings to the attention of each chamber the fact that spending legislation being considered is inconsistent with authorizing legislation previously sent to the President. If the will of the majority has changed since the original passage of a measure imposing limitations on the use of troops, the funding limitation provision does not have to be adopted by Congress. In accord with the bicameral require-
ment, at all times the will of the majority prevails. This procedure simply establishes the internal mechanism by which Congress can consider these vital issues.

Additionally, there is no infringement of the Presentment Clauses since both section 5(a) hostilities legislation and the spending limitation measure under section 6 are both submitted to the President for review. Unlike section 5(c) of the War Powers Resolution, which completely denied presidential review of legislation removing military forces, proposed section 6 of the Hostilities Act allows the President to exercise his presentment function twice.

In addition to comporting with the standards imposed by Article I of the Constitution, section 6 also accomplishes many of the objectives intended by the enforcement provisions of the War Powers Resolution. The legislative history indicates that Congress sought to exercise its constitutional war powers by simple majority in both chambers without being forced to garner a two-thirds vote to override a veto. Proponents of the war powers statute sought to avoid the possibility that one-third of the members plus one in either chamber (voting to sustain a veto) could prevail over the simple majority.

Chadha makes clear that the Article I requirements cannot be disregarded. The lawmaking equation (consisting of both the bicameral and presentment clauses) was carefully crafted to include a “step-by-step, deliberate and deliberative process.” At each “step” in the legislative equation, it is the threat of a check by either branch on the other that supplies legislative influence and power to each lawmaking institutional. For example, rather than an absolute veto, the President was assigned only a qualified check on legislative authority. The legislative power was similarly divided into two coequal chambers. Therefore, in addition to establishing a process for reviewing the propriety of all legislation, the coordinate branches were provided with “checks and balances” against the other. The primary deficiency of section 5(c) of the War Powers Resolution was a failure to comply with the presentment “step” in the lawmaking process.

Proposed section 6 satisfies the constitutional requirements pronounced in Chadha as a “narrow” congressional rulemaking excep-

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329. See supra text accompanying notes 267-74.
331. See supra note 281. See generally After Chadha, supra note 24, at 779-82 (discussing evolution of veto requirement during Constitutional Convention debate).
332. See supra text accompanying note 305.
tion, and, conjointly all measures under the proposal are submitted to the President. Moreover, the objective of establishing a legislative vehicle for Congress to assert its position through a simple majority, as currently embodied in section 5 of the War Powers Resolution, is accomplished by the proposed section 6 and its reliance on the power of the purse. Section 6 therefore overcomes some of the concerns presented by the so-called "barrier of a Presidential veto." The only requisite ingredient that neither the Constitution nor a procedural statute can supply is an insistent Congress capable of asserting its war powers position (through a majority vote) by the section 6 funding limitation process. As long as this majority is sustained, however, one-third of the members of either chamber will be prevented from thwarting the majority of both legislative bodies. While Congress must rely on its spending power, it need not be forced to garner a two-thirds vote in each chamber as long as Congress is able to maintain its position.

Therefore, the original purposes of the section 5 central enforcement mechanism in the War Powers Resolution will be attained constitutionally through the proposed section 6 procedural device. With viable constitutional means available, there is no need to allow the approach under section 5—tainted by the Chadha decision—to remain on the books. Congress should adopt section 6 of the Hostilities Act.

VIII. THE POWER OF CONGRESS TO REASSEMBLE ITSELF TO CONSIDER WAR POWERS LEGISLATION OR REPORTS

Once the Senate and the House have adjourned at the end of a congressional session, there is no provision under existing law by which Congress may call itself back for the designated purpose of considering legislation concerning the use of United States Armed Forces in hostilities. Consequently, the "collective judgment" on war powers matters provided by Congress may be denied during those "window" periods in which Congress has adjourned either sine die (concluding a session of a Congress) or temporarily for more than three days.

There are three constitutional means by which Congress can be

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333. See supra text accompanying note 268.
334. Sine die is latin for an indefinite adjournment. See, e.g., BLACK'S LAW DICTIONARY 1242 (5th ed. 1979) ("Without day; without assigning a day for a further meeting or hearing."). Traditionally, a sine die adjournment resolution is used for adjournment at the end of a congressional session or conclusion of a Congress.
assembled. Of these, the only directly applicable method for reassembling an adjourned Congress is pursuant to the President's authority "on extraordinary Occasions." Because this is an executive branch determination, without some other manner to reassemble itself following adjournment, the legislative branch is entirely dependent on an executive branch decision to reconvene for consideration of any matter, including war powers legislation or reports. In looking illustratively to the most recently adjourned session, the 100th Congress adjourned sine die on October 22, 1988. The 101st Congress convened on January 3, 1989. Thus, hypothetically, had any United States military forces been introduced into "hostilities" or "imminent hostilities" during this period, including in the Persian Gulf or off the coast of Libya for example, Congress would have been without any means to reconvene itself and would have been completely reliant on the President to call it back into session.

The question, therefore, is whether Congress may sua sponte make an independent determination on the necessity of reassembling after adjournment. A review of constitutional and statutory authorities, as well as of recent congressional practice, demonstrates that Congress need not depend on the President for reassembly. Following a discussion of current law, the power of Congress to conditionally adjourn, as well as recent illustrations of congressional exercise of such power, shall be explored.

A. Current Law

The War Powers Resolution provides for the receipt by Congress of a war powers report when the legislative branch has adjourned at the end of a Congress or for more than three days. However, this statutory provision does not allow Congress the authority to do anything more than receive the report. Precatory language

335. First, the Constitution specifies that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. amend. XX, § 2. The twentieth amendment superseded part of art. I, § 4, cl. 2, which provided for the assembling of Congress on the first Monday in December. Second, "on extraordinary Occasions," the President may convene the Congress, or either the House or Senate. Id. art. II, § 3. Third, the twenty-fifth amendment provides that Congress may be assembled "within 48 hours," when not in session, to determine the unique issue "that the President is unable to discharge the powers and duties of his office." Id. amend. XXV, § 4, cl. 2. This rare circumstance is only invoked by procedures specified in the constitutional amendment.


337. During the debate on the War Powers Resolution, a few members recognized the
allows the Speaker of the House and the Senate President pro tempore to "jointly request" the President to convene the Congress in order that it may "consider the report and take appropriate action." Alternatively, thirty percent of the members of either chamber may petition their respective congressional leaders to make a supplicatory request to the President. With regard to the reconvening of Congress, the House Report accompanying the War Powers Resolution noted that "the [House Foreign Affairs] committee recognizes that the Constitution states clearly that only the President may reconvene Congress." During debates on the War Powers Resolution, then subcommittee chairman and co-author, Congressman Clement Zablocki, stated that it was likely the President would "call Congress into session to consider his reasons for the commitment and to seek approval for his actions" if the sixty-day automatic termination period fell on a day after Congress had adjourned. However, pursuant to his constitutional authority and the statutory War Powers Resolution mechanism, the President can lawfully exercise his discretionary judgment and deny the congressional request to reconvene.

B. The Congressional Authority to Conditionally Adjourn

1. Constitutional and Statutory Authority

Congress has independent constitutional and statutory means by which it may determine that it be reassembled after adjournment. This authority is part of the congressional power to adjourn conditionally. The Constitution provides Congress with the power to adjourn: "Neither House, during the Session of Congress, shall, with-
out the Consent of the other, adjourn for more than three days."

Therefore, unless there was some unresolvable dispute over the adjournment time between the House and Senate that would have to be constitutionally reconciled by the President, Congress has plenary authority to determine when it may adjourn during any congressional session. It follows that the exercise of this authority would also include the concomitant power to adjourn conditionally. That is, if Congress has the power to decide to adjourn or not to adjourn, it may decide to adjourn under certain conditions. One of those conditions may include adjournment subject to reassembly under specified circumstances. (The conditional aspect of this power shall be explored in the next section.)

Furthermore, as a separate constitutional basis, it seems established that determinations of congressional adjournment are an aspect of Congress' rulemaking authority. In fact, the power to determine internal congressional rules was noted as part of the authority for adopting an amendment to the adjournment statute. Accordingly, each or both chambers of Congress may decide the time or manner of adjournment through a one-house or two-house (concurrent) resolution, neither of which mandates compliance with the regular requirement of presentment of legislation to the President.

Moreover, Congress may utilize an existing adjournment statute to reconvene itself. In the absence of a congressional declaration of

342. The Constitution provides that "in Case of Disagreement between [both Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper." Id. art. II, § 3.
343. Id. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . .").
345. See, e.g., INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (noting that the congressional rulemaking authority is an exception to the general requirement that all legislation comply with the Presentment Clauses of the Constitution). For a discussion of the congressional rulemaking authority, see supra text accompanying notes 238-56.
346. This statute provides:
(a) Unless otherwise provided by the Congress, the two Houses shall —
   (1) adjourn sine die not later than July 31 of each year; or
   (2) in the case of an odd-numbered year, provide, not later than July 31 of such year, by concurrent resolution adopted in each House by roll-call vote, for the adjournment of the two Houses from that Friday in August which occurs at least thirty days before the first Monday in September (Labor Day) of such year to the second day after Labor Day.
(b) This section shall not be applicable in any year if on July 31 of such year a state of war exists pursuant to a declaration of war by the Congress.
war or "[u]nless otherwise provided by the Congress," the statute provides for sine die adjournment by July 31st in even-numbered years and for adjournment for more than one month until the second day after Labor Day during odd-numbered years. In the war powers context, and without a declaration of war, however, this statute would not allow Congress to consider a war powers report unless it so "otherwise provided."

In sum, there are ample constitutional and statutory bases for Congress to decide the manner and time of its adjournment. The only executive role is limited to resolving irreconcilable disputes over the time of adjournment between the Senate and the House.

2. Congressional Practice

A review of congressional practice is useful in construing the constitutional power to adjourn conditionally. As the Supreme Court has noted, "in determining . . . the existence of a power, weight shall be given to the usage itself — even when the validity of the practice is the subject of investigation." Justice Felix Frankfurter restated this proposition when he wrote:

The Constitution is a framework for Government. Therefore, the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to words of a text or supply them.

Prior congressional practice clearly establishes the reliance of Congress on its power to adjourn conditionally. It has become prevalent for Congress to adjourn sine die by concurrent resolution by providing designated congressional leaders with explicit authority to reassemble Congress upon the occurrence of some specified event or determination. Pursuant to these measures, Congress becomes ad-

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348. See supra note 342.
351. For an excellent review of the congressional adjournment practice during the past four decades, see R.S. Beth, Adjournment of Congress: Provisions for the Reassembly of Congress Contained in Concurrent Resolutions Providing for Adjournments, 1947-1987 (Mar. 12, 1987) [hereinafter Reassembly Study]. This report references every sine die adjournment or adjournment of more than three days adopted by
journeyed (at the end of a session or for more than three days) subject to the reassembly provision or "callback mechanism." In light of the regular usage of the conditional adjournment procedure, such provisions have been described as "common," and as "a proven formula" in the event of an emergency so the House and Senate could perform their constitutional responsibilities. However, it is difficult to glean from the record the rationale or necessity for adopting each conditional adjournment because such resolutions often come up under procedures where debate it not permitted.

A review of legislative adjournment custom and usage during the forty-year period between the 80th Congress and the beginning of the 100th Congress follows. This history will focus on the elements common to these resolutions, including the events triggering reassembly, the congressional leaders designated with authority to make the reassembly determination, the reassembly notification and adjournment "window" periods, and other pertinent matters. This review constitutes a representative snapshot of recent congressional practice and further establishes the prerogative of Congress to decide the manner of its adjournment, including the mechanism of a conditional adjournment.

concurrent resolution for the period from January 1947 to February 1987.

Dr. Beth noted from his review, "When an adjournment sine die is accompanied by reassembly provisions, it must be regarded as a conditional sine die adjournment: if the reassembly provisions are not used before the next session is scheduled to convene, the adjournment becomes a sine die adjournment." Id. at 3 (emphasis added).

(remarks of Sen. Min. Leader Byrd) (inquiring whether the pending adjournment resolution contains "the common provisions that have been put into such adjournment resolutions recently allowing the House and Senate to call themselves back").


See H.R. Rule XVI, cl. 4, reprinted in Jefferson's Manual, supra note 294, at 519-20 (stating that a motion to adjourn "shall be determined without debate"); S. Rule XXII, cl. 1, reprinted in Senate Manual, supra note 294, at 21 (also removing debate from an adjournment motion). See also 132 CONG. REC. H4322 (daily ed. June 26, 1986) (colloquy between Speaker pro tempore and Rep. Walker) (noting that an adjournment resolution is not debatable in the House); 131 CONG. REC. S16,134 (daily ed. Nov. 21, 1985) (remarks of Senate presiding officer) (stating that "[t]he adjournment resolution is not debatable"); 94 CONG. REC. 10,185 (1948) (remarks of Senate presiding officer) (noting that the adjournment resolution is not debatable in the Senate).

This survey of congressional adjournment resolutions is based on Dr. Beth's Reassembly Study, supra note 351, a study of such resolutions during four decades.
a. The Trigger for Reassembly

Numerous options for reassembly after adjournment avail themselves to Congress. For example, Congress might select as a reassembly trigger a particular event (e.g., completion of particular legislation)\(^3\) or it might delegate the reassembly decision exclusively to specified congressional leaders. Typically, the stipulated mechanism for reassembly has been phrased in broad discretionary terms. In 1947, 1948, 1973 through 1976, and 1983 through 1987, for example, the resolution to adjourn by a specified date was subject to the reassembling of Congress whenever in the opinion of the designated congressional leaders "the public interest shall warrant it."\(^4\) Twice,

\(^3\)See, e.g., H.R. Con. Res. 232, 96th Cong., 1st Sess., 125 CONG. REC. 37,601 (1979) (providing, *inter alia*, for Senate *sine die* adjournment "when the Senate completes action on the Act providing loan guarantees for the benefit of the Chrysler Corporation").

in 1970 and 1973, the adjournment resolutions provided that the specified congressional leaders could callback Congress upon their determination that "legislative expediency so warrants." Many of these resolutions have also regularly allowed the Majority Leaders or Minority Leaders of each respective chamber to request the reassembly of Congress "for the consideration of legislation." In 1979, the conditional adjournment resolution allowed the Speaker of the House and the Senate Majority Leader to convene their respective chambers or both houses upon the exercise of their discretion and without specification of any standard.

In a comparative sense, the effect of such expansively phrased triggers for reassembly essentially leaves congressional leaders with about as much substantial discretion as the President is constitutionally delegated for reconvening the Congress. Thus, there is very little

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distinction (if any) between the latitude in the executive branch “extraordinary Occasion” determination and the congressional decision to reassemble in “the public interest” or because of “legislative expediency.” While Congress could select a narrower standard, these broad triggers establish the custom and usage of Congress to delegate the reassembly decision substantially to the discretion of specified decision-makers.

b. The Determination to Reassemble

The congressional leaders given authority to jointly reassemble the Congress have normally been the same, but with some variation. Usually, the Speaker of the House and the Senate President pro tempore or Senate Majority Leader have been assigned this task, with some form of consultation with the minority party leaders. During the forty-year period under review, these designated decision-makers can be grouped into three general categories (with and without a consultive role for the minority). First, on three occasions in 1947 and 1948, the decision for reassembly was authorized by the joint action of the Speaker of the House, the President pro tempore of the Senate, and the Majority Leaders of the two chambers. Second, nineteen times from 1973 to 1976, the callback authority was delegated to the joint action of the Speaker of the House and the Senate President pro tempore, and, at the same time to the possible alternative joint request of the Majority Leaders of the two chambers or the Minority Leaders of both bodies. A similar mechanism was


used when the chambers were authorized to be reassembled respectively by either the Speaker of the House or the Senate President pro tempore or upon the joint written request of the Majority and Minority Leaders of the respective house.\textsuperscript{564}

Starting in 1979, the Senate President pro tempore was no longer designated a role in the reassembly of either the Senate or the Congress. This authority has since been assigned to the Senate Majority Leader. For example, this third modified form of delegation of the reassembly determination allowed for the convening of the two Houses or either of them upon determination by the Speaker of the House and/or the Senate Majority Leader after consultation with their respective Minority Leaders.\textsuperscript{366}

It is noteworthy that in contrast to earlier callback mechanisms, a greater obligation of consultation with minority party leaders has been imposed in recent years. For example, on four occasions, reassembly has been authorized subject to the Speaker of the House consulting first with the House Minority Leader, and the Senate Majority Leader, also first consulting with the Senate Minority Leader. Under the plain meaning of these resolutions, consultation need not involve concurrence; consultation merely entails meeting and conferring. After such consultation, the Speaker and the Senate Majority Leader, acting jointly, could then invoke the reassembly provision.\textsuperscript{366}

On one occasion, a joint resolution was used to postpone the convening of a second session of Congress by incorporating a similar reassembly trigger prior to the specified convening date.\textsuperscript{367} A similar

\textsuperscript{365} See H.R. Con. Res. 232, § 4, 96th Cong., 1st Sess., 125 Cong. Rec. 37,601 (1979) (providing, after \textit{sine die} adjournment, for the conditional convening of either or both chambers pursuant to the reassembly provision); 125 Cong. Rec. 37,317 (1979) (House adoption).


\textsuperscript{367} H.R. J. Res. 421, 98th Cong., 1st Sess., 129 Cong. Rec. S16,858 (daily ed. Nov. 18, 1983) (providing for the convening of the 98th Congress, 2d Session on Jan. 23, 1984 or pursuant to the reassembly provision); 129 Cong. Rec. H10,105 (daily ed. Nov. 16, 1983) (House adoption). According to Dr. Beth's study, "This is the only instance found [during the forty year period reviewed] in which a reassembly procedure was provided in a joint resolution." Reassembly Study, supra note 351, at 14 n.D.

The U.S. Const. amend. XX, § 2, enables Congress by law to set the date that a congressional session shall be convened. See supra note 335.
mechanism requiring prior consultation with the Minority Leaders of each chamber was used in 1986 without the requirement of joint action by the Speaker of the House and the Senate Majority Leader. While more recently a requirement that the Speaker of the House or the Senate Majority Leader consult with the Majority or Minority Leaders has been regularly imposed, this practice has not always been followed. For example, in 1983 the Speaker of the House and the Senate Majority Leader were authorized to reassemble their members without consultation. A modified version of the consultation requirement has been used eleven times, whereby the Speaker of the House and the Senate Majority Leader were required to act jointly in consulting with the House and Senate Minority Leaders prior to jointly reassembling the Congress.


Similar reassembly provisions have been followed when only one chamber has conditionally adjourned. Once, when only the House adjourned and the Senate remained in session, the Speaker of the House alone was given the authority to callback the House, and on another occasion the Speaker of the House was authorized to reassemble the House after consultation with the House Minority Leader. However, on one occasion the Senate adjourned without a callback mechanism while the Speaker of the House, after consultation with the Minority Leader, was afforded the power to reassemble the House.

c. Notification Period

Upon the callback by congressional leaders, a question arises over how much notification should be afforded for the members of Congress to reassemble. The answer has typically been explicitly spelled out in the adopted adjournment resolution. The earlier resolutions specified a three-day notification period, while the more

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373. See S. Con. Res. 1, § 2, 100th Cong., 1st Sess., 133 CONG. REC. H92 (daily ed. Jan. 6, 1987) (providing for adjournment of the Senate and House on Jan. 6, 7, 8 or 9, 1987 to Jan. 12, 1987 without a reassembly provision and for the adjournment of the House from Jan. 8, 1987 to Jan. 20, 1987 or pursuant to the reassembly provision); 133 CONG. REC. S101 (daily ed. Jan. 6, 1987) (Senate adoption). This result is most likely explained by the fact that the Senate adjourned for less than a week while the House adjourned for twelve days.

374. This form was utilized 4 times. See S. Con. Res. 33, § 1, 80th Cong., 1st Sess., 93 CONG. REC. 10,400, 10,521 (1947); H.R. Con. Res. 218, § 1, 80th Cong., 2d Sess., 94 CONG. REC. 9158 (1948); S. Con. Res. 63, § 1, 80th Cong., 2d Sess., 94 CONG. REC. 10,185 (1948); H.R. Con. Res. 689, § 1, 91st Cong., 2d Sess., 116 CONG. REC. 27,795 (1970).
recent resolutions have afforded two days notice.\textsuperscript{375} Once, each chamber was adjourned subject to the being called back upon twenty-four hours notice,\textsuperscript{376} and twice, no time period for notification was designated.\textsuperscript{377}


d. Adjournment "Window" Periods

An examination of common practice during the four decades under review indicates the amount of time Congress has adjourned. Between January 1947 and February 1987, there were thirty-five conditional adjournment resolutions containing reassembly provisions. The conditional adjournment resolutions have been used with greater frequency since 1973. Of the seven sine die (or end of the session) conditional adjournment resolutions during this span, one, (involving only the Senate) lasted two weeks,\(^3\) seven lasted about one month,\(^4\) another lasted two months,\(^5\) while still another lasted just under five months.\(^6\) Perhaps a better sense of past adjournment "window" periods is measured by the more than thirty non-conditional sine die adjournment resolutions between the 80th and 99th Congresses. Of the non-conditional adjournment resolutions concluding a session of Congress, seven lasted for adjournment periods of less than one month,\(^7\) five lasted about one month (or not less than three weeks),\(^8\) one lasted more than two months,\(^9\) six lasted less

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378. H.R. Con. Res. 232, 96th Cong., 1st Sess., 125 CONG. REC. 37,601 (1979) (conditional sine die adjournment of 14 days for the Senate). These periods in notes 378-89 are calculated on Dr. Beth's study which indicates the dates of adjournment and reconvening of the Congress during the 40 years reviewed. See Reassembly Study, supra note 351.


381. See S. Con. Res. 63, 80th Cong., 2d Sess., 94 CONG. REC. 10,185 (1948) (conditional adjournment of 146 days).


383. See H.R. Con. Res. 604, 90th Cong., 1st Sess., 113 CONG. REC. 37,114 (1967) (sine die adjournment for 31 days); 113 CONG. REC. 37,190 (1967) (House adoption); H.R. Con. Res. 475, 91st Cong., 1st Sess., 115 CONG. REC. 41,147 (1969) (sine die adjournment for
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than three months,\textsuperscript{388} six lasted more than three months,\textsuperscript{386} four lasted about four months,\textsuperscript{387} three lasted more than five months,\textsuperscript{388}

\textsuperscript{27} days); 115 CONG. REC. 40,981 (1969) (House adoption); H.R. Con. Res. 498, 92d Cong., 1st Sess., 117 CONG. REC. 47,656 (1971) (\textit{sine die} adjournment for 32 days); 117 CONG. REC. 47,676 (1971) (House adoption); H.R. Con. Res. 442, 95th Cong., 1st Sess., 123 CONG. REC. 39,132 (1977) (\textit{sine die} adjournment for 35 days); 123 CONG. REC. 38,948 (1977) (House adoption); S. Con. Res. 57, 97th Cong., 1st Sess., 127 CONG. REC. 31,850 (1981) (\textit{sine die} adjournment for 40 days); 127 CONG. REC. 32,114 (1981) (Senate adoption).

384. H.R. Con. Res. 148, 81st Cong., 1st Sess., 95 CONG. REC. 15,017 (1949) (\textit{sine die} adjournment for 76 days); 95 CONG. REC. 15,091 (1949) (House adoption).


386. See H.R. Con. Res. 171, 82d Cong., 1st Sess., 97 CONG. REC. 13,710 (1951) (\textit{sine die} adjournment for 80 days); 97 CONG. REC. 13,777 (1951) (House adoption); S. Con. Res. 55, 87th Cong., 1st Sess., 107 CONG. REC. 21,528 (1961) (\textit{sine die} adjournment for 105 days); 107 CONG. REC. 21,371 (1961) (Senate adoption); H.R. Con. Res. 584, 87th Cong., 2d Sess., 108 CONG. REC. 23,472 (1962) (\textit{sine die} adjournment for 88 days); 108 CONG. REC. 23,515 (1962) (House adoption); H.R. Con. Res. 371, 88th Cong., 2d Sess., 110 CONG. REC. 23,934 (1964) (\textit{sine die} adjournment for 93 days); 110 CONG. REC. 23,785 (1964) (House adoption); S. Con. Res. 211, 94th Cong., 2d Sess., 122 CONG. REC. 35,336 (1976) (\textit{sine die} adjournment for 95 days); 122 CONG. REC. 34,417 (1976) (House adoption); H.R. Con. Res. 760, 95th Cong., 2d Sess., 124 CONG. REC. 38,642 (1978) (\textit{sine die} adjournment for 92 days); 124 CONG. REC. 38,081 (1978) (Senate adoption). See also H.R. Con. Res. 266, 83d Cong., 2d Sess., 100 CONG. REC. 15,554 (1954) (\textit{sine die} adjournment for the House for 138 days and for the Senate for 34 days); 100 CONG. REC. 15,414 (1954) (Senate adoption); S. Res. 331, 83d Cong., 2d Sess., 100 CONG. REC. 16,142 (1954) (providing for Senate adjournment from Nov. 18, 1954 to Nov. 29, 1954); 100 CONG. REC. 16,401 (1954) (Senate adjournment by unanimous consent adjourning \textit{sine die} after Dec. 2, 1954).

387. H.R. Con. Res. 229, 85th Cong., 1st Sess., 103 CONG. REC. 16,734 (1957) (\textit{sine die} adjournment for 130 days); 103 CONG. REC. 16,759 (1957) (House adoption); S. Con. Res. 123, 85th Cong., 2d Sess., 104 CONG. REC. 19,711-12 (1958) (\textit{sine die} adjournment for 136 days); 104 CONG. REC. 19,554 (1958) (Senate adoption); H.R. Con. Res. 440, 86th Cong., 1st Sess., 105 CONG. REC. 19,746 (1959) (\textit{sine die} adjournment for 114 days); 105 CONG. REC. 19,682 (1959) (Senate adoption); H.R. Con. Res. 745, 86th Cong., 2d Sess., 106 CONG. REC. 19,030 (1960) (\textit{sine die} adjournment for 124 days); 106 CONG. REC. 19,128 (1960) (House adoption).

388. S. Con. Res. 53, 83d Cong., 1st Sess., 99 CONG. REC. 11,153 (1953) (\textit{sine die} adjournment for 156 days); 99 CONG. REC. 10,968 (1953) (Senate adoption); S. Con. Res. 57, 84th Cong., 1st Sess., 101 CONG. REC. 13,062 (1955) (\textit{sine die} adjournment for 154 days); 101 CONG. REC. 12,858 (1955) (Senate adoption); H.R. Con. Res. 276, 84th Cong., 2d Sess., 102 CONG. REC. 15,129 (1956) (\textit{sine die} adjournment for 160 days); 102 CONG. REC. 15,267 (1956) (House adoption).
and one lasted six months.\textsuperscript{389}

Predictably, the conditional intrasession adjournment periods typically involved shorter periods, usually of only about a week or two, but sometimes longer. This duration also approximates the periods of non-conditional intrasession adjournment resolutions.

In the absence of some reassembly provision, had the War Powers Resolution been enacted at any time during this forty-year period, this survey provides a guide on the span of time Congress might have been foreclosed from exercising its “collective judgment” on war powers matters.

e. Receiving Reports During Congressional Adjournment

Some adjournment resolutions have also made explicit provision for the Congress to be able to receive specified documents or reports during the period of adjournment. For example, some resolutions have allowed “the Secretary of the Senate and the Clerk of the House, respectively, . . . to receive messages, including veto messages, from the President of the United States.”\textsuperscript{390} (For reasons that could not be ascertained from the record, this authorization, however, has not been provided in more recent resolutions.) The War Powers Resolution similarly allowed for the receipt of transmitted presidential war powers reports during a congressional adjournment.\textsuperscript{391}
C. **Congressional Authority for Conditional Adjournment**

Although authority to adjourn conditionally is well within the realm of Congress' adjournment and rulemaking authority, the experience of the last forty years clearly establishes the congressional practice of utilizing this conditional power as a means of ensuring that Congress could be called back *sua sponte* if necessary after adjournment. In exercising its power to conditionally adjourn, Congress has utilized a variety of reassembly mechanisms, including the delegation of such power to certain congressional leaders (with or without a requirement of consultation with the minority party), and has adjourned for varying spans of time. Accordingly, Congress may wish to tailor future adjournment resolutions with similar reassembly provisions to its institutional need to consider potential war powers reports or legislation.

D. **The Hostilities Act Proposal: H.R. 3912, Section 7**

One recent war powers reform measure, introduced by Congressman Daniel E. Lungren, draws upon the congressional adjournment practice in order to allow for the reassembly of Congress to consider specified "hostilities" legislation or a war powers report submitted by the President. The section-by-section analysis accompanying this measure describes the justification for this mechanism:

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392. Section 7 of H.R. 3912 provides:

(a) Reconvening — Whenever the two Houses of Congress have adjourned pursuant to a concurrent resolution providing for an adjournment sine die or for more than 3 days to a day certain, the two Houses of Congress shall stand in adjournment pursuant to the provisions of that resolution unless the members are notified to reassemble pursuant to subsection (b).

(b) Conditions for Reconvening — The Speaker of the House of Representatives and the Majority Leader of the Senate shall notify the Members of the House and the Senate, respectively, to reassemble —

(1) for the consideration of a bill or joint resolution described in section 5(a) ["hostilities" legislation], regardless of whether such a bill or joint resolution has been introduced; or

(2) for the consideration of a [war powers] report submitted pursuant to section 4(a) and for the taking of appropriate action with respect to the matters described in that report; if either (A) the Speaker and the Majority Leader of the Senate, after consultation with the Minority Leader of their respective Houses, deem the reconvening of Congress for that purpose to be appropriate, or (B) the Speaker and the Majority Leader of the Senate are each petitioned by at least 40 percent of the membership of their respective Houses to reconvene the Congress for that purpose.

Because it is often impossible to foresee whether it may be necessary for Congress to be reassembled to exercise its war powers after it has adjourned \textit{sine die} or to a date certain, section 7 would preserve this ability of Congress to reassemble itself on its own motion as an exercise of Congress' adjournment authority.\footnote{393. 134 CONG. REC. H259 (daily ed. Feb. 4, 1988) (emphasis added). See also \textit{id.} at H249 (remarks of Rep. Lungren) (stating that section 7 "is an important addition in the war powers area because it ensures that Congress will never be foreclosed from exercising its constitutional war powers when such occasion may have been unforeseeable at the time of adjournment").}

Two procedures are employed under the proposed Hostilities Act. First, consistent with current congressional adjournment resolution practice, the Speaker of the House and the Senate Majority Leader may reassemble the Congress after consultation with their Minority Leaders. This conforms with the most recent adjournment procedure authorizing the Senate Majority Leader, rather than the Senate President pro tempore, as provided under the War Powers Resolution.\footnote{394. \textit{id.} at H258-59 (section-by-section analysis). For a discussion of this recent change in practice, see \textit{supra} text accompanying note 365.} The second callback mechanism is patterned in part upon the War Powers Resolution, which allows thirty percent of each chamber to petition the House Speaker and Senate President pro tempore to merely \textit{request} the President to convene the Congress pursuant to his constitutional authority.\footnote{395. For a reproduction of section 5(a) of the War Powers Resolution, see \textit{supra} note 338.} Instead, section 7 of the Hostilities Act legislation \textit{requires} the Speaker and Senate Majority Leader to reassemble the Congress after forty percent of each chamber has presented a reassembly petition. This forty percent threshold is the same as other provisions in the bill mandating the use of expedited provisions.\footnote{396. See H.R. 3912, \S\S 5(a), 5(d)(1)(A), 100th Cong., 2d Sess., 134 CONG. REC. H256, H257 (daily ed. Feb. 4, 1988) (providing that legislation to limit the use of armed forces receiving co-sponsorship by forty percent or more of a House is subject to specified expedited procedures for consideration). For a discussion of the operation of these expedited procedures under this measure, see \textit{infra} text accompanying notes 446-52.}

Two objectives are served by this legislation. First, the reassembly determination is left in the hands of the legislative leaders. In contrast to the War Powers Resolution, which only acknowledges the executive authority to reconvene Congress "on extraordinary Occasion," the Hostilities Act proposal is predicated on Congress' clear constitutional authority to adjourn conditionally. The provision also
mandates consultation with the minority party leaders of the House and the Senate, which also comports with recent adjournment practice. The second purpose of this procedure is to provide for reassembly in the face of a recalcitrant leadership upon some sufficient threshold level of congressional sentiment to do so. If forty percent of the membership in each chamber desire the Congress be reassembled to consider war powers legislation or a report, then the congressional leadership should not deny the will of such a substantial number of members of Congress. The forty percent threshold strikes a balance between competing ends. On the one hand, the congressional leadership is put on notice of growing congressional will on a particular war powers matter. On the other hand, a threshold established too low has the potential of usurping the authority of congressional leaders. For example, a political minority of twenty or thirty percent should not control the determination of whether Congress is to be reassembled. It is noteworthy that a thirty percent level was used in the War Powers Resolution. However, the attainment of this level in the Resolution only mandates a petition be submitted and does not automatically trigger the reassembly of Congress as it would under the proposed bill. The forty percent level requirement also establishes a vehicle for informing the President of substantial legislative concern over a pending hostilities situation.

While the Hostilities Act legislation does not specify a particular notification period, prior practice suggests that Congress should use a short period, such as twenty-four hours, given the unforeseeable nature of war powers matters and in order to provide for immediate reassembly. Alternatively, the notification period could be left to the determination of the designated leaders.

Because the proposed language of the Hostilities Act proposal applies to any adjournment of Congress longer than three days (which would require, under the Constitution, the consent of both the Senate and the House), it is unnecessary to include the conditional boilerplate language in each adjournment resolution in order to preserve the possible consideration of war powers legislation or report. Thus, under the Hostilities Act provision, “Congress shall stand in adjournment pursuant to the provisions of [any] adjournment resolution unless the terms of section 7[] become operative.”

397. See supra text accompanying notes 366-73.
398. See supra text accompanying note 341.
E. Some Reassembly Conclusions

While the authors of the War Powers Resolution believed that reconvening Congress was only possible through the discretionary exercise of executive authority, this article suggests to current war power reformers that Congress has constitutional authority to retain the legislative key by which it may be reassembled after adjournment. By the inclusion of an appropriate reassembly provision in any war powers reform measure, Congress can ensure that it will never be foreclosed from exercising its constitutional war powers authority after adjournment and that it can *sua sponte* be reassembled. This capacity is essential given the unforeseen necessity of such exercise and if Congress is to at all times be able to proffer its “collective judgment” on war powers matters. While it may be assumed that the President would likely reconvene Congress pursuant to his authority under the Constitution, given the divided nature of the war powers, each branch should retain the ability to exercise its respective constitutional authority to its fullest potential.

IX. Expedited Procedures for Legislative Consideration

A. Overview

One ripe area in which Congress may improve its involvement in war powers matters is through the adoption of expedited procedures for the consideration of war powers legislation. Such procedures, enacted pursuant to the congressional rulemaking authority, would give certain legislation priority or privileged status for consideration in each house upon the occurrence of some contingent event. Such provisions have already been enacted in other legislative areas, including the Congressional Budget and Impoundment Control Act, the so-called “Gramm-Rudman-Hollings” Act, the National Emergencies Act, and the Energy Policy Act to name but a few.

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400. For a discussion of this constitutional authority, see supra text accompanying notes 239-54.
405. For a listing of statutes containing expedited procedures and their frequency of use
Because legislative fast-track provisions represent a departure from the standard, deliberative manner of congressional consideration, it should preliminarily be recognized that expedited procedures are not without their tradeoffs. In fact, in enacting any such reforms in the war powers area, Congress must cautiously balance the benefits against the burdens. Depending on how these provisions are designed, the congressional leadership, majority party, and committees of jurisdiction may each lose some degree of existing control over the timing and substance of legislation subject to the fact-track procedures. Illustratively, the leadership may lose some power over the scheduling or packaging of subject legislation as a result of mandatory time periods for consideration or limitations on amendments. A designated minority might derive greater influence in bringing legislation to the floor for a vote. Further, a committee might be deprived of jurisdiction through some discharge process unless the committee affirmatively acts prior to a specified deadline.

Another concern is that the priority provisions, in commencing a timed sequence of events, might be too rigid under certain circumstances, thereby unintentionally eliminating flexibility in some unforeseeable situations. The point, in sum, is that a variety of expedited provisions are available. Each type must be justifiable, in light of the period of 1975 to 1983, see *Legislative Veto After Chadha: Hearings Before the House Comm. on Rules, 98th Cong., 2d Sess. 704-05 (1984) [hereinafter 1984 House Rules Comm. Hearings] (prepared by Roger Davidson, Senior Specialist in American National Government and Public Administration, Congressional Research Service).

406 For an excellent discussion and overview of the tradeoffs involved in the adoption of expedited procedures, see *id.* at 674-89 (statement of Dr. Stanley Bach, Congressional Research Service).

407 Dr. Bach has identified at least five variables affecting a congressional vote on legislation:

Whether or when the House or Senate votes on a measure usually depends on (1) agenda decisions made by the committee of jurisdiction, (2) the schedule set by the committee in light of competing demands for its attention, (3) action by the House Rules Committee in reporting a special rule for consideration by the House (unless the measure is called up under suspension of the rules), and the prospects for limiting debate by unanimous consent in the Senate, (4) floor scheduling decisions usually made by the majority party leadership in cooperation with the appropriate committee leaders, and (5) the interest of members in debating and amending the measure.

*Id.* at 689. These are the primary variables, *inter alia*, that expedited procedures may modify or otherwise affect in providing for prompt congressional consideration.

408 However, this problem may be alleviated to some degree by provision of appropriate "escape" clauses allowing a majority in either house to vote to deviate from the expedited provisions. The drawback, however, is that the House may have to vote on an issue which it may not have otherwise.

For a discussion of the "escape" clauses within the War Powers Resolution, see *infra* note 423 and text accompanying notes 432-33.
of its drawbacks, for the unique situation to which is to be applied.

The ultimate objective of such procedures is to provide for a timely floor vote on specified matters without undue legislative delay or diversion. In accomplishing this aim, one senior legislative specialist, Dr. Stanley Bach of the Government Affairs Division of the Congressional Research Service, has noted that five elements are necessary for effective expedited procedures. Under his model, these provisions should:

(1) set a time limit for the committee of jurisdiction to report;

(2) provide for automatic discharge or a privileged motion to discharge, with no debate or limited debate, if the committee fails to report;

(3) make the resolution privileged for floor consideration, either immediately or after a brief layover period, whether the resolution has been reported or the committee has been discharged;

(4) prohibit amendments, including committee amendments, and impose stringent time limits on debate during floor consideration of the resolution; and

(5) provide for prompt floor consideration and little or no debate on an identical companion resolution from the other chamber (if each chamber has acted initially on its own measure).

In contemplating the applicability of expedited procedures, the role of political will and legislative inaction must be taken into account. It is generally accepted that "when Congress wants to act, it can do so through its own internal rules; it does not need to have expedited procedures in statute, and the fact that they are in statute does not mean that they will be used." With isolated exception, all congressional decisions are the product of political will, not a mandatory legislative time table for action. Therefore, expedited provisions may be superfluous where political will already drives legislation and a hindrance where these procedures try to force an unwilling Congress to vote on an issue it otherwise wishes to avoid. While such provisions have their proper time and place and must be

409. 1984 House Rules Comm. Hearings, supra note 405, at 678. These requirements are imposed to provide for three objectives ensuring an opportunity for a vote: "(1) that the resolution cannot be blocked or delayed unduly in committee, (2) that the resolution, whether or not reported from committee, can reach the floor promptly for consideration, and (3) that a final floor vote within the time permitted cannot be prevented through delay." 1984 House Rules Comm. Hearings, supra note 405, at 678.

enacted carefully, they may prove integral under war powers circumstances.

The utility of legislative inaction must also be recognized as an important screening device for unwanted or ineffective proposals.\textsuperscript{411} Generally, legislative inaction may be the result of considered judgment, leading to the termination of a proposal. However, as Dr. Bach has noted, inaction under expedited procedures has an opposite consequence, as those in power—the leadership, the majority party, or committee—may lose some measure of control over a legislative proposal by their failure to act.\textsuperscript{412} Effective expedited procedures must therefore preclude legislative inaction at the various points in the legislative process it can be employed. This is the essential premise underlying the five-part Bach model.\textsuperscript{413}

Notwithstanding the potential tradeoffs, carefully tailored expedited provisions might bring about legislative efficiencies otherwise unachievable in their absence. This article proposes that fast-track provisions are put to their best use only when applied to those measures toward which a substantial congressional sentiment has already been demonstrated. Through properly balanced and carefully created procedures in the war powers context, for example, Congress will: (1) become a more active participant in matters concerning the involvement of United States troops in hostilities by ensuring expeditious action; (2) send a signal to the executive branch, once the procedures are invoked, that the Congress will seriously consider and act upon the triggered legislation, thereby promoting dialogue between the branches on the specifics of the proposal; and (3) assure a floor vote on war powers legislation within a short time after the priority provisions are invoked, thereby avoiding potential detours or delay

\textsuperscript{411} Dr. Louis Fisher remarked, "Inaction is used routinely and responsibly by all three branches of government: executive, legislative, and judicial." \textit{1984 House Rules Comm. Hearings, supra} note 405, at 648. Dr. Stanley Bach noted the valuable function of committee inaction commending "the service they perform by doing nothing — by deciding not to act, as they screen and filter the thousands of measures that are introduced every Congress." \textit{1984 House Rules Comm. Hearings, supra} note 405, at 674. Dr. Bach commented further, "The agenda control of the majority leadership is more effective as a negative than as an affirmative power; as a general matter, these leaders in either chamber are better able to prevent consideration of measures they oppose than to secure consideration of measures they support." \textit{1984 House Rules Comm. Hearings, supra} note 405, at 683.

\textsuperscript{412} \textit{1984 House Rules Comm. Hearings, supra} note 405, at 681 (statement of Dr. Stanley Bach).

\textsuperscript{413} In Dr. Bach's words, "[T]he absence in any set of [expedited] procedures of one or more of the elements [in the model] jeopardizes the utility of the procedures by leaving open some significant opportunity for inaction or delay." \textit{1984 House Rules Comm. Hearings, supra} note 405, at 688.
within the legislative branch. After a review of the expedited provisions in the War Powers Resolution, this article will explore specific proposals giving Congress, through its constitutional rulemaking authority, a more effective means for considering war powers issues.

B. Existing Law

The War Powers Resolution contains some rudimentary priority procedures for the consideration of a joint or concurrent resolution introduced pursuant to that statute.414 A review of the legislative history illustrates the necessity for such provisions in the war powers context, as perceived by Congress during consideration of the War Powers Resolution. The Senate committee wished to ensure that control would remain "in the hands of the majority" and to "safeguard against the possibility that Congressional action with respect to such measures could be obstructed or [d]elayed through a filibus-
ter or committee pigeonholing."415 The House committee also expressed an interest in adopting "'antifilibuster' provisions" and establishing "the status of relevant legislation as 'privileged motions.'"416 The need to prevent a Senate filibuster,417 and to deter a committee from bottling-up a measure from floor consideration were also matters of concern frequently echoed by members during

414. See 50 U.S.C. § 1545 (1982) (concerning bills or joint resolutions introduced pursuant to section 1544(b)); id. § 1546 (concerning concurrent resolutions introduced pursuant to section 1544(c)); id. § 1546(a) (concerning Senate consideration of measures requiring the removal of United States Armed Forces engaged in hostilities).
417. For example, committee member Representative Mailliard commented:
I do not anticipate any problem, frankly, under the rules of the House, but I am a little concerned about the rules of the other body where such a resolution could be filibustered if a few of the Members of the other body were of a mind to do so.

119 CONG. REC. 24,656 (1973). Representative White expressed his concern of "a filibuster in the Senate during a hostility in which our troops were engaged by the action of the President, which would continue because of such a procedural tie up." Id. at 24,667. In response to such a concern, Senator Javits remarked that priority procedures provide "a safeguard against the possibility that congressional action with respect to such measures could be obstructed or delayed through a filibuster." Id. at 24,542.

Further, during the veto override debate, Representative Brown noted his concern that the bill does not "preclude[] the operation of the [Senate] rules . . . which require a two-thirds vote for cloture," giving "one-third of the Members of the [Senate not only power to] subvert the will of even a unanimous House, but also the will of just less than two-thirds of the [Senate]." Id. at 36,212.
the 1973 debate.\textsuperscript{418}

With these objectives in mind, priority procedures were established under the War Powers Resolution for the consideration of legislation introduced pursuant to section 5(b) (mandating the automatic removal of United States Armed Forces after sixty days in the absence of specified congressional or presidential action),\textsuperscript{419} similar to those established under section 5(c) (providing a concurrent resolution mechanism for the removal of United States Armed Forces within the first sixty days of their introduction into hostilities).\textsuperscript{420}

Four stages are anticipated under the two priority provisions in the statute: (1) committee referral upon the introduction of war powers legislation, (2) chamber priority consideration of the legislation, (3) the referral of approved legislation to the other chamber, and (4) conference report consideration. Notably, a low invocation threshold triggers the expedited procedure as only one member of the House or Senate need introduce war powers legislation in order to commence the process of priority consideration.\textsuperscript{421} Thus, there is no initial re-

\textsuperscript{418} Committee member Representative Mailliard remarked that without a priority procedure, "a committee that may not have the same view that the House as a whole has, could button up a measure that might disapprove the President's action." Id. at 24,673. Fellow committee member Representative Bingham also remarked that a provision must be made for "adequate consideration" by the committee. Id. Similarly, Senator Javits commented that priority procedures prevent "committee pigeonholing." Id. at 24,542.

\textsuperscript{419} 50 U.S.C. § 1544(b) (1982). For the full text of this section, see supra note 80.

\textsuperscript{420} 50 U.S.C. § 1544(c) (1982). For the full text of this section, see supra note 261.

\textsuperscript{421} 50 U.S.C. § 1545(a) (1982) (providing congressional priority procedures for "[a]ny joint resolution or bill introduced pursuant to" section 5(b)) (emphasis added); id. § 1546(a) (providing congressional priority procedures for "[a]ny concurrent resolution introduced pursuant to" section 5(c)) (emphasis added).

The virtues of this low threshold trigger were repeatedly touted during the congressional debate. For example, subcommittee chairman Representative Zablocki remarked that "[i]t takes only 1 member out of 535 Members of the House or Senate to trigger the mechanism that requires that both bodies eventually are called upon to take an 'up or down' vote." 119 CONG. REC. 24,654 (1973). Similarly, committee member Representative Fountain observed, "After all, it takes only one Member of either body — 1 out of 535 — to drop in such a bill or resolution of support for the President," id. at 21,213, and committee member Representative Whalen stated that "[f]or section 5 to become operative all that is required is the submission of a bill or resolution by only 1 of the 535 Members of the House and Senate." Id. at 33,862 (conference report debate).

Committee member Representative Fascell contrasted the House committee bill allowing one member to trigger the priority provisions with Representative Regula's substitute amendment requiring one-third House co-sponsorship in order to trigger such procedures. Id. at 24,673. Committee member Representative Biester noted that "any Member may take advantage of the priority procedures through the introduction of a concurrent resolution." Id. at 24,696. During the conference report debate, Representative Zablocki observed, "The conference agreement retains the important feature of [the House bill] that legislation approving the President's action can be introduced by a single Member of either House and that once introduced it must be considered on a privileged basis." Id. at 33,859. Likewise, Representative...
requirement of demonstrating a wide base of legislative support for a specific legislative proposal. Under the Resolution, "any" member, including one affiliated with the party in opposition to the President or outside the mainstream of the majority or minority parties, can trigger these provisions.

Upon the introduction of "any" section 5(b) or 5(c) legislation, the Resolution first mandates referral of such measures to the House Committee on Foreign Affairs or the Senate Committee on Foreign Relations. The committees are then required to report out legislation within a specified number of calendar days, unless either house decides to modify the priority procedure. While both the House and Senate versions of the War Powers Resolution contained priority procedures, the Senate proposal, which also would have required that one-third of the members first co-sponsor the measure, would have bypassed committee consideration by allowing "any pertinent bill or joint resolution . . . to be considered as reported directly to the floor of the House in question unless otherwise decided by the yeas and nays." This approach was rejected by the conference committee in favor of the House procedure, thereby assuring preliminary committee consideration of all section 5 legislation.

Second, the war powers legislation reported out of committee becomes "the pending business of the House in question . . . and shall be voted on within three calendar days thereafter." Again, either house can alter this requirement by majority vote. Third,

Findley remarked that "any Member in this body who has the will can introduce a resolution of support for the President's policy and be assured that it will be dealt with on an up or down vote at some stage within the period provided." Id. at 33,861. Commenting further on the contents of the bill, Representative Bingham remarked during the veto override debate, "[T]he bill contains elaborate filibuster-proof provisions so that, once a resolution is introduced by any Member, it must be brought to a vote within the required time." Id. at 36,209.

422. The period to report for section 5(b) legislation is calculated by counting back from the 60-day period for automatic removal of military forces, while the time for a committee to report out a bill introduced under section 5(c) is a specified number of days. See 50 U.S.C. § 1545(a) (1982) (requiring committee action "not later than twenty-four calendar days before the expiration of the sixty-day period specified" under section 5(b)); id. § 1546(a) (requiring committee action "within fifteen calendar days" after introduction and committee referral of section 5(c) legislation).

423. Id. § 1545(a) (providing congressional priority procedures for section 5(b) legislation "unless such House shall otherwise determine by the yeas and nays"); id. § 1546(a) (providing congressional priority procedures for section 5(c) legislation "unless such House shall otherwise determine by the yeas and nays"). This "escape" clause was added in the conference report. See H.R. REP. NO. 547, 93d Cong., 1st Sess. 9 (1973).

424. Id.

425. 50 U.S.C. §§ 1545(b), 1546(b) (1982).

426. Id.
upon the passage by one chamber of either section 5(b) or 5(c) legislation, the Resolution mandates referral of such legislation to the other body. The legislation must be reported out by committee within a specified time period and then becomes the pending business of that house to be voted upon within three days. Under these provisions, unlike the standard manner of legislative consideration, the consequence of approval by one chamber mandates consideration by the committee and body of the other house. However, this procedure may be avoided by majority vote. Finally, where the two houses are in disagreement over war powers legislation passed under either section 5(b) or 5(c), the Resolution provides for the appointment of conferees who must report back within a specified period of time. Where such disagreement is not reconcilable within forty-eight hours, no mechanism for resolution is provided. In that case, the conferees shall report back to their respective Houses in disagreement. Of note, an “escape” clause allows each house either to depart from or to utilize an alternative procedure by the recording of a majority vote at any juncture. Accordingly, at all times the procedural means for consideration of war powers legislation is “in the hands of the majority.” The Multinational Force in Lebanon Resolution adopted priority procedures patterned on section 5(c) of

427. Id. § 1545(c) (requiring that section 5(b) legislation “shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period”); id. § 1546(c) (requiring that section 5(c) measures “shall be reported out by such committee together with its recommendations within fifteen calendar days”).

428. Id. §§ 1545(c), 1546(c).

429. Id.

430. Id. § 1545(d) (requiring that “the committee of conference shall make and file a report with respect to [section 5(b) legislation] not later than four calendar days before the expiration of the sixty-day period”); id. § 1546(d) (requiring that “the committee of conference shall make and file a report with respect to [section 5(c) legislation] within six calendar days after the legislation is referred to the committee of conference”). This provision concerning conference report action was added by the conferees to the War Powers Resolution. See H.R. REP. No. 547, 93d Cong., 1st Sess. 9 (1973).

431. 50 U.S.C. §§ 1545(d), 1546(d) (1982).

432. Id. §§ 1545, 1546 (1982) (qualifying the explicit priority procedures with the language “unless such House shall otherwise determine by the yeas and nays”). See also 119 Cong. Rec. 24,542 (1973) (remarks of Sen. Javits) (noting that in the Senate version “the respective Houses of Congress can modify the priority consideration provisions by majority vote”). As “escape” clause examples, Senator Javits noted that a house may wish to “direct[] a committee to hold hearings and report back by a certain date.” Id.

433. 119 Cong. Rec. 24,542 (1973) (remarks of Sen. Javits). See also id. at 33,550 (conference report debate) (remarks of Sen. Javits) (“[I]t is provided that either body can modify the mandated procedure at any stage by yea and nay vote. This is included to assure full flexibility to the Congress.”).
the War Powers Resolution.434

A separate procedure, added by amendment in 1983, pertains to legislation mandating "the removal of United States Armed Forces engaged in hostilities outside the territory of the United States, its possessions and territories, without a declaration of war or specific statutory authorization."435 Such legislation only applies to the Senate and conforms the manner of consideration of such legislation to the International Security Assistance and Arms Control Act of 1976, section 601(b),436 which includes, **inter alia**, time limits on debate and a committee discharge requirement when the committee has not timely reported out a measure.

In comparison to other expedited procedures, the War Powers Resolution provisions are not complex or burdensome. However, some omissions and other matters deserve reform, or at least clarification. This becomes apparent after evaluating the priority procedures under the Bach model.437 For example, although the statute requires the committee to report out war powers legislation within a specified period of time, there exists no enforcement mechanism for a disobedient or recalcitrant committee, such as a discharge or privilege motion procedure allowing a floor member to automatically bring up the measure for consideration. The War Powers Resolution procedures also do not expressly make the reported legislation privileged. Instead, the measure becomes the pending business of the chamber and must then be voted upon within three calendar days. It is therefore possible that after becoming the pending business of the particular house, the bill might not be fully or adequately considered. Other than the requirement for a vote within three days and that the time in the Senate shall be equally divided, there are no limitations on amendments or floor debate. Thus, the second, third, and fourth elements of the Bach model are not accounted for in the priority procedures of the War Powers Resolution. It is therefore

437. See supra text accompanying note 407.
questionable whether the original objective of precluding delay or filibuster is attainable under current law.

Some features of the War Powers Resolution priority provisions require explication of their operation. For example, it is not clear how the "escape" clause operates. Can any member request a vote to depart from the priority procedures at any time? Can such a vote be requested during committee consideration or floor debate? Further, it is possible that a conference report may be subjected to a filibuster since no limits on conference report time or amendments are authorized. Perhaps consideration should also be given to extending these fast-track procedures (including a specified number of hours of debate) to deliberation on the overturning of a possible presidential veto of war powers legislation. Finally, Congress might wish to review the threshold requirement for invoking these procedures, since under current law the mere introduction of war powers legislation has the effect of requiring immediate committee and floor action, in the absence of an affirmative vote under the "escape" clause.

C. Alternative 1973 Debate Proposals

In considering reform of the priority procedures, it is useful to consider some of the other proposals introduced during the 1973 war powers debate. The Senate approved bill, for example, contained expedited provisions that would not be triggered unless "sponsored or cosponsored by one-third of the members of the House of Congress in which it [was] introduced." A similar provision was offered as a substitute amendment in the House of Representatives by Congressman Regula. However, this proposal was criticized in the House on two grounds. First, some believed it required too many members to invoke the expedited procedures, as contrasted with the one-member trigger in the House committee bill. Second, it did not provide sufficient time for committee consideration, since the proposal required floor consideration one day after introduction if cosponsored by one-third of the members of the chamber, unless determined otherwise by a majority. The amendment was defeated in the House and the proposal did not survive conference committee

439. 119 CONG. REC. 24,672 (1973).
440. Id. at 24,673 (remarks of Rep. Fascell).
441. Id. (remarks of Rep. Bingham).
442. Id. at 24,672 (remarks of Rep. Regula).
443. Id. at 24,676.
action.  

In a separate proposal, Senator Griffin introduced a war powers amendment triggering legislative consideration of either a funding prohibition bill or a bill approving executive action, both within five days after a war powers report was submitted by the President.  

This amendment also specified the periods for committee and chamber action, the time allowed for debate, the manner of consideration of legislation referred from the other body, and conference committee consideration.

D. Some Current Reform Proposals

Given the existing operation of priority procedures under the War Powers Resolution, it is useful to consider some reform suggestions that might improve the congressional process of debating war powers measures.

1. The Hostilities Act Proposal: H.R. 3912, Sections 5(a)-(k)

   a. Threshold Trigger

   Compared with the War Powers Resolution, in which "any" legislation introduced pursuant to section 5(b) or 5(c) receives priority consideration, a relatively more stringent trigger to commence the fast-track process is advocated under the reform proposal embodied within H.R. 3912. The standard procedure for legislative consideration (including potential committee inaction, hearings, or markup of legislation) prevails under this proposal until "actual" or "imminent" hostilities legislation is cosponsored by forty percent of the members of either house. The attainment of this cosponsorship threshold then commences the specified priority procedures. Normally this forty percent requirement translates into 174 members in the House and forty Senators, barring any absentees.

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446. See supra note 421.
447. Under H.R. 3912, there are three forms of hostilities legislation: actual, imminent, or potential. A forty percent threshold trigger is used for the first two forms, while a fifty percent level is utilized for potential hostilities. H.R. 3912, 100th Cong., 2d Sess., §§ 5(d)(1)(A) (forty percent), 5(d)(1)(B) (fifty percent), 134 CONG. REC. H251 (daily ed. Feb. 4, 1988). Only voting members of Congress are counted toward the forty percent or fifty percent calculation. See id. § 5(k).

For a discussion of these three forms of hostilities legislation under the proposal, see supra notes 230-32.
In a comparative sense, the forty percent threshold may be con-
sidered “modest” when contrasted with the “any” member trigger
under the War Powers Resolution.\textsuperscript{448} However, the higher threshold
under H.R. 3912 advances several functions, unobtainable under the
current War Powers Resolution mechanism. First, it forces members
of Congress to cosponsor war powers legislation in order to start the
priority procedures. Instead of allowing only one or a few members
to call for action, the focus is placed on the level of overall congres-
sional support for a specific legislative proposal. After all, the ut-
imate measure of success is whether a particular bill can garner suffi-
cient support to be passed and be sent to the President for review.
Under this approach, it is possible that competing bills, introduced
by members of opposing congressional factions, will vie for expedited
consideration. Of course, prior to attainment of the forty percent co-
sponsorship level, the traditional manner of committee consideration
is preserved and followed.

Second, by highlighting specific legislative measures, the co-
sponsorship trigger signals to the executive branch that there is in-
creasing congressional sentiment on a specific war powers position.
Accordingly, an atmosphere is established in which, in the face of a
potential legislative-executive branch confrontation, accommodation
and compromise alternatives may be explored, thus promoting com-
ity between the branches. Under current procedure, although a sub-
stantial level of co-sponsorship informs the President of significant
congressional sentiment on a war powers issue, it does not invoke the
important timing requirements that normally bring legislation to a
congressional vote.

Third, the forty percent requirement recognizes that Congress
only acts affirmatively when there is sufficient political will. Expe-
dited provisions are ineffectual when they attempt to \textit{force} political
will on a particular issue, instead of when used as an indicator or
measure of such political will. In contrast, the one-member threshold
under the War Powers Resolution may or may not have the support
of a considerable number of members. Why should the House or
Senate go through the exercise of expedited consideration of legisla-
tion if the requisite votes will ultimately be lacking? Under these
circumstances, why should either house be forced to disengage the
priority procedures under the “escape” clause? For these reasons,

\textsuperscript{448} See 134 Cong. Rec. H257 (daily ed. Feb. 4, 1988) (section-by-section analysis of
H.R. 3912) (comparison of the relative modesty of the H.R. 3912 expedited procedure trigger
to that of the War Powers Resolution).
the proposed expedited process is contingent on an initial showing of substantial support. As the Supreme Court noted on one occasion:

The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole; and the question which has over and over again been raised is, what is necessary to constitute the official action of this legislative and representative body.\textsuperscript{449}

The central problem in this debate is determining the threshold level that is an appropriate price to pay in order to deviate from the regular manner of legislative consideration. The utility of a substantial threshold requirement for the co-sponsorship trigger can be demonstrated by exploring the effects of modifying the trigger level. For example, a thirty percent level, such as that proposed under the Senate version of the War Powers Resolution and by Congressman Regula during the 1973 debate,\textsuperscript{450} would give greater power to a minority group in forcing congressional consideration of a war powers bill than would the proposed forty percent level. While the composition of the cosponsoring group reveals whether the congressional support has, in fact, a wide base, a lower threshold level increases the possible influence of the party in opposition to the President or even a minority fringe group within the majority party.

Another possible modification to the threshold level would require thirty-three percent plus one, thus corresponding with the constitutional number that could prevent a veto override.\textsuperscript{451} This threshold level would be relevant with regard to legislation considered under the priority procedures which provides congressional authorization for the President's position. It would be ironic if the "veto-proof" level were adopted as the threshold requirement for invoking the expedited provisions in light of the congressional desire repeated often during the 1973 War Powers Resolution debate that a minority group should not have the power to control war power matters.\textsuperscript{452} However, when contrasted with the easy trigger requirement under the War Powers Resolution, these higher threshold levels seem more reasonable.

\textsuperscript{449} United States v. Ballin, 144 U.S. 1, 7 (1892).
\textsuperscript{450} See supra text accompanying notes 424, 438-44.
\textsuperscript{451} U.S. CONST. art. I, § 7, cls. 2, 3 (noting two-thirds veto override requirement).
\textsuperscript{452} See supra notes 267-70.
Given these concerns, a forty percent threshold requirement is the most appropriate trigger. This level is only obtainable with a wide base of congressional support, thereby justifying the priority procedures. A higher level would be superfluous since fifty percent plus one would be sufficient to pass the legislation anyway. Most importantly, this approach focuses specifically on a legislative proposal that has obtained strong support, rather than on war powers legislation introduced, potentially without merit, by only one or a few members of Congress.

b. Other Features of H.R. 3912

While the forty percent co-sponsorship level is one of the most important features of the proposal for expedited provisions, other aspects of the expedited procedures under H.R. 3912 are worth reviewing. Some of these provisions are based on the War Powers Resolution priority provisions, while others are not found in that statute.

1) Joint or Sequential Committee Referral

All hostilities legislation introduced pursuant to H.R. 3912 is first referred to the House Committee on Foreign Affairs and/or the Senate Committee on Foreign Relations, in a fashion similar to the War Powers Resolution.453 However, the measure also specifies that such legislation may be jointly or sequentially referred to the House and Senate Committees on Appropriations and/or Armed Services, where these committees would have jurisdiction, for example, over any proposed funding prohibition applied to the armed forces or any action under the Department of Defense Authorization bill.454

Unlike the Senate passed version of the War Powers Resolution, which allowed legislation to completely bypass the committee process,455 priority procedures should allow at least initial committee consideration of all war powers measures. It is through the jurisdictional committee process that Congress usually applies its expertise. At the same time, it is important to deny any committee, after it has had a sufficient chance to consider legislation, the power to prevent

453. H.R. 3912, §§ 5(c)(1), 5(c)(2), 100th Cong., 2d Sess., 134 CONG. REC. H251 (daily ed. Feb. 4, 1988). This is similar to the initial mode of referral under the War Powers Resolution. See 50 U.S.C. §§ 1545(a), 1546(a) (1982).
455. See supra text accompanying note 424.
either chamber from voting on a measure that carries the substantial support of the members. H.R. 3912 takes into account both of these concerns. Under the first legislative track under the proposal, “it is left to committee discretion to determine whether hearings or markup should be held or whether inaction is the best course.” As already discussed, the second legislative track for expedited consideration is triggered only when the sufficient level of co-sponsorship is attained. Once this occurs, the committees must report out hostilities legislation “not later than 21 calendar days after the requisite number of cosponsors has been attained.” The expedited process therefore assures that the committee will have at least three weeks for consideration of legislation, after which time the measure must either be reported out or discharged for floor consideration.

2) Escape Clause

The bill provides an “escape” clause to allow for departure from the expedited process. During the twenty-one day period of committee review, any member may offer a privileged motion that the committee shall not be required to report out the hostilities legislation under the expedited provisions. Although it is unlikely that this escape provision would frequently be used, given the high level of co-sponsorship required to commence the expedited procedure, it does assure that the majority will retain control over the manner of consideration. This was one of the paramount concerns expressed during the War Powers Resolution debate. Providing an “escape” clause is also consistent with the view that expedited procedures should not be contrary to the political will of Congress. The escape provision is also included as a reform proposal in order to improve existing law. It is not clear how a similar mechanism under the War Powers Resolution would be considered. This statute specifies that the fast-track process must be followed “unless such House shall otherwise determine by the yeas and nays.” In order to overcome the uncertainty surrounding the implementation of the escape clause,

458. Id. § 5(d)(2).
459. See, e.g., supra text accompanying notes 415-18.
461. See supra note 423. There are six such “escape” clauses under the War Powers Resolution priority procedures. See supra text accompanying notes 423, 432-33 for a discussion of these clauses under the statute.
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H.R. 3912 permits a member to submit a privileged motion, limits debate on such motion to one hour, and allows each member to submit only one motion during the twenty-one days of committee consideration. 462

3) Committee Discharge

Upon the failure of a committee to report after twenty-one days and in the absence of chamber approval of the motion to “escape” the expedited procedures, under the proposal the jurisdiction of the committee is discharged and the hostilities legislation is automatically placed on the floor calendar for consideration. 463 The measure is then subjected to a privileged motion for immediate consideration. 464 This proposal will correct the deficiency under the War Powers Resolution involving the lack of an enforcement feature to bring up a measure the committee has failed to report out for floor consideration. This feature also conforms with the second prong under the Bach model for effective priority procedures. The discharge process under H.R. 3912, therefore, may be avoided only if either the escape clause is invoked or the committee reports out legislation within the requisite number of days. 465

4) Consideration of a Measure Passed by the Other House

The provisions for expedited consideration under H.R. 3912 also establish a similar procedure for twenty-one day committee consideration of hostilities legislation that has been passed by the other body. 466 This addresses the fifth element under the Bach model. Such a clause is necessary if the priority procedures are to be meaningful in advancing consideration of the approved legislation and in precluding one chamber from pigeonholing measures. However, it is notable that the forty percent co-sponsorship requirement, when coupled with passage in one house, has the effect of forcing the other chamber’s committee to consider the measure. Failure of the committee to timely report out the legislation that has already been ap-

463. Id. § 5(e).
464. See infra text accompanying notes 469-73.
proved in the other chamber also results in automatic discharge of jurisdiction. In the event a committee has already reported a companion measure when the measure approved by the other house is referred, then the bill reported by that house's own committee may be considered. No such provision is made under the procedures in the War Powers Resolution. These features are intended to facilitate the deliberative process and the manner in which bills proceed to conference.

5) Floor Consideration

A discharged or committee reported measure is subject to a non-debatable, privileged motion in the House and Senate that places designated war powers legislation in immediate consideration. This feature conforms with the third prong of the Bach model for expedited procedures. The non-debatable, non-amendable nature of the motion simply requires an up or down vote on the question of the bill's immediate consideration and ensures that this issue cannot be delayed or otherwise modified. The proposal also specifies that no intervening motions can preclude consideration of this privileged motion.

Two procedures may be utilized for floor consideration under the proposal. A committee reported measure may be called up at any time by the chair of the committee. This is generally consistent with the current legislative practice of retaining this control in the chairman of the committee with jurisdiction over the measure. However, if after three days following the reporting of the bill the chairman has not moved for its consideration, any floor member may raise the privileged motion for immediate attention. Two objectives are served by this proposal. First, prompt deliberation is guaranteed. All committees will be cognizant of the futility in attempting to bottle-up legislation that has already received the requisite level of support of members. Second, the process contains a built-in incentive for committees chairmen to exercise their influence and control over the measure. Since non-committee members can force committee or floor action, this proposal preserves at least an opportunity for the

467. Id.
468. Id. § 5(f)(2).
469. Id. § 5(g).
470. Id.
471. Id. § 5(g)(1)(A).
472. Id. § 5(g)(1)(B).
committee and their chairmen to exercise their role of expertise over the subject area. Critically, at all times prompt floor consideration is assured.

6) Debate and Amendment Limitations

In attempting to apply the fourth Bach requirement for effective priority procedures, H.R. 3912 specifies limitations on floor debate and amendments. A total of twenty-six hours for debate and amendment is provided in both the House and Senate. Some expedited provisions, including those in the War Powers Resolution, specify a number of days for full consideration. This aspect of H.R. 3912, which is modeled in part on the time provisions in the Congressional Budget and Impoundment Control Act of 1974, opts instead to specify the number of hours of debate in order to ensure thorough and sufficient time for deliberation and amendment. The twenty-six hour time period would likely be spread out over three to five days. If, in contrast, three days of debate were stipulated in the absence of a specified number of hours, for example, it is possible that less actual time for debate and amendments would be allowed. Presumably, the expedited procedures under H.R. 3912 would only be invoked during those infrequent occasions in which United States Armed Forces become involved in hostilities and legislation receives forty percent co-sponsorship. Consistent with the deliberative function of Congress and its substantial constitutional war powers, on these expectedly rare occasions it is important to allow ample time for debate on such vital national issues. While a motion to limit debate may be offered, thereby leaving control in the hands of the majority at all times, such motions are not debatable. The proposal also provides that time for debate on committee reported or discharged legislation shall be equally divided between the majority and minority.

7) Conference

The War Powers Resolution provides for the appointment of conferees and requires expedited consideration by the conference

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H.R. 3912 builds on this procedure, but places a shorter, three-day limit on the conference committee's action. Like the War Powers Resolution, the conferees must report back within forty-eight hours in the event of disagreement. Unlike the statute, time limits for consideration of a reported conference report are imposed in order to prevent any filibuster or delay. While many enforcement devices can ensure that delay does not occur in committee or on the floor, it is also important to provide prompt attention at the conference level.

8) Some Conclusions on H.R. 3912

Not dissimilar with other expedited provisions, the proposal in H.R. 3912 was tailored with some definite principles in mind. First, the committee process (and concomitant jurisdictional expertise) should certainly be given an initial opportunity to operate in these war power deliberations. Therefore, even under the fast-track procedure, the committee is first permitted ample time and opportunity to report out legislation. Failure to do so results in automatic discharge. Further, the committee chairman is assigned at least a preliminary role in calling up the reported measure. Additionally, H.R. 3912 would allow for sequential or joint referral to related committees where the expertise of those committees may come into play.

Second, these proposed provisions are designed to take into account developing congressional political will on a specific war powers measure, instead of compelling the exercise of political will. This is accomplished through (1) the forty percent co-sponsorship trigger, requiring a substantial level of support before proceeding to the expedited process, (2) the escape clause, allowing the will of a majority to prevail and to modify or depart from the fast-track procedures at anytime, and (3) the allowance of ample, yet specific periods of time for debate and amendment.

Third, consistent with the Bach model, H.R. 3912 attempts to eliminate any opportunity for legislative inaction on a war powers measure that has received forty percent co-sponsorship, unless an affirmative vote under the “escape” clause is exercised. The proposal, therefore, includes a process for discharging legislation from committee, procedures for considering legislation in one body when the

477. See supra text accompanying notes 430-31.
other chamber has approved similar legislation, and time limits for
c consideration of conference reports.

The expedited provisions of H.R. 3912 serve as a model for
reform so that war powers procedures may be effectively empowered.

2. S. J. Res. 323

By way of comparison, a review of the priority procedures pro-
posed in one of the central Senate reform bills introduced during the
100th Congress is useful. S. J. Res. 323 was sponsored by Senate
Majority Leader Robert Byrd and cosponsored by Senators Sam
Nunn, John Warner, and George Mitchell. Its priority provisions,
which are in large part similar to those of H.R. 3912 and other bills,
offer some additional innovative suggestions that shall be briefly
noted.

Rather than allow a single member to impose the expedited
procedures (as under the War Powers Resolution) or require forty
percent co-sponsorship (as under H.R. 3912), these fast-track proce-
dures do not commence until a designated member of a "permanent
consultative group" introduces legislation either mandating troop
disengagement from hostilities or providing authorization of con-
tinued engagement. Such legislation must first be approved by a major-
ity of this group.\footnote{480} The proposed permanent consultative group,
consisting of eighteen congressional leaders, would act, \textit{inter alia}, as
a preliminary screen for legislative proposals.\footnote{481}

The legislation is then referred to the House Committee on
Foreign Affairs or the Senate Committee on Foreign Relations,
which shall have seven calendar days to consider the legislation or
the bill is subject to discharge.\footnote{482} Once this measure is either dis-
charged or reported out, no other measure may be reported or dis-
charged from committee while the first one is before the House, in

\footnote{480}{S.J. Res. 323, § 4, 100th Cong., 2d Sess. (1988) (defining joint resolution); \textit{id.} § 6
(priority procedures for joint resolutions).

\footnote{481} These designated leaders are: the Speaker of the House, President pro tempore of
the Senate, the House Majority Leader, the House Minority Leader, the Senate Majority
Leader, the Senate Minority Leader, the chairman and ranking minority member of the
House Committee on Foreign Affairs, the chairman and ranking minority member of the
House Committee on Armed Services, the chairman and ranking minority member of the
House Permanent Select Committee on Intelligence, the chairman and ranking minority mem-
ber of the Senate Committee on Foreign Relations, the chairman and ranking minority mem-
ber of the Senate Committee on Armed Services, the chairman and ranking minority member
of the Senate Select Committee on Intelligence. \textit{id.} § 3(c)(1).

\footnote{482} \textit{id.} § 6(c)(1).}
conference, or before the President. Like H.R. 3912, a privileged motion to proceed to immediate floor consideration may be made. However, once this motion is approved, "the joint resolution shall remain the unfinished business of the respective House, to the exclusion of all other business, until disposed of," unless otherwise specified. A time limit of twelve hours for debate is imposed, to be equally divided between the majority and minority parties, and time limits for germane and relevant amendments are also provided. Expedited procedures are similarly provided when one house receives an approved measure from the other body. Three hours of debate are permitted in each house for consideration of a conference report. Finally, this proposal allows twenty hours of debate in the event the joint resolution is vetoed by the President.

E. The Necessity for Effective Expedited Procedures on War Powers Measures

The central issue surrounding consideration of expedited procedures is whether the placing of certain war powers legislation in a privileged status creates sufficient benefits to warrant deviation from the traditional, deliberative process of congressional consideration. A strong argument can be made that carefully tailored expedited provisions are justified. As a general matter, congressional deliberation on measures concerning war is of sufficient special and unique importance to warrant priority consideration. Congress may decide that pursuant to its rulemaking authority and as a necessary and proper means of exercising its power to declare war, raise and support an army and provide a navy, expedited means of consideration are warranted. The need for such provisions in the war powers context was first recognized in the War Powers Resolution.

However, an even more persuasive argument can be made where Congress initially indicates a strong sentiment on specific war powers legislation. The forty percent co-sponsorship threshold is

483. Id. § 6(c)(2).
484. Id. § 6(d)(1)(A).
486. Id. § 6(d)(2)(C).
487. Id. §§ 6(e), 6(f).
488. Id. § 6(g)(1)(B).
489. Id. § 6(g)(2).
proposed in recognition of the fact that there must be sufficient political will for congressional action. Thus, little is gained by triggering expedited procedures if sufficient support is not already present. As noted at the beginning of this section, many forms of priority procedures are available. Some may be inappropriate under certain circumstances, particularly where Congress is forced to confront an issue on which it already lacks support for final approval. Congressional inaction may serve a valuable function of filtering out such proposals. It is an entirely different matter, however, where the congressional leadership or a committee is utilizing inaction or delay to deny deliberation on an issue that has substantial support. Under this scenario, effective priority procedures must be crafted to eliminate the possibility of delay or inaction.

Expedited provisions may also have the concomitant benefit of fostering an environment promoting deliberation within the Congress and negotiation, accommodation, and perhaps compromise between the branches. It is interesting to note from the legislative history that the primary concern of Congress in adopting the priority procedures of the War Powers Resolution was to overcome internal obstacles within Congress, such as filibustering and committee pigeonholing.\textsuperscript{490} Effective provisions, taking into account the concerns highlighted under the Bach model, can better enable Congress to consider and vote on designated issues. Significantly, incentives should be incorporated into these procedures to encourage committee and other legislative action. However, expedited procedures might also promote comity between the branches, particularly on this separation of power issue. Thus, as the forty percent co-sponsorship requirement is approached and finally attained, an important signal would be sent to the executive branch. If the legislative position is contrary to that of the President, then either branch may wish to negotiate or compromise before an interbranch constitutional confrontation surfaces. This proposal is not advanced with the aim of encouraging compromise between the branches on all occasions. The dividing of the war powers suggests that circumstances were contemplated in which neither of the two branches will be in accord. However, the nature of these separated powers also intimates that accommodation or compromise may regularly be in the best interests of the nation. In this regard, the proposal also aims to foster comity between the branches, which is often vital in this constitutional area. Accordingly, the expedited procedures advance this objective through the estab-

\footnote{490. See supra text accompanying notes 414-18.}
lishment of a legislative infrastructure.

Few would dispute the necessity of these procedures in war powers decisions. Instead, the debate appears focused on the efficacy of current procedures. This discussion has served to demonstrate the need to improve certain "loopholes" in the priority procedures of the War Powers Resolution. While many forms of expedited procedures exist, any reform procedures finally adopted must be carefully and properly designed to serve the decision-making process to which they are applied.

X. CONCLUSION

This review has illustrated that the sixteen-year statute is in need of significant reform if the original objective of "collective judgment" is to be attained.941 This article has undertaken comprehensive consideration of several essential reforms of the War Powers Resolution.942 Ultimately, any reform effort will have to be the product of bipartisanship and interbranch comity and accord. The recommendations set forth here are offered as serious proposals for the inevitable reform debate. It is apparent from this review that a viable, active role for Congress as a full co-equal partner with the executive branch, is constitutional, possible, and necessary.

Although made against the backdrop of the divided constitutional war powers, none of the reform proposals has sought to define or clarify substantively this authority by statutory means. Instead, the recommendations have sought to address only the process of war powers decision-making. The words of Senator John Stennis during the 1973 debate are appropriate to this point: "There is no assurance of wisdom in Congress any more than in the Presidency. As Professor Alexander Bickel has said, 'the only assurance there is lies in process — in the duty to explain, justify and persuade, to define the

491. See supra text accompanying note 9.


While these communicative provisions are not without dispute between the branches, comparatively, there is less controversy on these aspects of reform as these statutory channels have become, in significant part, accepted. See, e.g., supra notes 79 (discussing consultation requirement), 94, and 63 (discussing reporting requirement).
national interest by evoking it, and to act by consent." Of course, the objective of establishing a process is to serve the development of foreign policy as forged by the political departments, albeit frequently through the "invitation to struggle for the privilege of directing American foreign policy." Therefore, by avoiding the implementation of arbitrary elements that impose major policy ramifications (such as section 5(b) of the War Powers Resolution) in any reform statute, both Congress and the President will be better able to apply their respective powers "co-extensive with all the possible combinations of [the infinite] circumstances" that threaten the "safety of nations." Statutory reform efforts should therefore be designed to serve this "policy tailoring" objective. Disagreement between the branches is a deliberate and inherent part of the constitutional framework. Reconciliation is not always easily attained, but is possible. As one commentator has concluded with regard to the constitutional war powers: "in the absence of judicial elucidation, the Congress and the President have been required to accommodate themselves in the controversy to accept from each other less than each has been willing to accept but more than either has been willing to grant." Reform should therefore concentrate on the process by which decisions are made to introduce United States Armed Forces into hostilities and on the methods by which the political branches cooperate, notwithstanding their differences over constitu-

493. 119 Cong. Rec. 24,545 (1973). As one congressional aide noted: [W]hat I think the War Powers gives you — and what you didn't have before — is a structured process by which you can directly and effectively confront the issue before you. First of all, you should have some prior consultation and even more after the fact. Beyond that, you should have information that you didn't have before the Act. In effect you have a stage on which to carry out this debate, as to whether or not the presence of those armed forces is legitimate and politically or strategically desirable for a variety of reasons.

1988 House Hearings, supra note 5, at 126 (remarks of George Berdes, former senior staff consultant, House Comm. on Foreign Affairs) (emphasis added).

494. See supra note 1 (quoting Edwin Corwin).

495. See supra note 59 (quoting Alexander Hamilton).


Former Attorney General and Secretary of Defense Elliot Richardson echoed this view: Whatever the characterization of the legal situation, it seems to me that only one conclusion can be drawn — in order for our system to work effectively, some accommodation has to be reached between the Executive Branch and Congress. It is a situation, in my view, that calls for comity. Comity, of course, rests on a recognition that without mutual understanding, cooperation, and indeed, ultimately trust, the result can only be a breakdown in the effectiveness with which the United States is able to address what may in fact be a critical situation.

1988 House Hearings, supra note 5, at 136.
This article has served to point out that an effective statutory infrastructure can result in attendant benefits to the war powers decision-making process. Significantly, not all of these benefits need the approval of both Congress and the President. Through the legislative rulemaking authority, Congress may on its own initiative improve the manner in which it considers war powers legislation. As seen, for example, Congress may develop internal mechanisms to make *sua sponte* determinations on the existence of “hostilities,” thereby triggering the war powers statute, and to reassemble itself for the purpose of considering war powers reports or legislation if Congress has already adjourned for more than the constitutional period of three days. Critically, the central enforcement embodied in section 5 of the War Powers Resolution, which has been nullified by the Supreme Court’s [*Chadha*](https://www.supremecourt.gov/opinions/78pdf/78-1877.pdf) decision, can be replaced by a procedure which serves much of the original objective of section 5 through the rulemaking power and the congressional power of the purse.

However, no legislation can supply the essential ingredient: the political will to act. As Justice Robert Jackson stated:

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

Without diminishing executive authority, this article has clearly demonstrated that Congress has the tools by which it may fully and vigorously exercise its constitutional duties on war power matters.

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497. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring). The bottom line, in the view of Senator Griffin during the 1973 debate of the War Powers Resolution, was that “Congress has the power to act — but sometimes it lacks the will to act.” 119 CONG. REC. 25,100 (1973).