U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

June 9, 1993

LIMITED OFFICIAL USE

MEMORANDUM

TO: Alan Kreczko
Special Assistant to the President and Legal Adviser
National Security Council

FROM: Daniel L. Koffsky DLK
Acting Assistant Attorney General
Office of Legal Counsel

SUBJECT: Legal Assessment of the War Powers Resolution

Attached is our memorandum setting forth the views of the Department of Justice on the constitutionality of the War Powers Resolution and related issues, in response to questions directed to the Department in Presidential Review Directive/NSC-28 on War Powers Issues. As the memorandum notes, it presents the current position of the Department of Justice on those issues, but is being submitted concurrently to the recently confirmed Solicitor General and to the Assistant Attorneys General Designate for the Office of Legal Counsel and the Civil Division. A draft was previously submitted to the Departments of State and Defense for comments. The Department of State's response, dated June 8, 1993, was not received in time to be incorporated into our draft or responded to fully, but is attached as an appendix.

cc: Leon Fuerth
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Legal Assessment of the War Powers Resolution

This memorandum presents the current position of the Department of Justice on the constitutionality of the War Powers Resolution and related issues. It is being submitted concurrently to recently confirmed Solicitor General Drew Days; to Walter Dellinger, Assistant Attorney General Designate, Office of Legal Counsel; and to Frank Hunger, Assistant Attorney General Designate, Civil Division. The memorandum provides the Department's best assessment of the merits of the legal issues but is not intended to foreclose arguments that the Department might make as advocate in litigation on the same issues.

SUMMARY OF CONCLUSIONS

The War Powers Resolution (WPR) requires the President to consult with Congress before sending American forces into hostilities or "imminent" hostilities, and to report to Congress within 48 hours after doing so. It also requires the President to withdraw troops within 60-90 days unless Congress declares war or authorizes the use of force by statute. The WPR permits Congress to recall the troops sooner by concurrent resolution, which does not require the President's signature.

Constitutionality of the War Powers Resolution

- § 2(c) (stating that the President uses force only pursuant to a declaration of war, statutory authority, or to repel an attack on the United States):
  - § 2(c) is only a congressional statement of policy. It does not bind the President.
  - As a constitutional matter, the President's implied authority to use military force is imprecise, but includes, among other things, repelling attacks on the United States and suppressing civil insurrection within it, protecting American citizens abroad and U.S. Embassies, and carrying out security commitments in treaties.
- §§ 3 & 4 (reporting and consultation): These provisions are constitutional.
- § 5(b) (requiring withdrawal of troops within 60-90 days):
  - No administration has accepted the constitutionality of this provision. Most scholars do.

- We believe it would be held constitutional on its face, but in some circumstances would be unconstitutional as applied.

- § 5(c) (withdrawal by concurrent resolution): This provision is an unconstitutional legislative veto.

- § 8(a) (prohibiting inferred authority to use force from statutes and treaties): This provision is constitutional, but would not bind later Congresses.

- Legislative alternatives:

  - Withdrawal by joint resolution: Such a provision would be constitutional.

  - Funding cut-offs: Such a provision would be constitutional.

Justiciability of compliance with the War Powers Resolution

- Under the current WPR, a court would probably find no justiciable issue as to the WPR. No court has yet reached the merits of the WPR case.

- Legislative amendments could probably create a justiciable issue regarding the reporting requirement (§ 4), but not the termination requirements (§ 5).

Legal Assessment of the War Powers Resolution

I. Background

The War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548) ("the WPR" or "the Resolution") (copy attached), was enacted by Congress on November 7, 1973, over President Nixon's veto. In large part, it represented an attempt by Congress to regain control over the United States' warmaking. This section describes the WPR's origins and legislative history and then summarizes its provisions, the issues that have arisen under them, and the Executive Branch interpretation of them. The next four sections then treat in detail constitutional questions raised by the WPR.

A. Origins and Legislative History

In the late 1960's, the escalating controversy over the war in Vietnam stimulated Congress' interest in its war powers and the President's uses of force abroad. The WPR responded to a perception in Congress that "the constitutional 'balance' of authority over warmaking has swung heavily to the President in modern times. To restore the balance provided for and mandated in the Constitution, Congress must now reassert its own prerogatives and responsibilities." H.R. Rep. No. 287, 93d Cong., 1st Sess. 4 (1973). It sought

> "to restore the balance which has been upset by the historical disenthronement of that power over war which the framers of the Constitution regarded as the keystone of the whole Article of Congressional power -- the exclusive authority of Congress to 'declare war'; the power to change the nation from a state of peace to a state of war."

S. Rep. No. 220, 93d Cong., 1st Sess. 2 (1973) (quoting Sen. Javits).[1]

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[1] Professor John Hart Ely suggests a more cynical view:

> The War Powers Resolution was enacted . . . in response to a perception on the part of Congress that since 1950 -- when President Truman had sent our troops into Korea without congressional authorization -- it had been dodging its constitutional duty to make the decision whether to commit American troops to combat. Instead, it had lain back, neither disapproving

(continued...)

The WPR was largely motivated by the war in Southeast Asia. The Senate Report traced the "immediate legislative history" of the WPR to "the controversial Gulf of Tonkin Resolution of 1964 and the subsequent conduct of hostilities in Vietnam, Laos and Cambodia without valid Congressional authorization." S. Rep. No. 220 at 4. In 1969 the Senate passed by a wide margin a non-binding resolution expressing its sense that United States Armed Forces could be used on foreign soil only pursuant to "a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment." National Commitments Resolution, S. Res. 85, 91st Cong., 1st Sess., 115 Cong. Rec. 17,245 (1969). In the view of the Senate Foreign Relations Committee, that resolution had been "ignored." S. Rep. No. 220 at 4. Congress saw President Nixon's commitment of forces to Cambodia in 1970 as proof that he thought, as Congress believed President Johnson had, that he could commit U.S. forces to hostilities without express authorization from Congress, and this realization provided the "initial impetus" for war powers legislation. S. Rep. No. 220 at 5; H.R. Rep. No. 287 at 4. In the years following, both houses of Congress passed various war powers measures but were unable to agree on a single bill. See H.R. Rep. No. 287 at 3; William B. Spong, Jr., The War Powers Resolution Revisited: Historic Accomplishment or Surrender?, 16 Wm. & Mary L. Rev. 823, 824-27 (1975). The heavy bombing of North Vietnam in December 1972, combined with the abuses of power revealed in the Watergate scandal, gave war powers legislation added momentum in 1973. Id. at 827-28.

The WPR resulted from a compromise between the House and the Senate, which had taken very different approaches to "restoring the balance" in the exercise of war powers. To be sure, several provisions of the House and Senate bills were similar. Both bills required the President to remove troops from hostilities if Congress had not expressly authorized them within a certain time (the Senate bill allowed 30 days, the House bill 120). Spong, 16

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[1](...continued)
presidential military ventures nor very explicitly approving them, trusting the President to take the lead and waiting to see how the war in question played politically. In 1973 it therefore decided it could not count on itself to decide such issues unless forced to, and the War Powers Resolution was designed to exert such force.

John Hart Ely, Suppose Congress Wanted a War Powers Act that Worked, 88 Colum. L. Rev. 1379, 1379-80 (1988).

Wm. & Mary L. Rev. at 832.[2] Both bills also permitted Congress to order American forces out of hostilities before the time had expired -- in the House bill, by concurrent resolution, and in the Senate bill, by joint resolution (requiring presentment to the President). Id. But beyond that, the bills had very different objectives. The "essential purpose of the [Senate] bill [was] to reconfirm and to define with precision the constitutional authority of Congress to exercise its constitutional war powers with respect to 'undeclared' wars and the way in which this authority relates to the constitutional responsibilities of the President as Commander-in-Chief." S. Rep. No. 220 at 2 (emphases added). The House bill, on the other hand, merely "outline[d] arrangements which would allow the president and Congress to work together in mutual respect and maximum harmony toward their ultimate, shared goal of maintaining the peace and security of the Nation." H.R. Rep. No. 287 at 5. The House bill did not place any limitations on the President's ability to commit troops, other than the 120-day time limit described above, if the consultation and reporting procedures were followed.

Ultimately, the conference committee preferred the House approach, but it shortened the time limit on the use of force to 60 days, with an additional 30 if military necessity dictates. To accommodate the Senate's desire for an enumeration of the President's warmaking powers, the conferees added a "purposes and policy" section specifying the President's powers. The conference report stated, however, that "[s]ubsequent sections of the joint resolution are not dependent upon the language of this subsection, as was the case with a similar provision of the Senate bill." H.R. Conf. Rep. No. 547, 93d Cong., 1st Sess. 8 (1973).

President Nixon vetoed the WPR because its restrictions were "both unconstitutional and dangerous to the best interests of our nation." 9 Weekly Comp. Pres. Doc. 1285 (Oct. 24, 1973). He expressed the belief that the provisions of § 5, requiring the withdrawal of troops in certain circumstances, were unconstitutional because they "take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years." Id. at 1286. He did not explain his rationale, except to note that § 5(c) denied the President his constitutional role in approving legislation. Id. President Nixon also believed as a matter of policy that the WPR

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[2] Such a provision was lacking in the previous year's House bill, which had died with its Senate counterpart in conference. See Spong, 16 Wm. & Mary L. Rev. at 827.

would undermine United States foreign policy. He asserted that the WPR would have precluded an effective response to the Berlin crisis in 1961 and the Cuban missile crisis in 1962, among others, and that it would deprive the President of "peace-keeping tools" such as humanitarian relief efforts and shifts of deployment to back up diplomacy. Id.[3] President Nixon also charged that § 8 of the WPR, restricting the inferences of authorization of force that could be drawn from statutes and treaties, would impair the United States's treaty obligations to NATO. Id. Finally, President Nixon expressed concern that under § 5 Congress could make foreign policy decisions through inaction. Id. at 1286-87. As an alternative to the WPR, he proposed a non-partisan commission to study the constitutional roles of the President and Congress. Id. at 1287. Congressional supporters of the WPR responded that Nixon had failed to address the argument against the President's use of force without authorization. See Staff of the House Comm. on Foreign Affairs, 97th Cong., 2d Sess., The War Powers Resolution: A Special Study of the House Committee on Foreign Affairs 157-58 (Comm. Print 1982) ("Special Study"). The veto was overridden on November 7, 1973, by a four vote margin in the House and by a substantial margin in the Senate.[4]

B. Summary of Provisions and Issues

1. Sections 1 & 2: Title, Purposes, and Policy.

Section 1 establishes the title as the "War Powers Resolution." Because the WPR was presented to the President and enacted over his veto, however, the fact that it is a "resolution" rather than an "act" is of no legal consequence. Indeed, it has been suggested that the WPR be renamed the "War Powers Act" to avoid any impression that it has less legal effect

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[3] One observer has suggested that Nixon's veto message was drafted to respond to the Senate bill, which limited the instances in which the President could initiate a use of force, rather than the House bill, which did not. See Michael J. Glennon, Constitutional Diplomacy 88 n.84 (1990).

[4] Extraneous political factors may have played a significant role in the override. Commentators have pointed to Congressional frustration over the President's repeated successful vetoes in 1973 and to the escalating Watergate scandal, in which the "Saturday Night Massacre" had occurred just four days before the override vote. See Louis Fisher, Constitutional Conflicts Between Congress and the President 267 (3d ed. 1991); Spong, 16 Wm. & Mary L. Rev. at 836; Special Study, supra, at 164, 167.

than an ordinary statute. See Ely, 88 Colum. L. Rev. at 1385-86. Cf. Sen. Joseph R. Biden, Jr. & John B. Ritch, III, The War Power at a Constitutional Impasse: A "Joint Decision" Solution, 77 Geo. L.J. 367, 396 (1988) (proposing "The Use of Force Act").

Section 2 states the Resolution's purpose and the constitutional authorities upon which it is predicated. Its purpose is "to fulfill the intent of the framers of the Constitution" 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, and to the continued use of such forces in hostilities or in such situations.

WPR § 2(a), 50 U.S.C. § 1541(a). Section 2(b) invokes the Necessary and Proper Clause of the Constitution, art. I, § 8, cl. 18, as the constitutional basis for the legislation. The section notes specifically that the clause applies not only to Congress' own powers, "but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof." WPR § 2(b), 50 U.S.C. § 1541(b). Section 2(c) declares that the President's constitutional powers as Commander in Chief with respect to the introduction of United States Armed Forces into hostilities or situations in which hostilities are clearly indicated

> 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.

WPR § 2(c), 50 U.S.C. § 1541(c).

There has been a good deal of debate about whether this section purports to state all of the circumstances in which the President may order forces into situations where hostilities are likely. As discussed below, the predominant view is that the list in § 2 is not meant to be exclusive or binding.

2. Consultation

Section 3 of the WPR, 50 U.S.C. § 1542, calls for consultation "with Congress" "in every possible instance . . . before introducing United States Armed Forces into hostilities or

into situations where imminent involvement in hostilities is clearly indicated by the circumstances," and regularly thereafter. The House Report explained that the consultation was not intended to be "synonymous with merely being informed," but rather means that "Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated." H.R. Rep. No. 287 at 6-7.

Several questions of interpretation have arisen under this section. The first concerns the definition of "hostilities." The House Report indicated that "hostilities" was preferred to "armed conflict" because "hostilities" was the broader term. In addition to actual fighting, the report explained,

> 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.

Id. at 7 (emphasis in original). The Executive Branch, however, has interpreted the terms more narrowly. The Ford Administration took the apparently narrower view that the term included:

> 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.

Letter to Rep. Clement J. Zablocki from Monroe Leigh, Legal Adviser, Dept. of State, and Martin R. Hoffmann, General Counsel, Dept. of Defense (June 3, 1975), reprinted in War Powers: A Test of Compliance: Hearings Before the Subcomm. on International Security of the House Comm. on International Relations, 94th Cong., 1st Sess. 39 (1975) ("1975 Hearings"). Successive administrations have held the same view. See, e.g., "Overview of the War Powers Resolution," 8 Op. O.L.C. 271, 275 (1984); "Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization," 4 Op. O.L.C. 185, 193-94 (1980) (agreeing that "hostilities" do not include "sporadic military or paramilitary attacks").

The section requires consultation with "Congress." In practice, the President has generally consulted only with a select group of congressional leaders. See "Executive Power with Regard to the Libyan Situation," Memorandum for the Attorney General, et al., from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel 9 (Dec. 23, 1981) ("1981 OLC Memorandum"); see also The Situation in Iran: Hearings Before the Senate Comm. on Foreign Relations, 96th Cong., 2d Sess. 31-32 (1980) ("1980 Hearings") (Acting Secretary of State Christopher suggesting that depending on the circumstances it would be sufficient under § 3 for the President to consult with only congressional leaders or with leaders and heads of relevant committees).

A question has also arisen about the "in every possible instance" language. While recognizing that this language did not give the President carte blanche to dispense with consultation, the State Department Legal Advisers in both the Ford and Carter Administrations believed that some emergencies would preclude consultation, even when Congress was in session. 1975 Hearings at 82 (Legal Adviser Leigh); War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations, 95th Cong., 1st Sess. 189 (1977) ("1977 Hearings") (Legal Adviser Hansell). Accord 4 Op. O.L.C. at 194-95. See also 119 Cong. Rec. 33,550 (1973) (Sen. Javits observing that the WPR takes into account "instances of such great suddenness [that] it is not possible to consult in advance"). They also asserted that the need for secrecy might justify the failure to consult in some instances, as in the first stage of the attempted rescue of the hostages in Iran. See 1980 Hearings at 9, 13 (statement of Warren Christopher, Acting Secretary of State); accord, 1981 OLC Memorandum at 10; see also 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., 1st Sess. 146 (1988) ("1988 Senate Hearings") (Legal Adviser Sofaer: "We believe that President Carter was on firm ground by using that language ['in every possible instance'] -- and that, incidentally, has been the only instance in which that exception has been invoked -- to justify not consulting ahead of the Iran rescue effort.").[5] The

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[5] The Bush Administration based its decision not to consult with Congress before the invasion of Panama on that language, on the ground that the rapidly evolving situation did not allow time for consultation. The Administration reassured Congress, however, that "the President is committed to consultations with Congress prior to deployments of U.S. Forces into actual or

(continued...)

Comptroller General has observed that the "in every possible instance" clause "suggests that the President is permitted a great degree of discretion regarding when and how he is to 'consult' . . . [and] nominally grant[s] substantial discretion to the President to decide when and to what extent consultation is 'possible.'" 1986 U.S. Comp. Gen. LEXIS 23, at *10 (Dec. 24, 1986) (unpublished opinion, B-223011).

3. Reporting under the WPR

Section 4(a) of the WPR, 50 U.S.C. § 1543(a), calls for a report to be filed with Congress within 48 hours in any case in which troops are introduced

> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, air space or waters of a foreign nation, while equipped for combat . . . ; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation . . . .

Section 4(a) provides that the report must set forth: (A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which the forces have been introduced;[6] and (C) the

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[5](...continued)
imminent hostilities in all instances where such consultations are possible." Letter from Brent Scowcroft, National Security Adviser, to Rep. Dante B. Fascell (Feb. 10, 1990), quoted in Staff of the House Comm. on Foreign Affairs, 101st Cong, 1st Sess., Congress and Foreign Policy 1990, at 15-16 (Comm. Print 1991).

It is not clear, however, that President Carter's failure to consult was based on the "in every possible instance" language. An opinion of the Counsel to the President, Lloyd Cutler, quoted that clause but explained that in the first stage, the rescue mission did not involve hostilities. See 1980 Hearings at 48.

[6] Although the statute refers to constitutional and legislative authority, in most cases the reports filed have relied solely upon the President's constitutional authority as (continued...)

estimated scope and duration of the deployment. Section 4(c) requires the President to report to Congress no less often than every six months, as long as the forces remain in the situation giving rise to the report.

Under § 5(a), the report required by § 4(a)(1) (deployment into hostilities or situations where imminent involvement in hostilities is clearly indicated) must be transmitted to the Speaker of the House and the President pro tempore of the Senate and to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations.

4. Removal of Troops

Section 5(b), 50 U.S.C. § 1544(b), provides that "[w]ithin sixty calendar days after a report is submitted or is required to be submitted pursuant to" § 4(a)(1), the President must terminate the use of United States Armed Forces unless Congress has declared war, enacted a specific authorization for the use of troops, or extended the 60 day period, or unless Congress is unable to do so because of an armed attack on the United States. The President may extend the 60-day period by no more than 30 days if "unavoidable military necessity respecting the safety of" the forces "requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces." WPR § 5(b). Section 6 of the WPR, 50 U.S.C. § 1545, sets out expedited procedures for consideration by both Houses of joint resolutions extending the time of the deployment of troops under § 5(b).

Section 5(c) authorizes Congress, acting by a concurrent resolution not presented to the President for approval or veto, to require removal of troops in any situation involving actual hostilities. Under § 7 of the WPR, 50 U.S.C. § 1546, such resolutions receive expedited consideration in Congress. After the Supreme Court's decision in INS v. Chadha, 462 U.S. 919 (1983), called into question the constitutionality of the concurrent resolution mechanism, Congress enacted a free-standing statute that provided for the expedited consideration of joint resolutions requiring the removal of United States Armed Forces

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[6](...continued)
Commander in Chief and Chief Executive. See 1981 OLC opinion at 11; see also Staff of the Subcomm. on Arms Control, Int'l. Security and Science, House Comm. on Foreign Affairs, 100th Cong., 2d Sess., The War Powers Resolution: Relevant Documents, Correspondence, Reports (Comm. Print 1988) (reproducing various reports concerning uses of force).

in the absence of congressional authorization. See Pub. L. No. 98-164, § 1013, 97 Stat. 1062 (1983) (codified at 50 U.S.C. § 1546a).

The 60-day limit on the use of force by the President without Congressional authorization is the subject of the most heated debate on the WPR's constitutionality. Proponents of the WPR argue that the time limit is well within the power of Congress to declare (or, they assert, not declare) war. Opponents contend that it unconstitutionally restricts the President's exercise of his inherent authority to use force, and some suggest that the automatic nature of the time limit also violates Chadha.

5. Interpretative Provisions and Issues of Judicial Review

Section 8 of the WPR, 50 U.S.C. § 1547, contains certain other miscellaneous provisions. Section 8(a) expressly provides that authority to introduce United States Armed Forces into § 4(a)(1) situations "shall not be inferred" from any provision of law, including any appropriations provision, or any treaty "unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities . . . and states that it is intended to constitute specific statutory authorization within the meaning of" the WPR. This provision is intended to preclude Executive Branch reliance for deployments of United States Armed Forces on any ambiguous statutes (including appropriations laws) or treaties. Thus, under § 8 the President's authority to deploy armed forces into hostilities must be grounded in his inherent constitutional powers unless Congress has specifically provided by statute for such deployment. It has sometimes been suggested that § 8(a) is unconstitutional because it would purport to bind future Congresses or revise the interpretation of pre-existing treaties.

Subsection § 8(c) states that under the WPR, the term "'introduction of United States Armed Forces'" includes the "assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."

The WPR as it stands makes no provision for judicial review of its constitutionality or the President's compliance with it. Who, if anyone, may sue to enforce the WPR's provisions has been subject to considerable debate. We discuss in Part IV below various questions of standing, the political question doctrine,

and other potential bars to judicial action that have arisen under the WPR.[7]

II. Constitutionality of the War Powers Resolution

A. Overview

Since President Nixon vetoed the WPR, no administration has affirmatively recognized its constitutionality. All but the Carter Administration have concluded that at least some provisions of the WPR are unconstitutional. The Carter Administration did not "challenge" the WPR's constitutionality and expressed its intention to follow the WPR "as a matter of policy," but steadfastly refused to state that it was constitutional. See 1977 Hearings at 190, 207, 209; see also 1980 Hearings at 9. Later administrations hinted, even if they did not expressly state, that they would not necessarily comply with provisions they deemed unconstitutional. See Crisis in the Persian Gulf: Hearings Before the House Comm. on Foreign Affairs, 101st Cong., 2d Sess. 22, 32 (1990) ("1990 Hearings") (indicating that the Administration would abide by its belief that the 60-day time limit of § 5(b) was unconstitutional).[8]

The controversy over the WPR stems from sharply different views of the constitutional division of war powers. Supporters of the WPR generally view Congress as being the predominant branch of government in warmaking, and they therefore believe that the President may exercise warmaking powers without Congressional authorization only in strictly limited circumstances. See, e.g., Glennon, Constitutional Diplomacy at 71-87. Opponents of the WPR, on the other hand, believe that the Constitution grants the President broad authority over foreign

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[7] Even if the President's compliance with the WPR is not subject to judicial review, and indeed even if Congress acquiesces in the questioned actions, the President nevertheless has an independent obligation to ensure that his actions comply with the Constitution and, to the extent they are not unconstitutional, the laws of the United States.

[8] In 1983, Secretary of State George Shultz told Congress that despite "important differences of principle" with respect to the WPR, that "the Administration has been prepared to consider practical proposals that enabled us to protect our common, national interest in Lebanon without prejudging our respective positions on the basic issue of principle." 129 Cong. Rec. 25,191 (1983).

affairs and that he therefore has various inherent powers, including those arising from international law, allowing the use of force. See, e.g., Eugene V. Rostow, "Once More Unto the Breach:" The War Powers Resolution Revisited, 21 Val. U. L. Rev. 1 (1986).

The text of the Constitution addresses warmaking in a number of provisions whose relationship is not clear. The principal provisions upon which the President's role in warmaking is based are that making him "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," art. II, § 2, cl. 1, and that granting him the "executive Power" of the United States, art. II, § 1, cl. 1. Those upon which Congress' war powers are based include the powers:

> To lay and collect Taxes . . . to . . . provide for the common Defense . . . ;
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> To define and punish . . . Offenses against the Law of Nations;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
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> To raise and support Armies . . . ;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . . [and]
>
> 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.

U.S. Const., art. I, § 8, cls. 1, 10, 11, 12, 13, 14, 15, 16, 18. Also of note, the Constitution provides that "[n]o State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const., art. I, § 10, cl. 3.

It is apparent that the text alone cannot resolve the dispute over the appropriate roles of Congress and the President in the use of force. Some have turned to the intentions of the framers, but the evidence is subject to conflicting interpretations. The historical practice since the founding also provides different answers to different interpreters. The Constitution's ambiguities may be by design, allowing for added flexibility as well as accommodation between the political branches. In a sense, therefore, it may be better to leave unresolved some of the questions that could arise.

B. Section 2(c): The President's War Powers

1. Construction of § 2(c)

Section § 2(c) of the WPR probably should not be read as a legally binding definition of President's authority to deploy our armed forces without prior congressional authorization. Rather, § 2(c) is "at most a declaratory statement of policy," Letter to Sen. Thomas F. Eagleton from Marshall Wright, Assistant Secretary of State for Congressional Relations (Nov. 30, 1973), reprinted in 119 Cong. Rec. 40,023 (1973) ("Wright Letter"); see 1977 Hearings at 196 (Legal Adviser Hansell) (list in § 2(c) is not exclusive); 4 Op. O.L.C. at 190 (Assistant Attorney General Harmon) ("policy statement [in § 2(c)] is not to be viewed as limiting presidential action in any substantial matter"); 8 Op. O.L.C. at 274 (Assistant Attorney General Olson) (citing 1973 State Department letter), a conclusion with which the Comptroller General -- an agent of Congress -- and supporters of the WPR have agreed, see 55 Comp. Gen. 1081, 1085 (1975) (various evidence "indicates that Congress meant section 2(c) only as a statement of policy."); Cyrus R. Vance, Striking the Balance: Congress and the President Under the War Powers Resolution, 133 U. Pa. L. Rev. 79, 81 (1984) (§ 2(c) "is a non-binding and non-exhaustive statement of the President's powers"); Spong, 16 Wm. & Mary L. Rev. at 837-41.[9]

The text and structure of the WPR itself suggest this conclusion. Unlike the Senate version of the provision, § 2(c) contains no mandatory language such as "shall," which appears in every subsequent section of the WPR, and § 2(c) has no enforcement provisions. Id. at 838-40; see also Wright Letter (§ 2(c) contains no mandatory or prohibitory language); Glennon, Constitutional Diplomacy at 89 (§ 2(c) "expresses the

[9] Although Senator Spong left the Senate before the WPR was enacted, he was the floor manager of the Senate war powers bill in 1972. Spong, 16 Wm. & Mary L. Rev. at 823 n.*.

understanding of Congress as to the scope of the President's constitutional power . . . but it contains no mandatory language"). Further, § 2(c) appears in the WPR under the heading "Purpose and Policy," "where all agree it is operational only to the extent the President chooses voluntarily to comply." Ely, 88 Colum. L. Rev. at 1393; see also Wright Letter; 55 Comp. Gen. at 1085; Spong, 16 Wm. & Mary L. Rev. at 837 (§ 2(c)'s placement in the "Purpose and Policy" section raises a question as to its effect). And § 8(d) clearly disavows any intent to define the President's constitutional authority: "Nothing in this joint resolution -- (1) is intended to alter the constitutional authority of the Congress or of the President, ..." See also 55 Comp. Gen. at 1085. The legislative history indicates the same result. Regarding § 2(c), the conference report on the WPR stated that: "[s]ubsequent sections of the joint resolution are not dependent upon the language of this subsection, as was the case with a similar provision of the Senate bill," H.R. Conf. Rep. No. 547 at 1-2 (emphasis added). This statement suggests that § 2(c) was not meant to be binding or an operative part of the WPR, as the version in the Senate bill admittedly was. See Wright Letter; 55 Comp. Gen. at 1085-86. But cf. Spong, 16 Wm. & Mary L. Rev. at 838 (the conference report's statement of § 2(c)'s relationship to the rest of the WPR does not say anything more than is apparent from the text, that is, that the subsequent sections of the WPR are not tied to a use of force as described in § 2(c)). Further, Senator Muskie, the floor manager of the Senate bill and a conferee, conceded in override debate that "this language [in § 2(c)] is not operative language." Id. at 841 (quoting 119 Cong. Rec. 36,194 (1973) (Senator Muskie explained that it was added to make clear that Congress did not intend to surrender any of its constitutional authority)). Several years later, Senator Javits, an author of the WPR and also a member of the conference committee, expressed a similar view. See 1977 Hearings at 195-97 (list in § 2(c) is not an exhaustive list but only "a beginning").[10]

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[10] Of course, a legislator's views expressed after enactment are a particularly hazardous basis on which to interpret a statute. See United States v. Price, 361 U.S. 304, 313 (1960) Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n. 13 (1980); see also Sullivan v. Finkelstein, 110 S. Ct. 2658, 2667 (1990) (Scalia, J., concurring in part). We note Senator Javits's remarks here merely because they confirm other indications in the text, structure and legislative history of § 2(c). But cf. 119 Cong. Rec. 33,549-50, 33,557-58 (1973) (Sen. Javits, explaining that § 2(c) is "operative," and that not being "dependent" on the other sections, as the conference report states, means only that § 2(c) is not the triggering mechanism).

2. The Constitutional Allocation of War Powers

If § 2(c) were intended to be binding on the President, we believe that it would likely be an unconstitutional limitation on the President's constitutional authority. See Thomas M. Franck, Rethinking War Powers: By Law or by "Thaumaturgic Invocation", 83 Am. J. Int'l L. 766, 772 (1989); Spong, 16 Wm. & Mary at 842. It is true that the Constitution authorizes only Congress to declare or initiate war in the constitutional sense and that that power is not limited simply to declaring the existence of a state of war. Congress may exercise its war powers by various means other than by a formal declaration of war.[11] Nevertheless, the Constitution's grant to the President of the executive power and the role as Commander in Chief implies authority to use force in limited instances without the authorization of Congress. Congress could not, by mere legislation, deprive the President of that constitutional authority.

a. The Power to Declare War and the Commander in Chief Power

In 1798, James Madison described the Constitution's distribution of war powers as follows: "The Constitution supposes, what the History of all Gov[ernmen]ts demonstrates, that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl[ature]." Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), reprinted in 6 Writings of James Madison 312 (Gaillard Hunt ed. 1906).

The record of the framing and ratification of the Constitution supports Madison's assertion that the power to make war was left to Congress. Early drafts of the Constitution gave Congress the power to "make war," and designated the President as Commander in Chief. See, e.g., 2 Records of the Federal Convention of 1787 182, 185 (Max Farrand ed., 1966) ("Records"). Elbridge Gerry and James Madison moved to change "make" to "declare" in order to "leav[e] to the Executive the power to repel sudden attacks." Id. at 318. Rufus King supported the change, but on the ground that to "'make' war might be understood to 'conduct' it which was an Executive function." Id. at 319 n.*. Roger Sherman opposed the change, however, on the ground that "[t]he Executive sh[oul]d be able to repel and not to commence war" and that the change would narrow Congress' power

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[11] See the discussion of "undeclared" war below, section II. B. 2. b.

too much. Id. at 318.[12] Although the record leaves ambiguous what the change was intended to accomplish, see Lofgren, 81 Yale L.J. at 675-76, it is reasonable to conclude from the record as a whole that the power to declare war "was not understood in a narrow technical sense but rather as meaning the power to commence war, whether declared or not." Id. at 699. As Professor Ely points out, articles 6 and 9 of the Articles of Confederation used "declare," "determine on," and "engage in" war interchangeably. Ely, 88 Colum. L. Rev. at 1388 n.33.[13] Indeed, Chancellor Robert R. Livingston, a drafter of the Declaration of Independence and the Articles of Confederation, rebutted arguments at the New York Ratifying Convention that Congress would not have the "same powers" under the Constitution as the Continental Congress had under the Articles of Confederation by

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[12] Some have relied on Sherman's comment for the idea that the President's power is much broader than Madison or Gerry indicated. See Dick Cheney, Congressional Overreaching in Foreign Policy, in Robert A. Goldwin & Robert A. Licht, eds., Foreign Policy and the Constitution, 118 (1990). We do not believe, however, that the argument of an opponent of the change as to its possible effect is entitled to as much weight as the statements of the sponsors of the change. The record does not suggest that those who supported the change adhered to Sherman's view.

[13] One commentator explained:

> [A]t the time of the framing, the word 'declare' enjoyed a settled understanding and an established usage. Simply stated, as early as 1552, the verb 'declare' had become synonymous with the verb 'commence'; they both meant the initiation of hostilities. This was the established usage of international law as well as in England, where the terms to declare war and to make war were used interchangeably. This practice was familiar to the Framers.

David Gray Adler, The Constitution and Presidential Warmaking: The Enduring Debate, 103 Pol. Sci. Q. 1, 6 (1988) (footnotes omitted). Alexander Hamilton's proposed plan of government at the constitutional convention reflects that understanding. His plan would have given the executive "direction of war when authorized or begun," but under it the Senate would have had "the sole power of declaring war." 1 Records at 292 (emphasis supplied).

maintaining: "They have the very same . . . [including] the power of making war." 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution, 278 (J. Elliott ed. 1836) ("Debates").

The power granted to the President appears to have been correspondingly narrow. The Commander in Chief power, for example, appears to have been viewed as a narrow one even by such a zealous defender of executive power as Alexander Hamilton:

> [The Commander in Chief power] would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the declaring of war, and to the raising and regulating of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature.

The Federalist No. 69 at 465 (J. Cooke ed. 1961) (emphases in original);[14] see also Fleming v. Page, 50 U.S. (9 How.) 603, 614-15 (1850), ("As commander-in-chief, [the President] is authorized to direct the movement of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy," but he does not have the power to enlarge the Union by conquest.); W. Taylor Reveley III, War Powers of the President and Congress: Who Holds the Arrows and Olive Branch? 64 (1981) (Commander in Chief power was viewed by the framers as a "modest grant of authority"). Nothing in the record of the convention or the

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[14] Hamilton had previously stated that "the undefined power of making war" was "an acknowledged prerogative of the [English] crown." The Federalist No. 26, at 166. In speaking of the King's power of "declaring . . . war," therefore, Hamilton undoubtedly meant that the President differed from the King in that the President would lack the "undefined power of making war."

In arguing in favor of a single magistrate as the chief executive, James Wilson emphasized that such an executive would lack many of the King's powers, including the war power. Madison's notes of the constitutional convention indicate that "[h]e did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace, &c." 1 Records at 65-66.

ratification suggests an intent to give the President general authority to make war in the absence of a declaration of war:

> No ratifier suggested that the President would be able unilaterally to utilize forces provided for one purpose in some unauthorized military venture. Undeclared wars were far too important a part of the international scene for one safely to assume that the Framers and ratifiers meant to leave that area of power to the President.

Sofaer, War, Foreign Affairs and Constitutional Power at 56. On the contrary, James Wilson, a strong proponent of Presidential power at the Philadelphia Convention, told the Pennsylvania ratifiers that the proposed constitutional system

> will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

2 Debates at 528 (emphases added).[15] Nor did Alexander Hamilton display great trust of the executive in military affairs. In explaining the two-year limitation on appropriations for an army, Hamilton stated that Congress could not give the President permanent funds for an army, "if they were even incautious enough

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[15] After ratification battles had passed, James Wilson reiterated that account of the war power as a Supreme Court Justice riding circuit. In Henfield's Case, 11 F. Cas. 1099, 1109 (C.C.D. Pa. 1793) (No. 6,360), he said that neither the President alone, nor the President and Senate together, "can lift up the sword of the United States. Congress alone have power to declare war, and to 'grant letters of marque and reprisal.' Who indeed should have the power to declare war but these, as the immediate representatives of those who must furnish the blood and treasure upon which war depends?" In the same case, Attorney General Randolph, himself a delegate to the Constitutional Convention, argued that "[t]he right of peace and war is always vested in the government. In the United States, but congress alone possesses it." Id. at 1116.

to be willing to place in [the executive branch] so improper a confidence." The Federalist No. 26, at 168 (emphasis added).

Early practice also reflects the view that Congress held the bulk of the warmaking power. George Washington thought congressional authorization was necessary for any "offensive expedition of importance" against the Creek Indians in 1793. 10 Writings of George Washington 367 (J. Sparks ed. 1836), quoted in Reveley, War Powers of the President and Congress, at 277. Jefferson's "undeclared" war against the Barbary powers is sometimes cited in support of the President's inherent authority to use force. But while Jefferson did seize the initiative to defend American shipping against the pirates, he told Congress that the navy was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense." 1 Messages and Papers of the Presidents, 1789-1908 315 (J. Richardson ed. 1908) (Jefferson's First Annual Message to Congress, Dec. 8, 1801).[16] He thereupon asked for authorization for offensive measures, which function was "confided by the Constitution to the Legislature exclusively." Id. Congress granted his request. Act of Feb. 6, 1802, ch. 4, 2 Stat. 129.

President George Washington's Neutrality Proclamation of 1793 provoked an animated discussion between two leading framers, Alexander Hamilton and James Madison, on the scope of the President's constitutional authority. Much has been made of a statement by Hamilton, defending the proclamation, that:

> The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument.
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> * * *
>
> [A]s the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general "Executive Power" vested in the President, they are to be construed strictly -- and ought to be extended no further than is essential to their execution.

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[16] The Pasha of Tripoli had effectively declared war in 1801 by ordering the United States consular flagstaff to be cut down. Henry Adams, History of the United States of America During the Administrations of Thomas Jefferson, 165 (Library of Amer. ed. 1986).

15 H. Syrett and J. Cooke, eds., The Papers of Alexander Hamilton 39, 42 (1969) (Pacificus I, June 29, 1793) ("Pacificus I"). See also Rostow, 21 Val. L. Rev. at 14; War Powers: Origins, Purposes, and Applications: Hearings Before the Subcommittee on Arms Control, Int'l Security and Science of the House Comm. on Foreign Affairs, 100th Cong., 2d Sess. 107-08 (1988) ("1988 House Hearings") (statement of Robert F. Turner). Rostow asserts that Hamilton's analysis "leads logically to the conclusion that while only Congress can move the nation into a state of 'public, notorious, and general war,' as that term is known to international law, the President can use the national force under all the other circumstances in which international law acknowledges the right of states to use force in time of peace." Rostow, 21 Val. L. Rev. at 15.

Hamilton's views simply do not carry so far. He was defending a proclamation of neutrality, rather than a use of force, and conceded that the power to declare war "naturally includes the right of judg[ing] whether the Nation is under obligations to make war or not." Pacificus I at 40. Further, Hamilton, although a defender of Presidential power, maintained that "the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War . . . It is the province and duty of the Executive to preserve to the Nation the blessings of peace. The Legislature alone can interrupt those blessings, by placing the Nation in a state of War." Id. at 42. He emphasized that the President was merely declaring the state of the law under existing treaties. Id. at 43. Finally, in 1798 Hamilton criticized the actions of President John Adams in the undeclared naval war against France. He stated that Adams could repel actual attacks, but could not make reprisals without Congressional authorization. See Lofgren, 81 Yale L.J. at 701.

In any event, Hamilton's views during the controversy over the Neutrality Proclamation were not accepted by other framers. Thomas Jefferson, Secretary of State in 1793, wrote to James Madison expressing concern that if no one answered Hamilton "his doctrines will therefore be taken for confessed" and urged him: "For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in the face of the public." 6 Paul Leicester Ford, Writings of Thomas Jefferson 338 (1895) (letter of July 7, 1793). Madison did. In essays under the pseudonym "Helvidius," he rejected Hamilton's argument that the power to declare war is executive because it "execute[s]" nothing and because the Constitution lists it together with other clearly legislative powers. 15 Thomas A. Mason et al., eds., The Papers of James Madison 68-69 (1985) (Helvidius I, Aug. 24, 1793); see also id. at 82 (Helvidius II, Aug 31, 1793) ("The

power to judge of the causes of war as involved in the power to declare war, is expressly vested where all other legislative powers are vested, that is, in the Congress of the United States. It is consequently determined by the constitution to be a Legislative power.") (emphasis in original). Madison reasoned that because the power to declare war is essentially legislative "the rule of interpreting exceptions strictly, must narrow instead of enlarging executive pretensions on those subjects." Id. at 69. His argument concluded that "[t]hose 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." Id. at 71 (emphasis in original).

Other incidents from the period immediately after the Framing reflect Executive Branch deference to Congress' war-making and war-funding powers. In addition to the case of the Barbary pirates, discussed above, President Jefferson's Administration provided another example of such deference during a dispute with Spain on the Florida border. In a message to Congress on December 6, 1805, Jefferson explained that the Spanish intended "to advance on our possessions until they shall be repressed by an opposing force." 1 James D. Richardson, ed., Messages and Papers of the Presidents, 377 (1897). Jefferson sought Congress' authorization for the use of force: "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided." Id. Even in the face of a threatened invasion, Jefferson had relied on his own inherent authority to take only very limited, defensive steps: he had "barely instructed the officers stationed in the neighborhood of the aggressions to protect our citizens from violence, to patrol within the borders actually delivered to us, and not to go out of them but when necessary to repel an inroad or to rescue a citizen or his property; . . . ." Id.

James Madison, while President, adhered to the narrow view of Presidential war power that he had espoused during the framing and the Washington Administration. In a message to Congress on June 1, 1812, he drew attention to British attacks on American commerce and noted the failure of our diplomatic "remonstrances," and then asked Congress, as a "solemn question which the Constitution wisely confides to the legislative department of the Government," whether we should oppose "force to force in defense of [our] national rights." 2 Richardson, Messages, 484-85, 489.

During the period of acute tension with France in 1798, Hamilton, who by then had left the cabinet, was asked by the Secretary of War whether an Act of Congress that had increased

the size of the navy, see Act of Apr. 27, 1798, ch. 31, 1 Stat. 552, had in effect authorized the President to initiate hostilities. Hamilton replied that it did not:

> I am not ready to say that [the President] has any other power than merely to employ ships or convoys, with authority to repel force by force (but not to capture) and to repress hostilities within our waters, including a marine league from our coasts. Anything beyond this must fall under the idea of reprisals, and requires the sanctions of that department which is to declare or make war.

21 Harold C. Syrett, ed., The Works of Alexander Hamilton, 461-62 (1974) (emphases in original).

In sum, then, the practice and statements of Washington, Madison, Jefferson and Hamilton -- the most important Framers to hold positions in the Executive Branch in the period directly after the adoption of the Constitution -- firmly support the view that, without congressional authorization, the President has very limited power to order the use of military force. See also Holtzman v. Schlesinger, 414 U.S. 1304, 1311-12 (1973) (Marshall, Circuit J.) ("as a matter of substantive constitutional law, it seems likely that the President may not wage war without some form of congressional approval -- except, perhaps, in the case of a pressing emergency or when the President is in the process of extricating himself from a war which Congress once authorized."); Letter to Sen. Edward M. Kennedy from 127 Law Professors (Jan. 2, 1991) (stating that "[t]he Constitution thus requires that the President meaningfully consult with Congress and receive its affirmative authorization before engaging in acts of war.").

b. Undeclared War .

There is no notion in the record of the framing and the ratification of the Constitution that the power to "declare War" was limited only to a formal declaration of hostilities. Indeed, one of the strongest advocates of executive power at the time, Alexander Hamilton, told the ratifiers of the Constitution that such formal declarations had fallen into disuse. The Federalist No. 25, at 161 (J. Cooke ed. 1961). See also Sofaer, War, Foreign Affairs and Constitutional Power at 56 n.* (in the century preceding the Constitution "wars were frequent, but very seldom declared").

The framers provided for legislative devices other than declarations of war as means of authorizing and legalizing armed combat between this country and a foreign power. The text of the

Constitution itself reflects this fact. Article I, section 8, clause 11 empowers Congress not only to "declare War" but also to issue "Letters of Marque and Reprisal." The latter proviso enables Congress to authorize limited wars and military expeditions conducted by non-governmental forces or privateers acting under governmental commissions. See 1 Wm. Blackstone, Commentaries on the Laws of England, 250-51 (1st ed. facsimile, U. Chicago 1979) ("the prerogative of granting [letters of marque and reprisal] is nearly related to, and plainly derived from, that other of making war; this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war.").[17] Thus, the framers seem to have provided for both conditional and unconditional authorizations of war, which in turn may be conducted either by public or by private forces acting under a governmental commission. See Lofgren, 81 Yale L.J. at 699-700.

The early case law corroborates the view that Congress may authorize warmaking by a variety of means other than formal

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[17] The "Letters of marque and reprisal" was apparently intended to ensure that this power would not be considered an incident of the Commander-in-Chief authority:

> In its draft constitution the Committee of Detail forbade the individual states to grant such letters but failed to indicate where the power should reside. Thus it might conceivably be regarded as a mere adjunct to the power of the commander in chief. To forestall the possibility of such an interpretation, Elbridge Gerry, who had spoken out . . . against empowering 'the Executive alone to declare War,' brought forward . . . a proposition to add to the list of legislative powers that of granting letters of marque and reprisal. On the 5th of September the Convention voted without a dissenting voice to make this new phrase part of the clause dealing with a declaration of war.

A. Bestor, Separation Of Powers In The Domain Of Foreign Affairs: The Intent Of The Constitution Historically Examined, 5 Seton Hall L. Rev. 527, 610 (1974) (footnotes omitted; emphasis in original). Thus, the clause underscores the President's inability to initiate war without congressional authorization.

For a recent discussion of the "Letters of marque and reprisal" clause, and the practice under it, see Jules Lobel, Covert War and Congressional Authority: Hidden War and Forgotten Power, 134 U. Pa. L. Rev. 1035, 1058-69 (1986).

declarations, and may subject the conduct of such "wars" to a variety of limitations.[18] In Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800), the Supreme Court recognized, in seriatim opinions, that legislative enactments other than formal declarations of war could validate hostilities between nations, such as had occurred in this country's first war, the Naval War of 1798-1800. Justice Bushrod Washington's opinion, for instance, distinguished "perfect" wars from "imperfect" wars that were "limited as to places, persons, and things," in which "those who are authorized to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war . . . ." Id. at 40 (emphasis in original); cf. Miller v. The Ship Resolution, 2 U.S. (2 Dall.) 19, 21 (Fed. Ct. App. 1782) (noting that international law recognized both general and limited war). Justice Chase opined: "Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time." Bas v. Tingy, 4 U.S. at 43. Justice Paterson, a framer from New Jersey, also posited this distinction, stating that "this modified [i.e., 'imperfect'] warfare is authorised by the constitutional authority of our country . . . As far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations." Id. at 45.[19] Similarly, in Talbot v. Seeman (The Amelia), 5 U.S. (1 Cranch) 1, 28 (1801), Chief Justice Marshall, writing for the Court, observed:

> The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body can alone be resorted to as guides in this inquiry

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[18] One early example of a congressional authorization of force absent a declaration of war is an act passed in 1795 that authorized the President to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion." Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424. See also Raoul Berger, War, Foreign Affairs, and Executive Secrecy, 72 Nw. U. L. Rev. 309, 322 (1977).

[19] The Congress that authorized President John Adams to take military actions against the French in "imperfect" war considered in Tingy also displayed a sophisticated awareness of the variety of legal forms available for legalizing hostilities, and of the advantages and disadvantages of a "declaration" of war. See 8 Annals of Cong. 2119 (July 6, 1798) (remarks of Rep. Sitgreaves). Statutory authorization for "limited" hostilities may be found even in current law. See 22 U.S.C. § 1732 (President may "use such means, not amounting to acts of war, as he may think necessary and proper" to obtain release of captive U.S. citizen).

> [as to whether the seizure of a French ship was lawful]. It is not denied, nor, in the course of the argument, has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they apply to our situation, must be noticed.

Later cases similarly recognize that Congress may validate executive warmaking by a variety of devices. In the Prize Cases, 67 U.S. (2 Black) 635 (1862), the Court upheld President Lincoln's blockade of the Confederacy both on the ground that the President had pre-existing statutory authority to order such a measure, id. at 668 (citing 1795 and 1797 statutes authorizing the President to use force in case of invasion by foreign nations, and to suppress insurrection against the government of a state or of the United States), and on the ground that Congress had subsequently ratified his acts, id. at 670 ("If it were necessary to the technical existence of a war, that it should have legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861," including legislation expressly purporting specifically to ratify the President's acts).

In Orlando v. Laird, 443 F.2d 1039 (2d Cir.), cert. denied, 404 U.S. 869 (1971), the Second Circuit was confronted with a challenge by several members of the armed forces to the constitutional sufficiency of the legislative authority relied upon by the Executive in waging war in Vietnam. The court concluded that the choice of legislative formulae for authorizing such military operations was a political question committed to the other branches. It also stated:

> [N]either the language nor the purpose underlying that provision [the declaration clause] prohibits an inference of the fact of authorization from such legislative action as we have in this instance [military appropriations acts]. The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operations in Southeast Asia.

Id. at 1043. See also Alire v. United States, 1 Ct. Cl. 233, 238 (1865), rev'd on other grounds, 73 U.S. (6 Wall.) 573 (1868); Marks v. United States, 28 Ct. Cl. 147, 170 (1893), aff'd, 161 U.S. 297 (1896).

We believe that these authorities demonstrate that a formal "declaration of war," as that term is ordinarily now understood, is not a prerequisite to a constitutional exercise of the executive's warmaking power. See Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771, 1801-02 (1968). Congress may authorize, or ratify, hostilities by other means. At the same time, however, the authorities confirm that some form of legislative authorization (or ratification) is needed in most cases if the executive is to undertake hostilities in accordance with the Constitution. In United States v. Smith, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342), for example, Circuit Justice Paterson, himself an important framer, denied that the President "possess[es] the power of making war . . . . That power is exclusively vested in congress." Id. at 1230. He suggested that the President may by the "law of nature" "repel an invading foe. But to repel aggressions and invasions is one thing, and to commit them against a friendly power is another." If the United States is not in a de facto or de jure state of war with another nation, "it is the exclusive province of congress to change a state of peace into a state of war." Id.

3. The President's Constitutional Authority to Use Force

That the President does have some inherent authority to use force without prior authorization from Congress is recognized by § 2(c) itself. The WPR grants the President no additional authority to use force, see § 8(d)(2), yet states that the President has authority, absent a declaration of war or specific statutory authorization, to use force in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." WPR § 2(c)(3). The President's power to repel sudden attacks was, as discussed above, allowed by the framers, has been repeatedly recognized since then, see, e.g., Massachusetts v. Laird, 400 U.S. 886, 893 n.1 (1970) (Douglas, J., dissenting from denial of leave to file bill of complaint); Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973); Massachusetts v. Laird, 451 F.2d 26, 31 (1st Cir. 1971), and does not appear to be seriously disputed.

Both the Comptroller General and the courts have recognized that the President has some implied authority to use force under the Constitution, such as the authority to protect Americans abroad. See, e.g., 55 Comp. Gen. at 1084 ("the President does have some authority to protect the lives and property of Americans abroad even in the absence of specific congressional authorization"); In re Neagle, 135 U.S. 1, 63-64 (1890) (among the President's "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the

protection implied by the nature of the government under the Constitution" the obligation to protect American citizens abroad).[20]

Even supporters of the WPR agree that the list in § 2(c) -- declaration of war, statutory authorization, or attack on the United States or its armed forces -- is too narrow. Professor Ely, for example, states that "[v]irtually everyone agrees that [§ 2(c)] should have included the protection of American citizens as one of the justifications for presidential military action." Ely, 88 Colum. L. Rev. at 1393; see also Glennon, Constitutional Diplomacy at 96. Senator Biden cites rescuing Americans and "forestalling an imminent attack" on the United States -- both included in the Senate version of the WPR -- as items that "most constitutional scholars would place under the heading of the President's established constitutional authority and responsibility." Biden & Ritch, 77 Geo. L.J. at 386. Professor Sofaer argued that the President has at least the authority granted to the States in Article I, section 10, cl. 3 to engage in war if "actually invaded or in such imminent Danger as will not admit of delay." U.S. Const. art. I, § 10, cl. 3. Sofaer, War, Foreign Affairs and Constitutional Power at 4.[21]

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[20] In Durand v. Hollins, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186), Justice Nelson wrote that "[i]t is to [the President that] the citizens abroad must look for protection of person and of property. . . . Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President." Id. at 112. Cf. Slaughter House Cases, 83 U.S. (16 Wall.) 36, 79 (1873) (including among the privileges and immunities of citizens of the United States the right "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government").

[21] But cf. Berger, 72 Nw. U. L. Rev. at 322. Following the maxim of construction expressio unius exclusio est alterius, Berger argues that the lack of an express grant of such power to the President suggests that such power was withheld from him. In light of the apparent intention of the framers to allow the President to respond at least to an actual attack, as opposed to an imminent one, the relevance of that maxim here is dubious. Further, the authorization to the States is an exception to the general prohibition on their engaging in war, a prohibition that is not expressly applied to the President.

Historically, Presidents have often assumed the power to project armed force abroad for purposes other than to defend against attack or to protect Americans. Altogether, the United States has employed its armed forces abroad over 200 times in its history. See United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (citing Congressional Research Service, Instances of Use of United States Armed Forces Abroad, 1798-1989 (E. Collier, ed. 1989)). See generally Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins (1976). In at least 125 of those instances, dating back to 1798, the President used the armed forces without obtaining express authorization from Congress. See Leonard C. Meeker, Legal Adviser, Dept. of State, The Legality of United States Participation in the Defense of Vietnam, 54 Dep't St. Bull. 474, 484-85 (1966); see also Office of the Legal Adviser, Dept. of State, "The President's Authority to Use the Armed Forces to Evacuate U.S. Citizens and Foreign Nationals from Areas of Hostilities" ("State Dept. Evacuation Memorandum"), reprinted in 1975 Hearings at 29-30; "Authority of the President to Repel the Attack in Korea," 23 Dep't St. Bull. 173 (1950).[22]

Any attempt to identify all the types of circumstances in which the Executive has deployed or might assert inherent constitutional authority to deploy United States Armed Forces would probably be insufficiently inclusive and potentially inhibiting in an unforeseen crisis. See 8 Op. O.L.C. at 274. Nevertheless, some efforts have been made to itemize examples of such situations. In 1975, the Legal Adviser to the Department of State listed six non-exclusive situations in which he contended the President had constitutional authority as Commander in Chief to direct United States Armed Forces into combat without specific authorization from Congress:

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[22] Professor Glennon notes that many of those uses of force were relatively minor and that they were also often subject to vigorous opposition in Congress. Constitutional Diplomacy at 80. Moreover, the frequent occurrence of unauthorized action by a political branch does not demonstrate that the practice is constitutional. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588-89 (1952); cf. INS v. Chadha, 462 U.S. 919, 959-60 (1983) (Powell, J., concurring in judgment) (noting repeated instances of legislative veto).

[1.] to rescue Americans[;][23]

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[23] See Letter to the President from Attorney General William P. Barr (Dec. 4, 1992), reprinted in 16 Op. O.L.C. 6 (1992) (preliminary print) (constitutional authority extends to the "protection of the lives of U.S. citizens and others in Somalia"); "Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia," 16 Op. O.L.C. 8, 9-10 (1992) (preliminary print); "Presidential Powers Relating to the Situation in Iran," 4 Op. O.L.C. 115, 121 (1979) ("It is well established that the President has the constitutional power as Chief Executive and Commander-in-Chief to protect the lives and property of Americans abroad."); Legal Opinion of Lloyd Cutler, Counsel to the President, reprinted in 1980 Hearings at 48; id. at 40, 42 (testimony of Acting Secretary of State Warren Christopher recognizing inherent authority to rescue citizens abroad, "a long recognized power under international law"); "Training of British Flying Students in the United States," 40 Op. Att'y Gen. 58, 62 (1941) ("[T]he President's authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests.") (Attorney General Jackson).

After leaving the presidency and before becoming Chief Justice, President Taft observed:

> It has been frequently necessary for the President to direct the landing of naval marines from United States vessels in Central America to protect the American consulate and American citizens and their property. He has done this under his general power as Commander-in-Chief. It grows not out of any specific act of Congress, but out of that obligation, inferable from the Constitution, of the government to protect the rights of an American citizen against foreign aggression.

William H. Taft, Our Chief Magistrate and His Powers, 95 (1916). Taft, however, subscribed to a much broader view of the President's war power: "Under this [the Commander in Chief power], [the President] can order the army and navy anywhere he will, if the appropriations furnish the means of transportation." Id. at 94.

[2.] to rescue foreign nationals where doing so facilitates the rescue of Americans[;][24]

[3.] to protect U.S. Embassies and Legations[;][25]

[4.] to suppress civil insurrection in the United States[;][26]

[5.] to implement and administer the terms of an armistice or cease fire designed to terminate hostilities involving the United States[;][27] and

[6.] to carry out the terms of security commitments contained in treaties.[28]

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[24] See State Dept. Evacuation Memorandum, reprinted in 1975 Hearings at 31 (explaining that successful evacuation of American citizens from Vietnam required the airlift of substantial numbers of Vietnamese as well); 55 Comp. Gen. at 1090-91 ("the President must be accorded considerable operational discretion" in evacuation of Vietnamese nationals). Cf. In re Neagle, 135 U.S. at 64 (citing as within the President's implied powers under the Constitution the rescue by threat of force of a foreign national who, "though not a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen").

[25] See Hamilton v. McClaughry, 136 F. 445, 450 (D. Kan. 1905).

[26] See "President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders -- Little Rock, Arkansas," 41 Op. Att'y Gen. 313, 326 (1957) (concluding that the President had authority to suppress domestic violence and the obstruction of a Federal court's school desegregation orders based "both [on his] powers as President under the Constitution and the powers vested in [him] by the Congress under Federal law"); see also Ex parte Siebold, 100 U.S. 371, 395 (1880); In re Debs, 158 U.S. 564, 582 (1895).

[27] See Holtzman v. Schlesinger, 414 U.S. at 1311 (Marshall, Circuit J.) (finding that President may not need prior congressional approval "when [he] is in the process of extricating himself from a war which Congress once authorized.").

[28] The use of force to carry out the terms of a treaty stands on a somewhat different footing from the other examples in

(continued...)

1975 Hearings at 90 (footnotes added); accord, 8 Op. O.L.C. 274-75. The Legal Adviser went on to state, however, that the Administration did "not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander in Chief authority could be exercised." 1975 Hearings at 91. See also Ely, 88 Colum. L. Rev. at 1394 (Leigh's list is not "recklessly open-ended, as it truly is impossible to predict and specify all the possible situations in which the President will need to act to protect the nation's security but will not have time to consult Congress.")

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[28](...continued)
the State Department's list. On the one hand, a justification for using force that is based on a treaty would not rely on the President's inherent powers alone, because a treaty must be approved by the Senate. Thus, a treaty would provide (limited) legislative authorization for the President's action. On the other hand, the President and the Senate, even acting together, cannot deny the House of Representatives its legitimate constitutional role in deciding whether to commit the nation to war. As Professor Tribe points out, "[w]hether these [mutual defense] treaties can serve as a predicate for executive deployment of military force has not been resolved," but "[i]t seems unlikely that, in the absence of a declaration of war by Congress, a prolonged military operation would be sanctioned by such a treaty." Laurence H. Tribe, American Constitutional Law, 233 (2d ed. 1988); see also North Atlantic Treaty: Hearings Before the Senate Comm. on Foreign Relations, 81st Cong., 1st Sess. 11 (1949) (statement of Secretary of State Dean Acheson: the NATO treaty would not automatically put the United States at war if another signatory were attacked; "[u]nder our Constitution, the Congress alone has the power to declare war.").

However, Professor Tribe finds it "[m]ore plausible" to suggest that "a collective defense treaty justifies presidential use of force in support of a harried ally until Congress has had ample time to determine whether it favors American military involvement in the conflict," id. at 233-34, and we agree that treaties may sanction the Presidential use of force to that extent. We need not enter here into the question whether any particular treaty is self-executing or purports to commit the United States to war. For a variety of views, see Thomas M. Franck and Faiza Patel, UN Police Action in Lieu of War: "The Old Order Changeth", 85 Am. J. Int'l L. 63 (1991); Michael J. Glennon, The Constitution and Chapter VII of the United Nations Charter, 85 Am. J. Int'l L. 74 (1991); Tribe, supra, at 233, n.14.

Although we believe that the Constitution does grant the President some implied authority to use force in the absence of congressional authorization, including those listed above, it would be unwise to try to specify in advance all of the situations in which the President would have that authority.[29] Here, as in much of the WPR, it is better to leave unclear where the line ultimately should be drawn as a constitutional matter. The extent of the President's power will often depend on the particular circumstances of the proposed use of force. However, the constitutional text, the evidence of the framers' intent, and the practice of past Presidents and Congresses, suggest a number of factors that should be considered in assessing whether a "war" exists within the meaning of article I, § 8, cl. 11, so that prior congressional authorization for the proposed use of force would be necessary. Of course, whether the President is authorized to use force will not depend on any mechanical test of the number of factors present, or arguably present. Rather, the factors highlight considerations that will make the existence of such authority more or less likely to exist. Without purporting to provide an exhaustive list, we believe that the factors to be taken into account will include: (1) whether the proposed action is likely to be extensive in scope and duration (most on Leigh's list are short-term and do not involve many troops); (2) whether the action is consistent with or in furtherance of other laws; (3) whether the action is in its nature defensive, of American citizens, territory or property; and (4) whether the military

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[29] In regard to proposed legislative alternatives to the WPR, it is important to consider not only the situations listed, but the restrictions placed on the President's authority to use force in those situations. For example, the list of situations in Senator Biden's proposed Use of Force Act may be broader than the Constitution would require, but it permits the President to use force only "if every effort has been made to achieve the objective . . . by means other than the use of force." 77 Geo. L.J. at 398-99. That clause presents a serious problem because, coupled with the proposal's judicial review provisions, it would invite a court to second-guess the President's policy choices among his constitutional options. What constitutes "every effort"? In the case of President Carter's rescue mission to Iran, for example, can it be said that the President had exhausted every other option? The President's implied authority under the Constitution gives him some discretion to select the best approach to the matter at hand.

situation permitted the President to seek and obtain congressional approval before beginning the operation.[30]

We do not, however, attempt to define here the President's authority to use the United States Armed Forces short of engagement in hostilities or imminent hostilities. Such matters are not for the most part addressed by the WPR. Only if forces are introduced into hostilities or imminent hostilities does the WPR require the President to consult with Congress, see WPR § 3, and place time limits on his use of force, see WPR § 5(b) & (c), although the WPR does require the President to report some other deployments of troops, see id. § 4(a)(2) & (3). Certainly, the President retains broad authority over such deployments in his capacity as Commander in Chief. As both a constitutional and a practical matter, the President is not barred from creating a state of affairs that makes war or hostilities more likely.

C. §§ 3 and 4: Consultation and Reporting

No Administration has challenged the constitutionality of the consultation or reporting requirements of the WPR on their face. See 4 Op. O.L.C. at 195. President Nixon did not object on constitutional grounds to either § 3 or § 4. See 9 Weekly Comp. Pres. Doc. 1285 (1973). Indeed, he cited the consultation requirement in § 3 as a "constructive measure[]" that is "consistent with the desire of this Administration for regularized consultations with the Congress in an even wider range of circumstances." Id. at 1287. The first three war powers reports submitted by the Ford Administration contained the phrase "taking note of" prior to their reference to § 4, but the Administration assured Congress that the use of that phrase was not meant to suggest a constitutional challenge to § 4. See Letter to Rep. Clement J. Zablocki from Monroe Leigh, Legal Adviser, Dept. of State, and Martin R. Hoffmann, General Counsel,

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[30] Cf. Glennon, Constitutional Diplomacy at 86-87. Professor Glennon suggests other limitations on the President's exercise of his inherent use of force, such as that the amount of force must be proportional to the justification and that all diplomatic options must have been exhausted. Although there might be some element of proportionality (it is unlikely the President could launch a full scale invasion of a country to rescue one American), we believe that the President has broad latitude to assess the degree of force necessary to complete the mission successfully. Further, it appears well within the President's authority to determine whether it is appropriate to continue diplomatic or resort to force in a given case.

Dept. of Defense (June 3, 1975), reprinted in 1975 Hearings at 40.

The Executive Branch has noted potential constitutional difficulties, however, in application of the consultation requirement under certain circumstances. In 1975, the State Department Legal Adviser noted that the consultation provision may pose a constitutional question if the President is required to consult and determines that such consultation would interfere with his independent constitutional obligations. 1975 Hearings at 100. In that case, the language in the statute requiring consultation "in every possible instance" may afford a construction to avoid the constitutional question.[31] Even if the "in every possible instance" language did not justify a failure to consult where, for example, secrecy required,[32] such an exception might be required by the Constitution to avoid an unconstitutional limit on the President's independent power. See 1981 OLC Memorandum at 10 n.2; 1980 Hearings at 13 (Acting Secretary of State Christopher, citing § 8(d), which states that the WPR is not intended to alter the President's constitutional authority). Similarly, a situation might arise -- though very rarely, we believe -- in which reporting within 48 hours might interfere with the President's constitutional authority.

A separate problem would arise if the consultation requirement were construed to permit Congress to limit the President's decisionmaking in any substantive way. In several WPR incidents, Members of Congress have criticized the level, extent, or timeliness of whatever consultation actually occurred:

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[31] Senator Biden's proposed Use of Force Act would create a problem in this regard. Although it allows exception from the consultation requirement in cases of "extreme national emergency," see 77 Geo. L.J. at 403, it appears to require consultation in all other circumstances, even if the President determines that extreme secrecy is essential for success of the operation, as President Carter did in regard to the first stage of the hostage rescue mission, see 1980 Hearings at 9, 13 (statement of Warren Christopher, Acting Secretary of State); accord, 1981 OLC Memorandum at 10.

[32] Consulting with the entire Congress might in some cases be incompatible with the need for "'dispatch, secrecy, and vigour'" in the conduct of military operations. See Gerhard Casper, The Constitutional Organization of the Government, 26 Wm. & Mary L. Rev. 177, 193 (1985) (quoting Joseph Story, 3 Commentaries on the Constitution 60 (1970)).

> After the hostage rescue mission in Iran, the Senate Committee on Foreign Relations asserted that "consultation" involves "permitting Congress to participate in the decisionmaking," and that the judgment about whether consultation is required in a particular situation "must be made jointly by the President and Congress."

8 Op. O.L.C. at 275-76; see also 1975 Hearings at 82 (Rep. Zablocki, addressing adequacy of consultations during the Ford Administration). Congress has repeatedly insisted that it have "real involvement in decisionmaking." Special Study, supra, at 211. Yet beyond mere consultation, any formal action of the Congress would require legislative action by both houses of Congress presented to the President. See INS v. Chadha, 462 U.S. 919 (1983). Such action might be too cumbersome in situations requiring a rapid response by the United States. Yet anything less, if it gave Congress -- whether designated leaders, committees, or Congress as a whole -- a binding role in decisionmaking, would raise a serious constitutional question under Chadha. See 8 Op. O.L.C. at 275.[33] However, we find nothing in the WPR or its legislative history indicating that this result was intended. The "in every possible instance"

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[33] For this reason, legislative proposals aimed at requiring "real involvement" by Congress in the decisionmaking process are constitutionally problematic. For example, a proposal introduced by Rep. DeFazio in 1989 would have required that "[i]n order to satisfy the consultation requirement of this section, Members of Congress must be asked by the President for their advice and opinions and, in appropriate circumstances, their approval of the action contemplated." H.J. Res. 157, § 2, 101st Cong., 1st Sess. (1989) (emphasis added). Permitting members of Congress to approve or disapprove the President's actions outside the legislative process would certainly be suspect under Chadha.

Senator Biden's proposed Use of Force Act would require the President to "seek the advice and counsel of the Congress prior to the use of force" in most cases, and sets up a leadership group and designates other committees to facilitate consultation. 77 Geo. L.J. at 403. If nothing in the consultation binds the President, then that formulation would avoid a Chadha problem. Any consultation that was meant to operate more as "advice and consent," however, would pose serious problems. The proposal of Senators Byrd, Mitchell, Nunn, Warner, and others, see S. 2, 101st Cong., 1st Sess. (1989); S.J. Res. 323, 100th Cong., 2d Sess. (1988), avoids this difficulty by retaining the language of the current § 3.

language would likely be held to allow the President to dispense with advance consultation where it would be incompatible with the exercise of his constitutional authority.

D. Section 5(b) & (c): Termination of the Use of Force

Section 5(b), which in some circumstances requires the withdrawal of forces, has traditionally been, and continues to be, the most controversial provision of the WPR. It and § 5(c) were the two sections President Nixon identified in his veto message as being unconstitutional. See 9 Weekly Comp. Pres. Doc. at 1286. Since then, although Presidents Ford and Carter complied with the WPR, no President has formally conceded its constitutionality. Stephen L. Carter, The Constitutionality of the War Powers Resolution, 70 Va. L. Rev. 101, 104 (1984).[34]

The State Department under President Carter was careful not to admit the constitutionality of § 5(b), even while indicating that the Administration did not "challenge" it and "as a matter of policy intends to follow the letter and the spirit of section 5." See 1977 Hearings at 190, 207, 209; see also 1980 Hearings at 9 (Acting Secretary of State Christopher, renewing the pledge to comply with the WPR in the wake of the attempted rescue of the Iranian hostages).[35] The Reagan Administration gave strong

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[34] Professor Glennon states that only Presidents Nixon and Reagan challenged the time limits imposed by § 5(b). Glennon, Constitutional Diplomacy at 93, 97 n.126. As will be seen, this assertion is in error.

[35] Under questioning in the 1977 Hearings, the Legal Adviser first admitted that the Administration would probably "challenge" a position it thought was unconstitutional, see id. at 208, but quickly retracted that statement after being "advised and reminded that that is obviously not a commitment that one could make or should be expected to make on behalf of the administration," id. at 209.

The Carter Administration expressed a strong desire to comply with the "letter and spirit" of the War Powers Resolution, although it did not affirmatively recognize its constitutionality, in the belief that "[a] prolonged debate over elusive constitutional issues, with no assurance as to what the final form of the amendments would be, could well produce new uncertainties within our own Government, and in the minds of our allies and potential adversaries, and might even detract from the effectiveness of the existing law." 1977 Hearings at 190.

indications that it rejected the constitutionality of § 5(b).[36] In signing the Multinational Force in Lebanon Resolution, President Reagan stated:

> There have been historic differences between the legislative and executive branches of government with respect to the wisdom and constitutionality of section 5(b) of the War Powers Resolution. . . .
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> [I]n signing this resolution, . . . I do not and cannot cede any of the authority vested in me under the Constitution as President and as Commander in Chief of the United States Armed Forces. Nor should my signing be viewed as any acknowledgement that the President's constitutional authority can be impermissibly infringed by statute [or] that congressional authorization would be required if and when the period specified in section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired . . . .

President Ronald Reagan, Statement on Signing S.J. Res. 159, the Multinational Force in Lebanon Resolution, 19 Weekly Comp. Pres. Doc. 1422, 1422-23 (Oct. 12, 1983). Similarly, the State Department Legal Adviser noted that § 5(b)

> presents serious problems under our constitutional scheme, in which the President has the constitutional authority and responsibility as Commander-in-Chief and Chief Executive Officer to deploy and use U.S. forces in a variety of circumstances, ... The Resolution itself appears to recognize that the President has independent authority to use the armed forces for certain purposes; on what basis can Congress seek to terminate such independent authority by the mere passage of time?

1988 Senate Hearings at 1059. The Reagan Administration also expressed in more general terms its belief that the WPR, or part of it, is unconstitutional. See, e.g., Richard Halloran, Captive

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[36] The Reagan Administration took a generally less conciliatory approach to the WPR, but nevertheless expressed a willingness in some situations "to consider practical proposals that enabled us to protect our common, national interest." See 129 Cong. Rec. 25,191 (1983) (statement of Secretary of State George P. Shultz).

Iranians Said to Help U.S. Find Mines in Gulf, N.Y. Times, Sept. 24, 1987, at 1 (quoting Secretary of Defense Caspar Weinberger's statement that "'We have always felt it was unconstitutional' . . . 'an infringement by the Congress on the constitutional authority of the President to conduct foreign policy and to be the commander in chief of the forces.'").[37] The Bush Administration took an even stronger position. Secretary of State Baker stated the administration's belief that § 5(b)'s "60-day time clock provision that I suppose you would say starts ticking, we think is unconstitutional," and he indicated that the administration would abide by that belief. 1990 Hearings at 22, 32.[38]

In what appears to be the only Executive Branch statement affirmatively accepting the constitutionality of § 5(b), however, in 1980 the Office of Legal Counsel considered the issue and determined that § 5(b) is constitutional:

> We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of § 1544(b) [§ 5(b)] of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of "unavoidable military necessity." This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his constitutional function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that

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[37] See also David Hoffman, Reagan Won't Invoke War Powers Law, Wash. Post, Oct. 11, 1987, at A4 (quoting President Reagan's statement that "'one part of [the WPR] . . . is unconstitutional' . . . referring to the clause giving Congress a vote over the deployment of U.S. forces.").

[38] The record of this hearing appears to contain a typographical error that confuses Secretary Baker's position. At page 32, Baker is quoted as saying that the automatic 60-day trigger "certainly is constitutional." This record is suspect, not only because Baker had said it was unconstitutional at page 22, but also because Representative Torricelli followed up by asking if Baker would "continue to abide by [his] belief that the act is unconstitutional" (emphasis added), to which Baker responded "yes."

> burden on the President unconstitutionally intrudes upon his executive powers.

4 Op. O.L.C. at 196.

The conclusion of past Administrations that § 5(b) is unconstitutional rests primarily on powers they have found the Constitution impliedly grants to the President. To the extent the President's authority to use force flows directly from the Constitution, Congress could not, the argument goes, restrict his exercise of it, even by statute. The validity of that argument depends in large part on the arguments in favor of a broad reading of the President's powers as Commander in Chief and Chief Executive.

Although the Commander in Chief power is perhaps the most obvious possible source for the President's inherent authority to use force, even some among those advocating a broad reading of the President's authority see the Commander in Chief power as relatively narrow. See War Powers: Origins, Purposes, and Applications: Hearings Before the Subcommittee on Arms Control, Int'l Security and Science of the House Foreign Affairs Committee, 100th Cong., 2d Sess. 191-92 (1988) ("1988 House Hearings") (former Secretary of Defense Elliot Richardson); Sofaer, War, Foreign Affairs and Constitutional Power at 3. The President's implied powers may rest instead largely on the grant to the President of the "executive Power," and especially on his role as "the sole organ of the federal government in the field of international relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). See also Youngstown Sheet & Tube, 343 U.S. at 645 (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."). Eugene Rostow has argued that the United States has always been understood to possess the powers of a sovereign state under international law, including the power to use force in certain circumstances. Eugene V. Rostow, "Once More Unto the Breach:" The War Powers Resolution Revisited, 21 Val. U. L. Rev. 1, 3-4 (1986). If the powers under international law are not judicial and cannot or have not been exercised by Congress, then the President must be able to exercise them, both as Chief Executive and "as the embodiment of the residual sovereignty of the United States." Id. at 15.

Contrary to the historic position of the Executive Branch, most leading scholars do not believe that § 5(b) is unconstitutional. See, e.g., Ely, 88 Colum. L. Rev. at 1392; Glennon, Constitutional Diplomacy at 93, 99; Carter, 70 Va. L.

Rev. at 116, 133. Their response lies essentially in a different view of the text, original intent, and historical use of the war powers. See Charles A. Lofgren, On War-Making, Original Intent, and Ultra-Whiggery, 21 Val. L. Rev. 53 (1986); Glennon, Constitutional Diplomacy at 84-87. Further, they assert that Congress' authority under the Necessary and Proper Clause allows Congress to define the extent of the power to declare war, and that the definition does not unduly intrude on the prerogatives of the Executive Branch. See, e.g., Carter, 70 Va. L. Rev. at 116-19.

In light of our analysis of the constitutional allocation of war powers, presented above, we believe that § 5(b) probably would be held constitutional on its face, although the President would retain his implied authority under the Constitution to act militarily outside of the time limits in extreme circumstances. For example, in an ongoing evacuation within the thirty days authorized by § 5(b) in case of military necessity, we would not conclude that the President must abandon whatever forces might remain in the combat zone at the moment the period expires. Cf. Holtzman, 414 U.S. at 1311 (Marshall, Circuit J.).

Although the conclusion that § 5(b) is constitutional on its face is contrary to the recent view of the Department of State, we note that the Legal Adviser has testified that Congress could generally terminate a military action by the President by cutting off appropriations, see below, and that Congress could enact a statute in an individual case that authorized a use of force for only 60 days, provided that the time limitation is contingent on the possibility that changed circumstances may require the President to use force for a longer period, pursuant to his inherent constitutional authority. See 1988 Senate Hearings at 150; see also 19 Weekly Comp. Pres. Doc. at 1423. We agree with both of those positions, and can find no ground upon which to distinguish § 5(b). If Congress can terminate funding for an action undertaken by the President pursuant to his constitutional authority, it would be odd to hold that Congress could not do the same directly by statute. Further, it appears to us that in most circumstances, the framework of § 5(b) would avoid constitutional problems, particularly because it allows the President 30 extra days to remove the troops safely, if necessary. Although our view would be much different if the time allotted for Presidential action were significantly shorter, the 60 day period appears to leave the President ample room to act. In those 60 days he can make his case to Congress for authorization. The expedited procedures in the WPR create the expectation that Congress could timely respond to any such request. And the 60 day period itself would allow the conduct of a quite substantial military operation. In sum, therefore, we believe that in most

circumstances the time limit of § 5(b) would not unconstitutionally restrict the President's ability to exercise his inherent authority regarding the use of force.[39]

Further, the case law appears to support the facial constitutionality of section 5(b). As discussed above, the Constitution authorizes Congress to declare either 'perfect' or 'imperfect' war, the latter of which may be "limited in place, in objects, and in time." Bas v. Tingy, 4 U.S. (4 Dall.) at 43 (Chase, J.). In Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804), the Court dealt with a statute that authorized limited military operations -- specifically, the seizure of forfeitable American ships sailing to French ports. The Executive, realizing that the statute would be ineffective unless the Navy could also intercept and seize such ships sailing from French ports, had issued an order authorizing naval officers to take such actions as well. The case concerned a challenge to one such seizure. The Court, speaking through Chief Justice John Marshall, implied that the Executive's order would probably have been valid in the absence of any statutory provision otherwise. Id. at 177. But the Court also construed the statute as limiting the Executive's power to

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[39] Although we believe that this is the better view, that is not to say that the Executive Branch could not make an argument for a different view, based on a much broader conception of the President's executive powers and on the changed nature of international relations in the modern era. The State Department Legal Adviser expressed such a view in 1966:

> Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.
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> * * *
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> In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown smaller. An attack on a country far from our shores can impinge directly on the nation's security.

Meeker, 54 Dep't St. Bull. at 484.

take military action, and held that the seizure, being contrary to the statute, was not properly authorized. Id. As Justice Clark pointed out in his opinion in the Steel Seizure case, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 661 (Clark, J., concurring in judgment), Little v. Barreme has remained good law.[40] If Congress can restrict the President's authority to order military action as it did in the statute at issue in Little, it would seem that it could also generally condition the President's ability to engage in military operations in the manner provided by WPR § 5(b).

Section 5(b) has also been attacked as an unconstitutional legislative veto. In INS v. Chadha, 462 U.S. 919 (1983), the Supreme Court held that congressional action that has the "purpose and effect of altering the legal rights, duties and relations of persons, including the . . . Executive Branch . . . outside the legislative branch" must be presented to the President for his approval or veto in accordance with the Presentment Clauses, U.S. Const. art. I, § 7, cls. 2 & 3. Chadha, 462 U.S. at 952. Some have argued that § 5(b) violates

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[40] Relying primarily on Little v. Barreme, Justice Clark concluded that "where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation." Youngstown Sheet & Tube, 343 U.S. at 662 (Clark, J., concurring in judgment). Were that standard applied to § 5(b), the provision would probably be sustained, even though in the absence of congressionally prescribed procedures the President might have possessed broader authority to deal with crises. Cf. Dames & Moore v. Regan, 453 U.S. 654, 668 (1981):

> When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." [Youngstown Sheet & Tube, 343 U.S. at 637 (Jackson, J., concurring).] In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence." Ibid.

Chadha because Congress achieves a change in the legal rights and duties of the President not by a bill or resolution presented to the President but by inaction. See Rep. Daniel E. Lungren & Mark L. Krotoski, The War Power Resolution After the Chadha Decision, 17 Loy. L.A. L. Rev. 767, 782-88 (1984). This, they contend, has the effect of a one-House veto, because one house (actually one-third plus one of one house, in the event of a veto) can prevent the necessary extension of time for the President's use of force. We see no merit in that argument. The WPR was passed by the constitutionally prescribed method, and it is the WPR, rather than any later act inconsistent with the Presentment Clause, that limits the President. Moreover, the WPR is sometimes viewed, notwithstanding its disclaimer to the contrary, as granting authority to the President to use force in some circumstances. If it does, then § 5(b) is no different from a statute in an individual case authorizing the use of force for 60 days, which Congress could certainly enact consistently with Chadha. See Carter, 70 Va. L. Rev. at 133; see also 1988 Senate Hearings at 150. Indeed, the same argument that is levelled against § 5(b) under Chadha could be made against any statute that was effective for only a limited time: reauthorization can be blocked by a minority of one house. Chadha does not forbid such statutes, so long as they are enacted by both houses of Congress and signed by the President or passed over his veto.

Chadha is applicable, however, to the concurrent resolution procedure in § 5(c), where the action of both houses of Congress would, without presentment of the resolution to the President, change the legal rights and duties of the President. To be sure, a number of members of Congress and scholars have argued that Chadha does not invalidate § 5(c). See 1988 House Hearings at 11 (Sen. Fascell); 1988 Senate Hearings at 158 (Sen. Adams); Fisher, Constitutional Conflicts at 270-72; Ely, 88 Colum. L. Rev. at 1395-97. Advocates for § 5(c) contend that the section is not in fact a "legislative veto," as was at issue in Chadha, and that therefore Chadha ought not apply. Id.[41] They contend that a

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[41] Professor Carter, although concluding that § 5(c) is probably unconstitutional, proposes an alternative rationale to avoid Chadha inspired by Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798). In Hollingsworth, the Supreme Court held that a proposed constitutional amendment need not be presented to the President for signature, notwithstanding the Presentment Clauses. Similarly, Carter suggests in an admittedly "shaky" argument that a declaration of war need not be presented to the President, and therefore that a resolution to bring the troops home, i.e., not to declare war, would similarly not be presented to the

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legislative veto is a device by which Congress delegates a portion of its power to the President but retains in itself, or in one house or a committee, the power to veto the President's (or a subordinate's) decision. Because the WPR expressly stated in § 8(d)(2) that it gave the President no additional authority with respect to the use of armed forces in hostilities, it delegated no power to the President. Further, defenders of § 5(c) are skeptical that the Constitution bars the legislative veto "in a situation where its unavailability has the effect of making it easier for the president to commit troops to action for as long as the appropriations last or for ninety days, whichever comes earlier, if the President has the support of over one-third of the membership of either house [thereby protecting him against a veto override]." Casper, 26 Wm. & Mary L. Rev. at 192.

Still, there is widespread agreement that § 5(c) violates the Presentment Clauses of the Constitution, art. I, § 7, cls. 2 & 3. A concurrent resolution under § 5(c) would have the purpose and effect of altering the legal rights and duties of the President, who is "outside the Legislative Branch," Chadha, 462 U.S. at 952. Therefore, § 5(c) would violate the clear terms of the Presentment Clause as interpreted by Chadha. The Executive Branch has taken that position since President Nixon vetoed the WPR. See 9 Weekly Comp. Pres. Doc. at 1286; see also 1975 Hearings at 91 (Legal Adviser Leigh); 4 Op. O.L.C. at 196; U.S. Supreme Court Decision Concerning the Legislative Veto: Hearings Before the House Comm. on Foreign Affairs, 98th Cong., 1st Sess.

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[41](...continued)
President. Carter, 70 Va. L. Rev. at 130-31.

The premise that a declaration of war is not subject to veto is highly questionable. See Ely, 88 Colum. L. Rev. at 1396 n.51. Each declaration of war in our history has been signed by the President, id., and the power to declare war is listed without distinction among Congress' other legislative powers, art. I, § 8, which are subject to the Presentment Clauses. Indeed, in the Pacificus/Helvidius debate Alexander Hamilton and James Madison agreed that a declaration of war must be submitted to the President like other legislation. See Pacificus I at 42; Helvidius I at 70; see also 1 St. George Tucker, Blackstone's Commentaries App. 269-72 (1803) ("on this occasion as on every other, except a proposal to amend the constitution, [the President may] exercise a qualified negative on the joint resolutions of congress; but this negative is unavailing if two thirds of the congress should persist in an opposite determination; so that it may be in the power of the executive to prevent, but not to make, a declaration of war.").

63 (1983) (remarks of Deputy Attorney General Schmults) ("1983 Hearings"); 8 Op. O.L.C. at 273; 86 Dep't St. Bull. 68 (Aug. 1986) (testimony of Legal Adviser Sofaer before a subcommittee of the House Foreign Affairs Committee, Apr. 29, 1986); 1988 Senate Hearings at 147, 1061 (Legal Adviser Sofaer). Congress has not disputed that conclusion: the general counsel to the Clerk of the House of Representatives agreed with the characterization that § 5(c) is "now presumptively invalid," 1983 Hearings at 36; Senator Biden has stated that he believes § 5(c) is unconstitutional, as "most everyone else does," 1988 Senate Hearings at 147; see also Biden & Ritch, 77 Geo. L.J. at 388; and a report of the Senate Foreign Relations Committee concluded that § 5(c) was "nullified" by Chadha, S. Rep. No. 106, 100th Cong., 1st Sess. 6 (1987). Many scholars agree, see, e.g., Glennon, Constitutional Diplomacy at 98; Harold H. Koh, The National Security Constitution 190 (1990); Franck, 83 Am. J. Int'l. L. at 769. Cf. Carter, 70 Va. L. Rev. at 129-33.

As to the argument that the WPR gave the President no new authority and that therefore § 5(c) is not actually a legislative veto, the power to compel withdrawal of troops by concurrent resolution would, in fact, prevent the President from taking action that would otherwise be open to him. Further, Chadha applies to any action that is "an exercise of legislative power," whether or not the term "legislative veto" seems appropriate in the circumstances. 462 U.S. at 952. There is nothing in the Presentment Clauses that would limit its effect to actions of Congress where it has delegated some power to the President while retaining a veto for itself. Nor, as Professor Koh points out, is there any basis in "Chadha's broad reasoning . . . upon which that provision [§ 5(c)] could be saved." Harold Hongju Koh, Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha, 18 N.Y.U. J. Int'l L. & Pol. 1191, 1209 n.53 (1986); see also Ely, 88 Colum. L. Rev. at 1397 (§ 5(c) is distinguishable, but because Chadha is so sweeping there is "a significant possibility that in the event section 5(c) ever got to court, it would be invalidated"). Indeed, the members of the Court in Chadha contemplated that § 5(c) of the WPR would be among the provisions struck down by its ruling. See 462 U.S. at 959 (Powell, J., concurring in the judgment) (noting that the Court's judgment would invalidate "every use of the legislative veto"); id. at 967, 971 (White, J., dissenting) (listing the WPR among the legislative vetoes that would be invalidated). We therefore believe that § 5(c) is unconstitutional.[42]

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[42] Even if the concurrent resolution provision is unconstitutional, however, several scholars have noted its

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There remains the question whether § 5(c) is severable from the rest of the WPR. Section 9 does, of course, specify that if any portion of the WPR is held invalid, "the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby." That severability provision does not end the inquiry, but does "create a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987). Under that decision, "unless there is strong evidence that Congress intended otherwise," the objectionable provision is severable. Id. Here, there appears to be little doubt. The constitutional problem with § 5(c) was raised during Congress' consideration of the WPR, so the risk was known. See H.R. Rep. No. 287 at 15-16 (supplemental views of Reps. Mailliard, Broomfield, Mathias, Guyer, and Vander Jagt); id. at 18, 20 (minority views of Reps. Frelinghuysen, Derwinski, Thompson, and Burke). Further, since Chadha Congress has provided a joint resolution mechanism providing expedited consideration of joint resolutions requiring the removal of United States Armed Forces, see Pub. L. No. 98-164, § 1013, 97 Stat. 1017, 1062 (1983) (codified at 50 U.S.C. § 1546a), which would presumably serve the same purpose as § 5(c), consistent with the Constitution. This also suggests that Congress did not intend the entire WPR to be rendered invalid by the invalidity of § 5(c).

E. Section 8(a): Inferences of Authorization

Section 8(a) has been the subject of relatively little constitutional discussion. President Nixon specifically mentioned § 8(a) in his veto message, charging that it would interfere with the United States' NATO commitments, but his objection appears to have been based on policy rather than the Constitution. See 9 Weekly Comp. Pres. Doc. at 1286. In the Reagan Administration, however, the State Department's Legal Adviser directly questioned the constitutionality of § 8(a). In congressional testimony in 1986, he observed:

42(...continued)
political usefulness. Once scholar suggested that a concurrent resolution stating Congress' opposition to the use of force should "[f]or all practical purposes . . . be just as effective as the now illegal legislative veto." Casper, 26 Wm. & Mary L. Rev. at 192 n.37; see also Fisher, Constitutional Conflicts at 271-72.

> [S]erious constitutional problems exist with respect to Section 8(a) of the resolution, which purports to limit the manner in which the Congress may, in the future, authorize the use of U.S. forces. I do not believe that one Congress by statute can so limit the constitutional options of future Congresses. Nor can Congress control the legal consequences of its own actions. If a particular congressional action constitutes legal authority for the President to undertake a specific operation, I doubt that one Congress can change the fact for all future times by requiring a specific form of approval.

86 Dep't St. Bull. at 69 (Sofaer). In 1988, however, Legal Adviser Sofaer cast the problem less as a constitutional problem than as one of construction, again emphasizing that one Congress cannot bind future Congresses. 1988 Senate Hearings at 148, 1066 ("In our view, Section 8(a) ineffectively attempts to restrict the rights of future Congresses to authorize deployments in any way they choose.").

Scholars generally have found no constitutional problem with section 8(a). Professor Ely noted the potential argument against § 8(a) but rejected it on the ground that Congress had the power to establish a rule of construction. Ely, 88 Colum. L. Rev. at 1418; Michael J. Glennon, Mr. Sofaer's War Powers "Partnership", 80 Am. J. Int'l L. 584, 585-86 (1986) (finding no bar to Congress giving direction to the Executive Branch and the courts as to how to interpret its intent); Glennon, Constitutional Diplomacy at 101-102. That the Supreme Court may impose such a rule on Congress by, for example, a clear statement rule, suggests that there is no bar to Congress adopting such a rule itself. Of course, a subsequent Congress would not be irrevocably bound by that rule: "If subsequent Congresses don't like this they can repeal the Resolution." Ely, 88 Colum. L. Rev. at 1419. As a less drastic alternative, a later Congress could presumably begin a future act with the phrase "Any provision of law to the contrary notwithstanding. . . ." We believe that § 8(a), prospectively applied, is constitutional as a rule of construction.

A separate issue is Congress' retroactive application of § 8(a)'s specific statement rule to statutes enacted and treaties ratified before the WPR. As it applies to statutes, the rule could simply be viewed as an amendment of any earlier statute authorizing the use of force. As § 8(a) applies retroactively to treaties, however, it raises a question concerning Congress' authority to alter the meaning of treaties already signed and ratified. This issue arises, of course, only if a prior treaty

would otherwise authorize the President to use force. Arguably, no treaty preceding the WPR did so. See Ely, 88 Colum. L. Rev. at 1419; see also Michael J. Glennon, United States Mutual Security Treaties: The Commitment Myth, 24 Colum. J. Transnat'l L. 510 (1986). But see Franck & Patel, 85 Am. J. Int'l L. 63. Even if a prior treaty did, however, § 8(d)(1) expressly disclaims an intent to alter the terms of any existing treaty. See Franck, 71 Am. J. Int'l. L. at 635. There is some question as to the effect of § 8(d)(1), however, given that it appears to be in direct conflict with the more general rule of § 8(a)(2). We need not resolve these issues here.

In any event, we do not believe that the Constitution would bar Congress from passing a statute that was inconsistent with prior treaties. As a matter of international law, a treaty may not be altered without the consent of the parties. See Glennon, 85 Am. J. Int'l L. at 83 (citing the Vienna Convention on the Law of Treaties, May 23, 1969, Art. 39, 1155 UNTS 331).[43] As a matter of domestic, constitutional law, however, Congress' authority to abrogate a treaty by statute is well established:

> If [a] treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a

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[43] A treaty is interpreted much as if a contract among nations, and so is largely dependent upon the parties' intentions. See "Relevance of Senate Ratification History to Treaty Interpretation," 11 Op. O.L.C. 28, 34 (1987); cf. The Federalist No. 64, at 437 (John Jay) ("a treaty is only another name for a bargain"). If Congress attempted to alter retroactively an understanding reached among the parties, it would likely create serious repercussions under international law. See Thomas M. Franck, After the Fall: The New Procedural Framework for Congressional Control over the War Power, 71 Am. J. Int'l. L. 605, 635 (1977) (referring to the provision, at first glance, as a "perhaps illegal alteration in the conditions of U.S. accession to the North Atlantic Treaty and the Inter-American Treaty of Reciprocal Assistance commonly known as the Rio Pact.") (footnotes omitted); Ann Van Wynen Thomas & A.J. Thomas, Jr., The War-Making Powers of the President: Constitutional and International Law Aspects 137-38 (1982) (under international law, § 8(a)(2) "would seem to be an illegal unilateral attempt to change already established treaty commitments"); cf. The Federalist No. 64, at 437 (John Jay).

> treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty is self-executing.

Whitney v. Robertson, 124 U.S. 190, 194 (1888); see also Reid v. Covert, 354 U.S. 1, 18 n.34 (1957) (plurality opinion); The Cherokee Tobacco Case, 78 U.S. (11 Wall.) 616, 620-21 (1871); United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1465 (S.D.N.Y: 1988); Restatement (Third) of Foreign Relations Law of the United States § 115 (1987) (Act of Congress supersedes prior treaty "if the purpose of the act to supersede the earlier rule or provision is clear and if the act and the earlier rule or provision cannot be fairly reconciled"). Therefore, even if § 8(a)(2) is inconsistent with the terms of a prior treaty, that inconsistency poses no constitutional problem.

III. Other Constitutional Issues: Congressional Options to Force Withdrawal

A. Joint Resolution

An additional issue stemming from the constitutional impediment to § 5(c) is whether Congress can force the withdrawal of troops by joint resolution.[44] We believe that in general Congress may do so. As explained above, Congress' power to declare war necessarily includes the power ultimately to determine whether the nation is at war or in peace. A joint resolution ordering that troops be withdrawn from certain hostilities is in essence a declaration that the nation will not be at war. We use the term "war" here in the sense we believe the framers did, that is, including hostilities short of full-scale war. See above, section II. B. 2. b. Thus it would be a legitimate exercise of Congress' war powers, subject to the limitation that Congress could not foreclose the President's exercise of his constitutional authority to use force.

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[44] Implicit in the question is the assumption that Congress would override the President's veto.

In the past, the Departments of State and Justice appear to have disagreed on this issue, although neither has to our knowledge formally addressed the question recently. In the Ford Administration, the State Department Legal Adviser asserted that Congress could not compel withdrawal by joint resolution. See 1975 Hearings at 91. Because the WPR gives the President no additional authority to use force, § 8(d)(2), the President generally would commit troops under his implied constitutional powers. Id. "[B]ecause the power is constitutional in nature," the Legal Adviser explained, it could not be taken away either by concurrent resolution or by joint resolution. Id.; see also id. at 29 ("Congress cannot by statute circumscribe a power which is derived from the Constitution."). Five years later, however, the Assistant Attorney General for the Office of Legal Counsel in the Carter Administration, John M. Harmon, in finding § 5(c)'s concurrent resolution mechanism unconstitutional, conceded that "Congress may regulate the President's exercise of his inherent powers by imposing limits by statute." 4 Op. O.L.C. at 196 (emphasis in original). That statement suggests that a joint resolution, which has the same effect as a statute, could compel the withdrawal of troops. The Reagan and Bush Administrations appear to have favored the State Department's approach. As noted above, Secretary of State Baker expressed the belief that § 5(b) was unconstitutional. See 1990 Hearings at 22, 32. In signing the resolution authorizing the use of U.S. forces in Lebanon, President Reagan had gone to great lengths not to suggest by that act "that the President's constitutional authority can be impermissibly infringed by statute," 19 Weekly Comp. Pres. Doc. at 1423.

As noted above, we do not believe that a joint resolution ordering the withdrawal of American forces would be an impermissible infringement in all cases. Cf. Youngstown Sheet & Tube, 343 U.S. at 662 (Clark, J., concurring in judgment). Although it could not be exercised in situations where the President has implied authority to act without congressional approval, we do not believe the President has the plenary power under the Constitution to commit troops indefinitely. As explained above in our discussions of §§ 2(c) and 5(b), the President's implied power to use force without congressional authorization is limited. As a general rule, therefore, in situations where § 5(b) would not violate the Constitution, a joint resolution would be permitted as well.[45]

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[45] The converse is not necessarily true. One could argue that § 5(b) is unconstitutional under Chadha, which would pose no constitutional bar to a joint resolution accomplishing the same
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B. Termination of Funding

There seems to be little doubt that the Congress may restrict the availability of funds for military operations abroad, at least in some circumstances. The Constitution authorizes Congress to impose taxes and borrow money and to spend that money by means of appropriations laws. U.S. Const., art. I, § 8, cls. 1 & 2, § 9, cl. 7. That power was intended to be a powerful check on the other branches:

> This power over the purse, may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58, at 394 (James Madison) (J. Cooke ed. 1961). Reinforcing that power in the military context, the Constitution also gives to Congress the power to "raise and support Armies" and to "provide and maintain a Navy." U.S. Const. art. I, § 8, cls. 12 & 13. See also The Federalist No. 26, at 168-70 (Alexander Hamilton) (discussing the prohibition against appropriations of more than two years for the army). Most scholars agree that Congress' broad appropriations power extends to Presidential uses of force. Professor Ely claims that "virtually everyone, including apologists for broad presidential power in this area, agrees that Congress has constitutional authority to end a war by terminating its funding." Ely, 88 Colum. L. Rev. at 1401 & n.69. Indeed, Congress has used that power on several occasions. See, e.g., Second Supplemental Appropriations Act, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99, 129 (1973) (appropriations law denying funds for "combat activities" in Southeast Asia); Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 30, 87 Stat. 714, 732 (denying funds "to finance military or paramilitary operation by the United States in or over Vietnam, Laos, or Cambodia"); International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 404, 90 Stat. 729, 757 (prohibiting assistance for military operations in Angola); Continuing Appropriations, Fiscal Year 1987, Pub. L. No. 99-591, § 216, 100 Stat. 3341, 3341-307 (1986) (prohibiting United States personnel from providing training or assistance to Nicaraguan resistance within 20 miles

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[45](...continued)
end. As noted above, however, we are not persuaded by the argument against § 5(b) based on Chadha.

of the Nicaraguan border); see also Louis Fisher, How Tightly Can Congress Draw the Purse Strings?, 83 Am. J. Int'l L. 758, 763 (1989); 55 Comp. Gen. at 1082-83.

The State Department has conceded that Congress may, at least in some circumstances, use its appropriations power to terminate or prohibit military operations. In 1975, the Legal Adviser stated that Congress could refuse to provide further appropriations for a military operation, but stated that Congress could not restrict the use of funds already appropriated. See 1975 Hearings at 89-90, 92. He did not explain the rationale. In terms of the Constitution, we see no reason why Congress -- if it could permissibly refuse to appropriate more funds -- could not enact a supplementary appropriations act amending the prior act to withdraw funds for the disputed activity. See "Appropriations Limitation for Rules Vetoed by Congress," 4 Op. O.L.C. 731, 732 (1980) ("Congress can undoubtedly amend a previously enacted appropriations act to impose additional limitations on the use of appropriated funds."). In more recent statements, the State Department has not suggested a distinction between previously appropriated and later appropriated funds. In 1988, for example, the State Department Legal Adviser reaffirmed Congress' power of the purse: "I cannot question Congress' power to use the expenditure of funds in principle to cut off virtually anything Congress does not want to occur." See 1988 Senate Hearings at 148; see also 86 Dep't St. Bull. at 71 ("Our history amply demonstrates that Congress has adequate means, through the budgetary process and otherwise, to provide an effective check on presidential power to employ military force.") (emphasis added).[46]

There are limitations on Congress' control of the purse strings. Some limits are expressed and clearly relate to appropriations. See U.S. Const. art. II, § 1, cl. 7 & art. III, § 1 (providing that the compensation of the President and judges may not be diminished while in office); see also Glennon, Constitutional Diplomacy at 286. But there are other limits as well. For example, it seems obvious that Congress is limited by the Bill of Rights in the exercise of its spending powers. See Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1350 (1988). It also appears that Congress must provide some funds

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[46] The effectiveness of such a move remains debatable. Some observers charged that President Ford's actions in the Mayaguez affair violated a statute restricting the use of funds for the conflict in Indochina. Special Study, supra, at 216. But see 55 Comp. Gen. 1081, 1094 (1975) (concluding that funding restrictions did not bar the rescue mission).

for the other branches to fulfill their constitutional duties: "Congress is obliged to provide public funds for constitutionally mandated activities -- both obligations imposed upon the government generally and independent constitutional activities of the President." Id. at 1350-51 (citing, as examples of activities that must be funded, the President's receiving of ambassadors and making treaties). See also Fisher, 83 Am. J. Int'l L. at 762; Letter from Louis Henkin to Rep. Louis Stokes, at 2-3 (Mar. 31, 1987), reprinted in Oversight Legislation: Hearings on S. 1721 and S. 1818 Before the Senate Select Comm. on Intelligence, 100th Cong., 1st Sess. 115-16 (1987) ("Where the President has independent constitutional authority to act, Congress is bound to implement his actions, notably by appropriating the necessary funds. Where the President's authority to act is not exclusive but is subject to regulation by Congress, Congress may prohibit or limit the President's activity directly by legislation, or indirectly by denying him funds or by imposing conditions on the use of funds appropriated."). Cf. United States v. Lovett, 328 U.S. 303 (1946) (striking down a law denying compensation to named individuals as a bill of attainder); 41 Op. Att'y Gen. 507, 525-30 (1960) (Congress may not condition appropriations on the President disclosing a document that he has determined to be executive privileged).[47] In the military context, therefore, Congress could not, for example, "tell the Commander in Chief how to run a particular tactical exercise by threatening to cut off funds." 1988 Senate Hearings at 148; see also "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act," 10 Op. O.L.C. 159, 169-70 (1986) (Congress "may not attach conditions to Executive Branch appropriations that require the President to relinquish any of his constitutional discretion in foreign affairs."). Similarly, it seems unlikely that Congress could cut off funds in a way that would place the armed forces in unreasonable danger upon withdrawal. Subject to such limitations, we conclude that Congress could generally terminate budgetary authority in order to terminate a use of United States Armed Forces abroad.[48]

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[47] The Supreme Court has never struck down a use of the appropriations power as an unconstitutional infringement on the President's power. Glennon, Constitutional Diplomacy at 288.

[48] Thus, a provision in the Byrd-Mitchell-Nunn-Warner bill barring funding for operations that are not undertaken consistently with the WPR, see, e.g., S. 2, 101st Cong., 1st Sess. § 5 (1989), would appear to be constitutional on its face, although its application might be unconstitutional in some cases.

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IV. Justiciability of Questions of Executive Branch Compliance with the War Powers Resolution

The legal questions regarding "compliance" with the WPR may be grouped into two general categories, based on two central commands of the WPR: (A) the requirement of § 4(a)(1) that the President submit a "report" to Congress when the armed forces are introduced into hostilities; and (B) the requirement of § 5(b) that the President "terminate" such use of the armed forces in specified circumstances.

A. Compliance with § 4(a)(1)

Section 4(a)(1) of the WPR requires the President to submit a report to the Speaker of the House and to the President pro tempore of the Senate within forty-eight hours of introducing United States Armed Forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." The President's report must specify the circumstances necessitating the introduction of the armed forces, the legal authority under which the introduction took place, and the scope and duration of the hostilities or involvement.

The litigation and commentary generated by the reporting requirement of § 4(a)(1) have focused on just one legal issue of compliance -- namely, whether the President has introduced the armed forces into "hostilities" so that he is legally obligated to file the requisite report. The following discussion considers the extent to which the courts would reach the merits of actions brought by members of Congress to force the President to comply with this obligation. Private persons almost certainly have no right of action under the WPR. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 209 (D.C. Cir. 1985). Contra Ange v. Bush, 752 F. Supp. 509, 511-12 n.1 (D.D.C. 1990). The relevant justiciability doctrines are standing, equitable discretion, political question, and ripeness.

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[48](...continued)
The State Department took the view that the funding restrictions of that bill are unconstitutional on their face because they would impermissibly "restrict or usurp the independent constitutional authority" of the President. See 1988 Hearing at 1062-63. We do not disagree with the reasoning, cf. 10 Op. O.L.C. 169-70, so much as with the premise. Because we conclude that the President's inherent constitutional powers are more narrow, we believe that Congress has a larger sphere within which it may freely impose restrictions on funding.

Before addressing each of these doctrines individually, we note that while different courts have ruled in favor of justiciability on various discrete grounds, no court in a case brought under the WPR has ever reached the merits. Thus, the Executive Branch, which has consistently argued against the justiciability of WPR compliance issues on all possible grounds, prevailed in every case, even if it did not prevail on every single ground. Accordingly, in all cases where courts may have ruled in favor of justiciability, the Executive Branch did not have the opportunity to appeal such rulings to a higher court.

1. Standing

Of the five "war powers" cases decided in the last decade, none resolved the question of congressional standing to enforce the reporting requirement of § 4(a)(1). The plaintiff in Ange was a military officer, not a member of Congress. Three of the cases explicitly pretermitted the standing questions regarding the WPR. See Lowry v. Reagan, 676 F. Supp. 333, 337 n.26 (D.D.C. 1987), appeal dismissed per curiam, No. 87-5426 (D.C. Cir. Oct. 17, 1988); Sanchez-Espinoza, 770 F.2d at 210; Crockett v. Reagan, 558 F. Supp. 893, 901 (D.D.C. 1982), aff'd per curiam, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984). The last case, Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990), was an action by members of Congress under the War Powers Clause, U.S. Const. art. I, § 8, cl. 11, to enjoin the President from initiating an offensive attack against Iraq without a declaration of war or other explicit congressional authorization. The court upheld the plaintiffs' standing on the basis that "members of Congress plainly have an interest in protecting their right to vote on matters entrusted to their respective chambers by the Constitution," specifically "the right to vote for or against a declaration of war." Id. at 1147. This holding does not carry over to the § 4(a)(1) context, because the President's failure to comply with that reporting provision does not deprive members of Congress of any right to vote on declaring war or requiring the President to remove the armed forces from hostilities.

General principles of standing support the conclusion that congressmen would not have standing to challenge the President's alleged failure to comply with § 4(a)(1). For a plaintiff to have standing, he "must have suffered an injury in fact -- an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992) (citations omitted). Moreover, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. As explained below, the President's failure to comply with § 4(a)(1) would not cause

injury-in-fact to members of Congress, and it is unlikely that any such injury could be redressed by a judicial decision.

Under certain statutes imposing legal duties on executive officials, members of Congress may conceivably have legally-protected interests, even if members of the general public do not. For instance, a statute that prevented the Department of Housing and Urban Development (HUD) from using funds for reorganizations without the prior approval of the Committees on Appropriations was held to give a congressional plaintiff "the right, as a member of the [House] Appropriations Committee, to participate in approval of any reorganization of HUD conducted before January 1, 1983." American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 305 (D.C. Cir. 1982) (per curiam) (referring to Pub. L. No. 97-272, 96 Stat. 1160, 1164 (1982)). More recently, the District of Columbia Home Rule Act, which required the Chairman of the D.C. Council to transmit legislation enacted by the D.C. Council to the Speaker of the House and the President of the Senate, was found to confer a right on members of Congress "to consider [an enactment of the D.C. Council] before it took effect." Bliley v. Kelly, 793 F. Supp. 353, 355 (D.D.C. 1992) (referring to D.C. Code § 1-233(c)(1)). These rights constituted legally-protected interests, the invasion of which would cause the injury-in-fact necessary to create standing.

The duties imposed by the statutes in Pierce and Bliley may be analogized to the duty imposed by § 4(a)(1) on the President to submit reports to Congress. Therefore, the issue is whether each individual member of Congress has a corresponding right, or a legally-protected interest, to receive, via the congressional leadership, a report from the President when the conditions set forth in § 4(a)(1) are met. To paraphrase the Supreme Court's formulation of the question in a recent case where the plaintiffs sought a private right of action: "Did Congress, in enacting the [WPR], unambiguously confer upon the [congressional] beneficiaries of the [Resolution] a right to enforce the requirement that" the President submit a report to Congress in the specified circumstances? Suter v. Artist M., 112 S. Ct. 1360, 1367 (1992). If it did not, then the congressional plaintiffs have no legally-protected interest that a failure to comply with the reporting requirement would invade. Thus, members of Congress would not suffer the injury-in-fact necessary to have standing to enforce § 4(a)(1).

Nothing in the text of the WPR or its legislative history indicates that the Resolution confers a private right of action on Congress as a whole, its Houses, or its individual members. The only language in the entire WPR that even remotely refers to the courts is the separability clause of § 9, which contemplates

that provisions of the WPR or applications thereof might be "held invalid." This language cannot be said "unambiguously" to confer a private right of action on Congress or its individual members. In addition, given the WPR's subject matter -- the constitutional authority of the President and Congress with respect to warmaking -- it is highly doubtful that Congress intended to involve the courts in the Resolution's operation. Moreover, in view of the concerns that animate the political question doctrine (discussed below), we believe that the courts would be especially hesitant to involve themselves by inferring a private right of action where the WPR does not create one in explicit terms. For all these reasons, we conclude that Congress did not unambiguously confer on itself or on its members a right to enforce the duties imposed on the President by § 4(a)(1). Cf. Lowry, 676 F. Supp. at 339 n.42 ("Although the Court does not decide the question . . . , this Court believes that the sponsors of the Resolution did not contemplate a private right of action to enforce section 4(a)(1)."). Contra Ange v. Bush, 752 F. Supp. at 511 n.1 ("The War Powers Resolution permits a private cause of action under Cort v. Ash, 422 U.S. 66 (1975)."). [49]

There is no other apparent basis for finding injury-in-fact to members of Congress by virtue of noncompliance with § 4(a)(1). A failure by the President to comply with the reporting requirement cannot be said to "nullify" any past votes by the members, Kennedy v. Sampson, 511 F.2d 430, 433 (D.C. Cir. 1974), nor, as discussed above, can it be said to deprive them of any right to participate in or vote on matters in the future, Riegle v. Federal Open Mkt. Comm., 656 F.2d 873, 877-78 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). The congressional plaintiffs would thus be forced to allege "generalized, amorphous injuries due to the conduct of the Executive" or make "generalized complaint[s] that [their] effectiveness is diminished by allegedly illegal activities taking place outside the legislative forum," neither of which is sufficient to confer standing on members of Congress. United Presbyterian Church v. Reagan, 738 F.2d 1375, 1382 (D.C. Cir. 1984).

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[49] Even if § 4(a)(1) conferred a private right of action on the Congress as a whole, or on the House and Senate separately, we believe that no individual member could, without additional authorization, properly assert the rights of those bodies. Cf. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 544 (1986) ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take.").

Even if members of Congress suffered injury-in-fact, however, it is unlikely that their injuries could be redressed by the judgment of a court. To redress the members' injuries, the court would have to order the President to submit the report required by § 4(a)(1). As recently recognized by a majority of the Supreme Court, an order against the President in his official capacity is generally beyond the constitutional power of the courts. See Franklin v. Massachusetts, 112 S. Ct. 2767, 2776-77 (1992) (four-Justice plurality) (dictum) ("[I]n general 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'") (quoting Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1867)); id. at 2788 (Scalia, J., concurring in part and concurring in the judgment) ("I think it clear that no court has authority to direct the President to take an official act."). But see Mackie v. Bush, 809 F. Supp. 144 (D.D.C. 1993) (enjoining the President from removing members of the U.S. Postal Service Board of Governors), appeal filed, No. 93-5001 (D.C. Cir. Jan. 7, 1993).[50]

We cannot claim to be completely certain that a majority of the Court would follow Mississippi v. Johnson in every case in which the relief sought was an injunctive order against the President in his official capacity (although we do believe that the Court would likely deny injunctive relief that interfered with the President's ability to undertake major military or diplomatic initiatives). Thus, there is some degree of risk that, in an action seeking to enforce the reporting requirement of § 4(a)(1), where the granting of an injunction would not seem to interfere directly with the President's war powers, a court might order the President to file a report. Assuming, however, that courts would decline to enter judgment against the President (who is the only Executive Branch officer on whom the WPR imposes duties) to force him to comply with § 4(a)(1) by filing a report, any injury allegedly suffered by members of Congress could not be redressed. For this reason, and because the WPR does not confer a private right of action to enforce the reporting requirement of § 4(a)(1), members of Congress would not have standing to enforce that provision.

2. Equitable Discretion

The D.C. Circuit's decision in Riegle, while granting a Senator standing, invented a new doctrine to justify a refusal to

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[50] Although the plurality in Franklin did not discuss this point, Justice Scalia also concluded that courts "cannot issue a declaratory judgment against the President," 112 S. Ct. at 2789, and his conclusion appears sound.

adjudicate the merits of his claim. The doctrine of "equitable discretion" (also sometimes called "remedial discretion") may be applicable to actions to enforce § 4(a)(1). The doctrine states: "Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action." Riegle, 656 F.2d at 881. See also Moore v. U.S. House of Representatives, 733 F.2d 946, 954-56 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985).

Given this formulation of the doctrine, it does not appear immediately applicable in the § 4(a)(1) context. As pointed out by the court in Dellums v. Bush, 752 F. Supp. 1141, 1148 (D.D.C. 1990), the decisions dismissing actions on the basis of equitable discretion involved congressional plaintiffs who were either battling their fellow congressmen or seeking a declaration that a statute was unconstitutional. In the former situation, the plaintiffs could obtain relief by persuading their colleagues to enact, repeal, or amend an internal rule of Congress, and in the latter situation, to enact, repeal, or amend a statute. See id. at 1149. By contrast, members of Congress cannot obtain relief from their colleagues for an alleged violation of § 4(a)(1) by the President. In such a case, the enactment of a new statute, or the amendment or repeal of an existing one, would not give the plaintiffs a remedy. Indeed, by hypothesis, they would be perfectly satisfied with the statute as it is written; they would merely want the President to comply with it. In other words, the plaintiffs would have a dispute with the President, not with their colleagues. The equitable discretion doctrine would not stand as a bar to resolution of the dispute.

Nevertheless, in the one case that specifically considered whether the equitable discretion doctrine bars adjudication of an action by members of Congress to enforce § 4(a)(1) of the WPR, the court reached the opposite conclusion under the following analysis:

> Although styled as a dispute between the legislative and executive branches of government, this lawsuit evidences and indeed is a by-product of political disputes within Congress regarding the applicability of the War Powers Resolution to the Persian Gulf situation. Before the filing of this lawsuit, several bills to compel the President to invoke section 4(a)(1) of the War Powers Resolution were introduced in Congress. . . . When this lawsuit was filed, Senator Brock Adams stated that he had joined as a plaintiff both to advance his substantive

> position and to resolve a question that Congress seemed unwilling to decide. In light of this history, this Court concludes that plaintiffs' dispute is "primarily with their fellow legislators."

Lowry v. Reagan, 676 F. Supp. 333, 338-39 (D.D.C. 1987) (quoting Riegle, 656 F.2d at 881) (footnotes omitted), appeal dismissed per curiam, No. 87-5426 (D.C. Cir. Oct. 17, 1988). Under this analysis, the applicability of the equitable discretion doctrine would depend on the particular facts surrounding the lawsuit by members of Congress.

It should be noted that the equitable discretion doctrine, which never gained adoption outside the D.C. Circuit, see, e.g., Dennis v. Luis, 741 F.2d 628, 633 (3d Cir. 1984), may be on the decline even in that court. In one of the last appellate cases that even mentioned the doctrine, the court hinted that it might not survive en banc review:

> We are fully mindful . . . that this circuit's recently minted doctrine of equitable discretion has not even been addressed, much less endorsed, by the Supreme Court. Moreover, several members of this court have previously expressed concern over whether equitable discretion represents a viable doctrine upon which to determine the fate of constitutional litigation. Those concerns, which all members of this panel share, continue to trouble us. As a panel, however, we are of course bound faithfully to follow and apply the law of our circuit.

Humphrey v. Baker, 848 F.2d 211, 214 (D.C. Cir.) (citations omitted), cert. denied sub nom. Humphrey v. Brady, 488 U.S. 966 (1988). Given its concerns, the court felt compelled to reach the merits as an "alternative" holding. Id. at 215. See also Dornan v. United States Secretary of Defense, 851 F.2d 450, 451 (D.C. Cir. 1988) (per curiam) (relying on equitable discretion but alternatively dismissing congressional lawsuit for lack of standing because "the 'equitable discretion' formulation has proved elusive in some cases").

Distinct from the D.C. Circuit's relatively recent doctrine of equitable discretion, which goes to the question of justiciability, is a more traditional doctrine regarding the discretionary power of the courts to withhold equitable relief even after having entertained a case and held for the plaintiff. See Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("A [statutory] grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. . . . The

essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case."). As then-Justice Rehnquist pointed out in 1978, the Supreme Court "has specifically held that a federal court can refuse to order a federal official to take specific action, even though the action might be required by law, if such an order 'would work a public injury or embarrassment' or otherwise 'be prejudicial to the public interest.'" TVA v. Hill, 437 U.S. 153, 213 (1978) (Rehnquist, J., dissenting) (quoting United States ex rel. Greathouse v. Dern, 289 U.S. 352, 360 (1933)). Therefore, for reasons having to do with public policy and inter-branch comity, the courts might, in the exercise of their sound discretion, deny an order for specific performance on the part of the President in an action to force compliance with § 4(a)(1).[51]

3. Political Question Doctrine

Assuming that congressional plaintiffs surmount the hurdles of standing and equitable discretion, the political question doctrine may nevertheless prevent the court from reaching the merits of their challenge to the President's failure to submit a report under § 4(a)(1). The classic statement of the doctrine appears in Baker v. Carr, 369 U.S. 186, 217 (1962):

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

The most recent Supreme Court decision applying this doctrine emphasized only the first two factors -- textual commitment and lack of judicial standards. See Nixon v. United States, 113 S.

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[51] As we discuss below, such discretion is within the control of Congress. Thus, were Congress to amend the WPR to require the courts to order injunctive relief whenever they found a violation of the statute, the doctrine of Hecht Co. would no longer apply.

Ct. 732, 735 (1993). Just last year, the Court also downplayed considerations of "respect" for the other branches. See United States Dep't of Commerce v. Montana, 112 S. Ct. 1415, 1426 (1992) ("Respect for a coordinate branch of Government raises special concerns not present in our prior [apportionment] cases, but those concerns relate to the merits of the controversy rather than to our power to resolve it.").

The precise "question" that the court may be barred from resolving is whether the armed forces have been introduced into "hostilities" or situations where hostilities are "imminent." The cases seem to yield the conclusion that if a particular military engagement is of great magnitude and duration (such as the operation against Iraq or the Vietnam conflict), courts will be free to find that it does constitute hostilities, but that if the involvement of the armed forces is relatively minor (such as the operation to escort Kuwaiti oil tankers in the Persian Gulf or military activities in El Salvador or Nicaragua), court will refuse to decide whether the involvement constitutes hostilities.

In Dellums v. Bush, 752 F. Supp. 1141, 1145 (D.D.C. 1990), for example, the district court stated that "the forces involved [in deployment to the Persian Gulf] are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat." Dellums drew support from Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973), which held that if the court could verify that 50,000 Americans had been killed and one hundred billion dollars had been spent in the course of the Vietnam conflict, it could conclude that there had been a "war" in Indochina. Accord Prize Cases, 67 U.S. (2 Black) 635, 669 (1863) (concluding that the Court would not "affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race"); Crockett v. Reagan, 558 F. Supp. 893, 898-99 (D.D.C. 1982) ("Were a court asked to declare that the War Powers Resolution was applicable to a situation like that in Vietnam, it would be absurd for it to decline to find that U.S. forces had been introduced into hostilities after 50,000 American lives had been lost."), aff'd per curiam, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984). Contra Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) ("Ange asks the court to find that the President's deployment of U.S. forces in the Persian Gulf constitutes 'war' [or] 'imminent hostilities' . . . . Time and again courts have refused to . . . undertake such determinations because courts are ill-equipped to do so."); Atlee v. Laird, 347 F. Supp. 689, 705 (E.D. Pa. 1972) (three-judge court) ("[T]he question whether American participation in Vietnam is a 'war,' is a political one."), aff'd mem. sub nom. Atlee v. Richardson, 411 U.S. 911 (1973).

On the other hand, courts have refused to resolve whether hostilities exist when the involvement of the armed forces is relatively minor and the answer is therefore heavily dependent on the specific facts of the particular case. See Crockett, 558 F. Supp. at 898 ("[T]he question presented does require judicial inquiry into sensitive military matters. . . . The Court lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador."); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 600 (D.D.C. 1983) ("[T]he questions presented [here] require judicial inquiry into sensitive military matters. Moreover, the covert activities of CIA operatives in Nicaragua and Honduras are perforce even less judicially discoverable than the level of participation by U.S. military personnel in hostilities in El Salvador."), aff'd, 770 F.2d 202, 210 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333, 341 n.53 (D.D.C. 1987) ("[T]he factual evaluation of [the term 'hostilities'] 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."), appeal dismissed per curiam, No. 87-5426, slip op. at 1 (D.C. Cir. Oct. 17, 1988) ("Appellants' first claim, that United States Armed Forces are currently involved in present or imminent hostilities in the Persian Gulf, presents a nonjusticiable political question.").[52]

This judicial refusal to make factual inquiries about the existence of "hostilities" has been criticized on both logical and historical grounds. With respect to courts' comparative inexpertise in military matters, Professor Ely has pointed out rightly that "[j]udges and lawyers generally are not experts on any substantive area. Instead they make their decisions (in a variety of areas on which others are more expert than they) by listening to the relevant facts, and when appropriate the opinions of experts, and coming to a decision." John Hart Ely, Suppose Congress Wanted a War Powers Act that Worked, 88 Colum. L. Rev. 1379, 1408 (1988). In this regard, Professor Ely quoted from the congressional plaintiffs' appellate brief in Crockett v. Reagan:

> Is it really more difficult to determine whether a group of soldiers, performing certain tasks in the

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[52] The court of appeals' order dismissing the appeal in Lowry was not published. Under D.C. Circuit Rule 11(c), therefore, the order may not be cited as precedent in briefs submitted to that court.

> midst of a civil war, are likely to get shot at, than to ascertain the probable economic impact of a given merger? Is there a basic difference between deciding whether a witness is lying when he or she testifies that certain military personnel have not participated in combat missions than when he or she testifies that a certain employer never mentioned race in considering applicants for a job?[53]

Id. Moreover, outside the war powers context, "courts are routinely called upon, without incident, to decide insurance cases in which the existence or non-existence of hostilities must be judicially determined for purposes of giving effect to a war risk clause." Id. at 1409.

More generally, the "courts have historically made determinations about whether this country was at war for many other purposes -- the construction of treaties, statutes, and even insurance contracts. These judicial determinations of a de facto state of war have occurred even in the absence of a congressional declaration." Dellums, 752 F. Supp. at 1146 (footnote omitted). Such determinations have covered "small" conflicts. See Marks v. United States, 161 U.S. 297, 304 (1896) (Whether an Indian tribe was "in amity with the United States . . . is not determined by the mere existence of a treaty between the United States and the tribe, or the fact that such treaty has never been formally abrogated by a declaration of war on the part of either, but that the inquiry is, whether as a matter of fact, the tribe was at the time . . . in a state of actual peace with the United States."); id. at 305 (Whether a "tribe was in amity with the United States . . . is a question of fact, to be determined by the testimony which may be introduced."). Cf. Sterling v. Constantin, 287 U.S. 378, 403-04 (1932) ("[T]he findings of fact made by the District Court [that no 'state of war' existed in the Texas oil fields] . . . leave no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful.").

We must reject the argument that the foregoing principles are inapplicable because judicial determinations of a state of war have greater effects on the political branches in the context

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[53] The refusal to make factual inquiries about the existence of hostilities may also confuse the question of the institutional competence of courts to make certain kinds of factual determinations with the question of the ability of plaintiffs to gather enough evidence to carry their burden of proof.

of the WPR than in cases involving only private litigants, such as those interpreting insurance contracts. Although the Supreme Court admitted in a recent case in which the Government urged application of the political question doctrine that "[r]espect for a coordinate branch of Government raises special concerns," it rejected the Government's arguments, emphasizing that "those concerns relate to the merits of the controversy rather than to [the judiciary's] power to resolve it." United States Dep't of Commerce v. Montana, 112 S. Ct. 1415, 1426 (1992). In the context of the WPR, we think this statement means that any "special concerns" arising from possible effects on the political branches of a judicial determination of "hostilities" should influence not whether the courts resolve the issue, but how much deference they give the to the President in the discharge of his duties under § 4(a)(1). Moreover, we believe that any such special concerns would cause the courts to be especially careful in considering the other justiciability doctrines that might bar their reaching the merits of the President's compliance with the WPR.

Thus, the applicability of the political question doctrine to judicial determinations under § 4(a)(1) will be judged on a case-by-case basis. The smaller the military force involved, and the less the relevant facts may be garnered through public channels open to the public, the more likely the courts will rely on the political question doctrine to refuse to decide whether the requirements of § 4(a)(1) have been triggered. If a court cannot make a determination about the existence of hostilities, it will be forced to dismiss any action seeking to compel the President to comply with § 4(a)(1) by submitting a report.

4. Ripeness

In Goldwater v. Carter, 444 U.S. 996 (1979) (mem.), the Supreme Court summarily vacated the D.C. Circuit's judgment in a dispute between member of Congress and the President over the President's power to terminate treaties without the ratification of either the Senate or the Congress as a whole. In his opinion concurring in the judgment, Justice Powell concluded that "a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority," that is, "until the political branches reach a constitutional impasse." Id. at 997. Because Justice Powell's analysis would apply the doctrine of "ripeness" only to "issues affecting the [constitutional] allocation of power between the President and Congress," id., the doctrine would not be strictly applicable to actions by members of Congress to enforce § 4(a)(1) of the WPR. A dispute about whether the President has introduced American armed forces into hostilities such that § 4(a)(1) imposes a duty on him to

submit a report to Congress is not a constitutional dispute. Moreover, Congress essentially has asserted its authority by enacting § 4(a)(1); there is nothing more for it to do. The doctrine of ripeness would not appear to bar the courts from reaching the merits of the issues.

However, the district court's opinion in Lowry v. Reagan, 676 F. Supp. 333, 341 (D.D.C. 1987), citing Justice Powell's discussion in Goldwater, noted that "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." The district court in Crockett v. Reagan employed much the same formulation: "Certainly, were Congress to pass a resolution to the effect that a report was required under the WPR, . . . and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented." 558 F. Supp. at 899 (citing Goldwater). In Justice Powell's terms, it might be said that these district courts (the court of appeals did not address ripeness in either case) would find no "impasse" until the President and Congress had formally disagreed about whether the conditions of § 4(a)(1) had been met with respect to a particular military operation. This seems to be an odd result given that it is the judiciary, not Congress, that is normally expected to apply a statute to particular facts. Nevertheless, because no other courts have considered ripeness in this context, the Lowry/Crockett district court rationale might operate to bar courts from adjudicating § 4(a)(1) compliance questions in certain circumstances.[54]

B. Compliance with § 5(b)

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[54] Somewhat akin to the doctrine of ripeness was the D.C. Circuit's "suggestion of compromise [between the two political branches] rather than historic confrontation" in United States v. AT&T, 551 F.2d 384, 394 (D.C. Cir. 1976). The court, rather than immediately adjudicating any "nerve-center constitutional questions" about the conflicting authority of the President and Congress with respect to national security information, decided to "pause to allow for further efforts at a settlement." Id. Accordingly, the court remanded the case "for further proceedings during which the parties and counsel are requested to attempt to negotiate a settlement." Id. at 395. The courts might seize on this example to delay adjudicating WPR compliance issues while ordering the parties to negotiate.

Section 5(b) of the Resolution requires that the President, within sixty days after a report is submitted or is required to be submitted under § 4(a)(1), "terminate" any use of the armed forces in the arena triggering the reporting requirement, unless Congress has declared war or otherwise authorized such use of the armed forces. Assuming that the sixty-day deadline had passed, either after the President had submitted a report under § 4(a)(1) or after a court had otherwise started the sixty-day clock, the question is whether and to what extent the courts would determine the President's compliance with the requirement that he terminate use of the armed forces. Section 5(b) also raises the issue whether Congress has the constitutional authority to terminate a military operation undertaken at the direction of the President. Assuming that the President asserts that Congress does not have this authority under the Constitution, would the courts resolve this issue?

1. Standing

With respect to the standing of members of Congress to seek the President's compliance with § 5(b), it is clear that no such standing exists. As discussed above, the WPR does not confer a private right of action to enforce its provisions, including the termination requirement of § 5(b). Members of Congress therefore do not have any legally-protected interest such that the failure of the President to comply with that requirement would cause any injury-in-fact to such members.

Moreover, even if the WPR were construed to confer a private right of action on individuals, members of Congress would still not suffer any injury-in-fact sufficient to give them standing. Because a failure to terminate the use of the armed forces does not affect congressmen in any "concrete and particularized" manner, they would be forced to allege that they were injured simply because the President was "breaking the law." The Supreme Court has repeatedly made clear that private citizens have no standing to assert such claims:

> We have consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2143 (1992). Accord Allen v. Wright, 468 U.S. 737, 754 (1984) ("[A]n asserted right to have the Government act in accordance with law is not

sufficient, standing alone, to confer jurisdiction on a federal court."). Accordingly, in their capacities as private citizens, members of Congress have no standing to compel compliance with § 5(b).

The lower courts have also made it clear that members of Congress are subject to these standing principles even in their capacities as legislators. Thus, in American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (per curiam), the D.C. Circuit denied standing to a member of the House who complained that a government agency had carried out a reduction-in-force in violation of law. It held that "the congressman's stake as a legislator was merely an interest in having laws executed properly." Id. at 305. However, "[a]ny interest that a congressman has in the execution of laws would seem to be shared by all citizens equally. Injury to that interest is a generalized grievance about the conduct of government, which lacks the specificity to support a claim of standing." Id. (citation omitted). In Chiles v. Thornburgh, 865 F.2d 1197, 1205 (11th Cir. 1989), the Eleventh Circuit confronted a Senator's argument that "as a Senator he has a right to see that the laws, which he voted for, are complied with." The court rejected this argument: "Such a claim of injury, however, is nothing more than a generalized grievance about the conduct of the government. The Supreme Court has repeatedly made clear that an injury to the right possessed by every citizen, to require that the government be administered according to law[,] is insufficient to support a claim of standing." Id. at 1205-06 (citation omitted). Finally, the Third Circuit has opined that "[o]nce a law is passed and upheld as constitutional, Congress's interest in its enforcement is no more than that of the average citizen. An ordinary citizen, in turn, has no standing to obtain an injunction to enforce the law, absent a personal stake in such enforcement." Ameron, Inc. v. U.S. Army Corps of Eng'rs, 787 F.2d 875, 888 (3d Cir.) (citation omitted), modified, 809 F.2d 979 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988).[55]

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[55] Just as Congress and its members would suffer no injury-in-fact if the President failed to comply with § 5(b) of the WPR, they would also suffer no injury-in-fact if the President failed to comply with the War Powers Clause of the Constitution, art. I, § 8, cl. 11. Citizens at large have no more interest in "the proper application of the Constitution," Defenders of Wildlife, 112 S. Ct. at 2143, than in the proper application of statutes such as the WPR. See, e.g., Whitmore v. Arkansas, 495 U.S. 149, 160 (1990) (denying citizen standing to require compliance with the Eighth Amendment); Schlesinger v. Reservists Comm. to Stop

(continued...)

Thus, members of Congress clearly have no standing to force the President to comply with § 5(b). Ameron suggests, however, that Congress or its constituent Houses (although not individual members) in some circumstances might have standing to obtain a declaratory judgment that § 5(b) is constitutional. The Ameron court also held that "Congress has standing to intervene [as a plaintiff] whenever the executive declines to defend a statute or . . . actually argues that it is unconstitutional." Id. n.8. The Third Circuit thought this principle flowed from the Supreme Court's narrower statement in INS v. Chadha, 462 U.S. 919, 940 (1983), that "Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." Cf. Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1105 (9th Cir. 1988) ("The U.S. Senate filed a complaint as intervenor . . . for declaratory and injunctive relief upholding the validity of the [statute]. . . . The district court granted the Senate's motion for summary judgment, upholding the constitutionality of the [statute]."), modified, 893 F.2d 205 (9th Cir. 1990) (en banc) (per curiam).

Under these rationales, neither Congress, nor its Houses, would have standing to maintain actions independently of private plaintiffs. The congressional standing recognized in Chadha and Ameron depended on the presence of two other adversary parties to the dispute, including a private party that has standing in its own right. Accordingly, in both cases, Congress participated as intervenor, not as original plaintiff or defendant. See Chadha, 462 U.S. at 930 n.5; Ameron, 787 F.2d at 880. One might say that in those cases, the "injury-in-fact" that supported congressional standing was the Executive Branch's assertion, in the course of litigation involving a private party with independent standing, that a statute was unconstitutional, such injury would not exist in an action for declaratory judgment brought solely by Congress

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55(...continued)
the War, 418 U.S. 208, 216-27 (1974) (denying citizen standing to enforce the Incompatibility Clause, art. I, § 6, cl. 2); United States v. Richardson, 418 U.S. 166 (1974) (denying citizen standing to enforce the Receipts and Expenditures Clause, art. I, § 9, cl. 7). Cf. Defenders of Wildlife, 112 S. Ct. at 2144 ("[O]ur generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress."). Accordingly, Congress and its members would not have standing to force compliance with the War Powers Clause. Contra Dellums v. Bush, 752 F. Supp. 1141, 1147-48 (D.D.C. 1990).

against the President. In addition, we must emphasize that the intervention in both of those cases was by Houses of Congress authorized to participate pursuant to statute or resolution, not by unauthorized individual members. See, e.g., Chadha, 462 U.S. at 930 n.5 (citing S. Res. 40, 97th Cong., 1st Sess. (1981), and H.R. Res. 49, 97th Cong., 1st Sess. (1981)).

Even if they could show injury, congressional plaintiffs would need to clear the redressability hurdle identified in the discussion of standing with respect to § 4(a)(1). They might attempt to do so in this context by bringing their action to compel compliance with § 5(b) not against the President, but against some other officer, such as the Secretary of Defense, with the authority to terminate the use of the armed forces. Courts do have power to enter injunctive or declaratory relief against the President's agents. See Franklin v. Massachusetts, 112 S. Ct. 2767, 2776 (1992) (four-Justice plurality) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)); id. at 2790 (Scalia, J., concurring in part and concurring in the judgment) (citing same).

2. Equitable Discretion

The analysis of the equitable discretion doctrine with respect to the issues arising under § 5(b) is essentially the same as with respect to § 4(a)(1) issues. Whether they are seeking the enforcement of § 5(b) or a determination that it is constitutional, members of Congress are neither battling their colleagues nor attempting to obtain a judicial declaration that a statute is unconstitutional. Thus, these plaintiffs cannot obtain relief from their colleagues. As with respect to the reporting requirement of § 4(a)(1), the congressmen desire to compel the President to comply with the termination requirement of § 5(b). Moreover, they wish the President (and the courts), not their colleagues, to acknowledge the constitutionality of § 5(b). Accordingly, equitable discretion by itself should not prevent courts from resolving § 5(b) disputes.

On the other hand, a court might employ the analysis used by Lowry v. Reagan, supra, 676 F. Supp. at 340-41, to examine whether there is a dispute within the Congress concerning the President's compliance with § 5(b) or the constitutionality of that provision. In such case, the court might consider whether bills had been introduced to compel the President to comply with § 5(b), or whether resolutions had been introduced declaring the sense of the Congress that § 5(b) was constitutional. On the facts of the particular case, the court might conclude that the plaintiffs' dispute over compliance or constitutionality was primarily with their fellow legislators, not with the President.

Equitable discretion would then prevent the court from adjudging the merits of that dispute.

The other kind of equitable discretion, discussed in TVA v. Hill, 437 U.S. 153, 211-13 (1978) (Rehnquist, J., dissenting), which was addressed above, might also be relevant in suits that seek compliance with § 5(b) of the WPR.

3. Political Question Doctrine

Once a determination has been made that the President must submit a report under § 4(a)(1), the determination of compliance with § 5(a) is relatively straightforward. Questions regarding whether sixty days have passed, whether Congress has declared war or enacted a specific authorization for use of the armed forces, or whether Congress has extended by law the sixty-day period present straightforward tasks of calendar reading or statutory construction. Resolution of these compliance questions would not be barred by the political question doctrine. Whether the President has terminated, or is in the process of terminating, the use of armed forces in hostilities, however, requires a separate analysis.

The most recent case that reached the termination issue was decided twenty years ago. After concluding that President Nixon had the duty to attempt, "in good faith and to the best of his ability, to bring the war [in Indochina] to an end as promptly as was consistent with the safety of those fighting and with [the national interests]," the D.C. Circuit held that "[w]hether President Nixon did so proceed is a question which at this stage in history a court is incompetent to answer." Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973). This holding rested on the court's perceived inability to procure the relevant evidence and a reluctance to substitute its judgment for the President's, who possesses "an unusually wide measure of discretion in this area." Id. Given this holding, together with all the other judicial hurdles that must be surmounted before even beginning to litigate termination issues, it is unlikely that a court would resolve a dispute about the manner in which the President was complying with the termination requirement. But cf. Baker v. Carr, 369 U.S. 186, 213-14 (1962) (With respect to "determination of when or whether a war has ended . . . , clearly definable criteria for decision may be available.").

With respect to whether the courts would reach the merits of a § 5(b) lawsuit if the President challenged that provision on constitutional grounds, the analysis is much more complex. The one case that speaks directly to this issue is Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990). The plaintiff, a sergeant in

the National Guard, challenged the President's order deploying him to the Persian Gulf in anticipation of the offensive military operation against Iraq. The plaintiff asked "the court to issue an injunction requiring that he be returned to the United States on the grounds that his deployment violates the War Powers Clause of the Constitution and the War Powers Resolution." Id. at 511. Given the President's vigorous constitutional defense of his authority to order the deployment, the court initially decided that "[i]n order to determine whether the President has violated the War Powers Resolution, this court would necessarily have to determine whether the President, under the Constitution, was or is constitutionally required to comply with the provisions of the War Powers Resolution." Id. at 512. Such a constitutional determination, however, "is one which the judicial branch cannot make pursuant to the separation of powers principles embodied . . . in the political question doctrine." Id. Thus, concluded the court, "the Constitution leaves resolution of the war powers dispute to the political branches, not the judicial branch." Id. at 514. Accordingly, the court dismissed the plaintiff's claims under the WPR.

Two other district court cases contain dicta that draw contrary conclusions under the political question doctrine. In Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987), which involved the Navy's escort of Kuwaiti oil tankers in the Persian Gulf, the court was confronted with a request by members of the House to rule on § 4(a)(1) issues. The constitutional issues arising under § 5(b) were not directly implicated by the case, but the court nonetheless took the opportunity, at the end of its discussion of the political question doctrine, to "note[] that, had the constitutionality of the War Powers Resolution been squarely presented," the doctrine would not have been relevant. Id. at 340-41. The court went on to state that the task of "analyz[ing] the constitutional division of powers" in military affairs "is within the purview of the judiciary." Id. at 341. The brief per curiam order dismissing the congressional plaintiffs' appeal did not discuss this point.

In Crockett v. Reagan, supra, the court concluded that the political question doctrine precluded it from determining whether a report was mandated under § 4(a)(1) of the WPR with respect to the presence of military advisers in El Salvador. 558 F. Supp. at 898. The court further suggested, however, that the doctrine would not prevent it from adjudicating issues that might arise under § 5(b) of the WPR: "Certainly, were Congress to pass a resolution . . . to the effect that [military] forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented." Id. at 899. In addition, the court did "not decide that all

disputes under the War Powers Resolution would be inappropriate for judicial resolution." Id. at 901. The summary affirmance by the court of appeals did not discuss this point. See 720 F.2d at 1356-57.

One other war powers case deserves mention at this point. Although Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990), which did not involve the WPR, was nominally concerned with the types of issues that would arise under § 4(a)(1) rather than under § 5(b), it contains language strongly suggesting that the court would not only reach the merits of the question of Congress' constitutional authority to terminate an offensive military attack but would also resolve that issue in favor of Congress. The court rejected the President's argument that harmonization of the various war-related and military-related provisions of the Constitution "is a political rather than a legal question." Id. at 1145. Moreover, the court was "not prepared to read out of the Constitution the clause granting to the Congress, and to it alone, the authority 'to declare war.'" Id. at 1146.

The Supreme Court has not yet issued an opinion in a case brought under the WPR. Two decades ago, however, the Vietnam conflict provided several individual Justices the opportunity to express their views. In denying an application to vacate a stay of an injunction prohibiting military action in Cambodia, Justice Marshall opined that "as a matter of substantive constitutional law, it seems likely that the President may not wage war without some form of congressional approval." Holtzman v. Schlesinger, 414 U.S. 1304, 1311 (1973) (Marshall, Circuit Justice). The political question doctrine would apparently not stand in his way: "if the decision were mine alone, I might well conclude on the merits that continued American military operations in Cambodia are unconstitutional." Id. at 1313. In an earlier Vietnam-era case, Justices Stewart and Douglas believed that the justiciability of war powers issues was a serious enough question to require plenary consideration rather than a summary denial of certiorari. Mora v. McNamara, 389 U.S. 934, 935 (1967) (Stewart, J., dissenting); id. at 939 (Douglas, J., dissenting).

Outside of the war powers context, there are few judicial decisions that provide any definitive guidance on the political question doctrine as it would apply to constitutional disputes between the two political branches. The most recent was the dispute in 1979 between the President and various members of Congress over the President's authority to terminate unilaterally the Mutual Defense Treaty with Taiwan. Sitting en banc, the D.C. Circuit resolved "the constitutional allocation of governmental power between two branches" on the merits. Goldwater v. Carter, 617 F.2d 697, 709 (D.C. Cir. 1979) (en banc) (per curiam). Not

one judge concluded that the political question doctrine barred such resolution.

Without briefing or oral argument, the Supreme Court on certiorari vacated the judgment and remanded the case with a direction to dismiss the complaint. Goldwater v. Carter, 444 U.S. 996 (1979) (mem.). No single rationale gained the support of a majority of the Court. Four Justices supported the result on grounds that appear to be relevant to the kinds of issues that might arise under § 5(b) of the WPR: "the basic question presented by [members of Congress] in this case is 'political' and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." Id. at 1002 (Rehnquist, J., concurring in the judgment). On the other hand, two Justices disagreed with this reliance on the political question doctrine. See id. at 998-1001 (Powell, J., concurring in the judgment); id. at 1006-07 (Brennan, J., dissenting). Two other Justices criticized passing on the political question doctrine without "plenary consideration" of the issues. Id. at 1006 (Blackmun, J., dissenting).

A few years before Goldwater, the D.C. Circuit was faced with a conflict between Congress and the Executive Branch over access to information concerning warrantless surveillance for national security purposes. The House of Representatives had asserted its constitutional authority to investigate while the President had asserted his constitutional authority to maintain the secrecy of national security information. The D.C. Circuit concluded that it could properly resolve the dispute: "In our view, neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional title, and it is or may be possible to establish an effective judicial settlement." United States v. AT&T, 567 F.2d 121, 127 (D.C. Cir. 1977). In the arena of war powers, we think, neither Congress nor the President has "a clear and unequivocal constitutional title."

Consideration of all these decisions yields an equivocal conclusion, albeit one that slightly favors the likelihood that the courts would not allow the political question doctrine to stand in the way of resolving § 5(b) issues in at least some circumstances. Although at least one judge in the District Court for the District of Columbia would definitely not resolve such issues, at least three others apparently would. At the appellate level, there has emerged no institutional support in the D.C. Circuit for applying the political question doctrine to disputes

about the constitutional allocation of power between Congress and the President. Of course, the court is much changed since 1979.

The same can be said of the Supreme Court. Of the Justices who relied on the doctrine in Goldwater, only two (Rehnquist and Stevens) still serve on the Court. The two other holdovers from that era (Blackmun and White) were also the Justices who would have set the case for briefing and oral argument before passing on that doctrine. Of all the great separation of powers cases since 1979, the political question doctrine played a part only in INS v. Chadha, 462 U.S. 919 (1983). Even in this case, which presented perhaps the sharpest structural constitutional conflict between the Executive Branch and Congress, the Court considered the doctrine only as it applied to the private party's challenge to a congressional statute, not to the interbranch conflict. See id. 940-43.

Finally, the Court's recent decision applying the doctrine to a federal judge's challenge to the Senate's conduct of his impeachment trial is relevant, even if it did not involve a conflict between the two political branches. If either the President or Congress claims there is "a textually demonstrable constitutional commitment of the [war powers] issue" to himself or itself, Baker v. Carr, 369 U.S. 186, 217 (1962), the Supreme Court's reply is likely to be that the judiciary "must, in the first instance, interpret the text and determine whether and to what extent the issue is textually committed," Nixon v. United States, 113 S. Ct. 732, 735 (1993).

4. Ripeness

Justice Powell's ripeness doctrine in Goldwater v. Carter, discussed above, is not strictly applicable to actions by members of Congress to enforce compliance with § 5(b) of the WPR. A dispute concerning whether the President is complying with his duty under § 5(b) to terminate the use of armed forces is simply not a constitutional dispute. Furthermore, Congress has asserted its authority by enacting § 5(b). As the legislative branch, there is nothing more it can do to express its will. Therefore, the doctrine of ripeness would not appear to preclude the courts from reaching the merits of § 5(b) compliance issues.

As before, however, there are cases that tend toward the contrary conclusion. In Crockett v. Reagan, the court stated: "Certainly, were Congress to pass a resolution . . . to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented." 558 F. Supp. at 899. See also Lowry v. Reagan, 676 F. Supp. at 340-41. This statement implies

that the court would not find an "impasse," and thus proceed to the merits, until the President and Congress formally disagreed about whether the President was in compliance with § 5(b) with respect to a particular military operation. Again, this seems to be an odd result given that it is the judicial branch, not the legislative branch, that is expected to apply the law to the facts. Nonetheless, because other courts have not considered ripeness in this context, the Crockett rationale might operate to prevent courts from adjudicating § 5(b) compliance questions in certain circumstances.

Justice Powell's analysis is more obviously relevant to the issue of the constitutionality of § 5(b), that is, to the issue whether Congress has the constitutional authority to order the President to withdraw troops that he has committed to a military operation. This is indeed a question of "the allocation of power between the President and Congress." Goldwater v. Carter, 444 U.S. at 997 (Powell, J., concurring in the judgment). Justice Powell's ripeness doctrine would prevent courts from deciding this question until there is "an actual confrontation between the Legislative and Executive Branches," which would require Congress to take some kind of "official action" that could be said to "reject[] the President's claim." Id. at 998. The enactment of § 5(b) could be said to constitute official action that rejects any Presidential claim to unilateral authority to engage in hostilities without the consent of Congress. Even if the constitutional dispute over § 5(b) might otherwise be ripe under this hypothesis, the ripeness doctrine might require one or both Houses of Congress, or their authorized representatives, to file the lawsuit, given that the intent of the doctrine is not to "encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." Id. at 997.

Of course, all of this analysis is the view of a single (now-retired) Justice of the Supreme Court. The full Court has not adopted it, and it has not had extensive treatment in the lower courts. Even the district courts in Lowry and Crockett, while citing the doctrine, did not explicitly rely on it as a basis for refusing to adjudicate any issues.

V. Statutory Elimination of Justiciability Barriers

The WPR could be amended, or separate statutes enacted, to remove some, but not all, of the barriers to the justiciability of compliance questions.

A. Standing

As discussed above, members of Congress do not now have a legally-protected interest in receiving reports required to be submitted pursuant to § 4(a)(1) because the WPR does not confer a private right of action on them. An amended Resolution, however, could create such a right by specifically providing for judicial enforcement, at the behest of a congressional plaintiff, of the President's duty to submit the required report. A failure by the President to submit the report would invade the members' legally-protected interest and cause them to suffer injury-in-fact. One model for such an enforcement provision is 28 U.S.C. § 1365(a), which provides in part:

> The United States District Court for the District of Columbia shall have original jurisdiction . . . over any civil action brought by the Senate or any authorized committee or subcommittee of the Senate to enforce, to secure a declaratory judgment concerning the validity of, or to prevent a threatened refusal or failure to comply with, any subpena or order issued by the Senate or committee or subcommittee of the Senate . . . .

See generally In re Application of the United States Permanent Subcomm. on Investigations, 655 F.2d 1232 (D.C. Cir.) (applying statute), cert. denied, 454 U.S. 1084 (1981); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (en banc) (applying similar predecessor statute).

An analogous provision in the WPR could have the advantage of specifying in advance which institutions or individuals were authorized to bring a civil action to enforce the reporting requirement and which were not. That is, the new statute could specify that the legal action be brought by both Houses jointly pursuant to a concurrent resolution, by either House individually pursuant to its own resolution, or by certain committees pursuant to the resolutions of their respective Houses or on their own motions. Cf. United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976) ("It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf."). The amended statute could also authorize any individual member to sue without further collegial action. Any of these options would also remove any doubt about whether an amended § 4(a)(1) conferred a private right of action on the authorized plaintiffs.

These conclusions, however, are at odds with the position taken by the Justice Department in the most recent Supreme Court

case that involved the standing of members of Congress to bring an action against Executive Branch officials. In a suit brought by congressional plaintiffs seeking a declaration that a bill had become a law notwithstanding President Reagan's purported pocket veto, the Department argued broadly that the separation of powers on which principles of standing are based forecloses lawsuits by Congress or its members challenging the actions of executive officials. See Brief for Petitioners at 13-20, Burke v. Barnes, 479 U.S. 361 (1987) (No. 85-781). Concerning who may properly represent Congress if the judiciary ever could referee a dispute between the other two branches, the Department also argued that because the Congress may generally act only through the express concurrence of both Houses, courts should require that Congress express its position through a concurrent resolution, rather than through its individual Houses or members. See id. at 27 n.20. Although we adhere to the analysis of standing herein, we recognize that the arguments advanced in the Burke brief could provide a reasonable basis for challenging an amended WPR in the Supreme Court, a challenge that has a reasonable possibility of success.

To overcome the redressability problem that exists because § 4(a)(1) now imposes the reporting duty only on the President, who is not likely to be amenable to suit in this context, the WPR could be amended to impose such duty on subordinate officials, such as the Secretary of Defense. See Franklin v. Massachusetts, 112 S. Ct. 2767, 2776-77 (1992) (four-Justice plurality); id. at 2788-90 (Scalia, J., concurring in part and concurring in the judgment).

With respect to the Executive Branch's compliance with § 5(b), there is no basis for creating by statute a legally-protected interest in Congress or its members to require the President or other officer comply with termination requirement. As discussed above, this kind of interest will not support the injury-in-fact requirement of Article III. The Supreme Court recently made this point in refusing to find standing in a case brought under the Endangered Species Act: "the [lower] court held that the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, non-instrumental 'right' to have the Executive observe the procedures required by law. We reject this view." Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2143 (1992). Under this analysis, Congress may not confer on itself the "right" to have the President comply with § 5(b) of the WPR.

The one statute that purported to create standing in members of Congress where there was otherwise no constitutional injury-in-fact was given no effect by the courts. In McClure v. Carter, 513 F. Supp. 265 (D. Idaho 1981), the three-judge district court

found that a Senator had no standing merely as a citizen or a Senator to challenge the appointment of a federal judge allegedly made in violation of the Ineligibility Clause, U.S. Const. art. I, § 6, cl. 2. Reviewing a special statute that purported to confer standing, Pub. L. No. 96-86, § 101(c), 93 Stat. 656, 657-58 (1979), the court opined: "It is difficult to see how this statute may, consistent with article III, confer upon a senator or member of the House of Representatives a 'right' to seek a decision from a federal court that such a senator or member of the House would otherwise be powerless to procure." 513 F. Supp. at 271. On appeal, the Supreme Court summarily affirmed this decision. McClure v. Reagan, 454 U.S. 1025 (1981).

With respect to the constitutionality of § 5(b), Congress could assure itself standing by conferring a private right of action under the WPR on individuals, such as soldiers engaged in the alleged hostilities required to be terminated by § 5(b), who clearly suffer injury-in-fact from the failure to comply with that provision. Congress could intervene in any action brought by the private plaintiff and seek a declaratory judgment that § 5(b) was constitutional, under the rule of INS v. Chadha, 462 U.S. 919, 940 (1983), as amplified by Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F.2d 875, 888 & n.8 (3d Cir.) (citation omitted), modified, 809 F.2d 979 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988).

B. Equitable Discretion

If the courts do uphold the standing of members of Congress under an amended WPR, the D.C. Circuit's equitable discretion doctrine, whatever its present force and applicability otherwise, would pose no barrier to judicial consideration of war powers questions. Only one case has considered that doctrine in light of a statute specifically granting members of Congress the right to bring an action for declaratory and injunctive relief. In reaching the merits of a challenge to the Gramm-Rudman Act by members of Congress and private parties, a three-judge District Court for the District of Columbia found

> no occasion to consider exercising the equitable discretion held by this Circuit's cases to justify denial of specific or declaratory relief to Members of Congress. Section 274 of the Act specifically provides for such relief to such plaintiffs, thus eliminating whatever equitable discretion might exist and leaving only the limitations of Article III.

Synar v. United States, 626 F. Supp. 1374, 1382 (D.D.C.) (per curiam) (referring to Pub. L. No. 99-177, § 274(a)(1), 99 Stat.

1037, 1098 (1985)), aff'd sub nom. Bowsher v. Synar, 478 U.S. 714 (1986).

Other decisions have made it clear that the exercise of equitable discretion is not mandated by the Constitution, but rests instead on the common-law discretion of courts to withhold injunctive and declaratory relief on prudential grounds. For example, the "separation-of-powers concerns" that underlie the equitable discretion doctrine "do not deprive the court of power to adjudicate under Article III," but merely counsel the court "to exercise judicial self-restraint." Moore v. U.S. House of Representatives, 733 F.2d 946, 954 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985). Thus, given Congress' undoubted power over the discretion of federal courts to grant or withhold injunctive and declaratory relief, the Synar district court held that Congress by statute may eliminate the discretion of courts to exercise self-restraint and may compel them to hear and decide any action that presents a "case" or "controversy" within the meaning of Article III. Cf. Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

This conclusion applies as well to any equitable discretion the courts might have to withhold relief even after a statutory violation has been found. See TVA v. Hill, 437 U.S. 153, 211-13 (1978) (Rehnquist, J., dissenting). As the Hill majority made clear in concluding that injunctive relief follows as a matter of course for violations of the Endangered Species Act, id. at 193-95, the extent of the courts' discretion is well within the control of Congress.

C. Political Question Doctrine

The nonjusticiability of political questions is based on the limitations of the "judicial Power" in Article III of the Constitution and therefore cannot be completely abrogated by statute. Cf. United States v. Munoz-Flores, 495 U.S. 385, 394 (1990) (The political question doctrine "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."). Yet it may be possible to displace the doctrine to some extent by an appropriately crafted statute. If Congress explicitly grants jurisdiction to the courts to entertain disputes under the WPR, confers standing on particular plaintiffs to bring those disputes into court, and prescribes workable standards for adjudicating and resolving the disputes, it is not clear that the "political question" doctrine would continue to stand as a constitutional barrier to all judicial decisionmaking in such cases. (Typically, if not always, the "political question" doctrine has been invoked in

cases where Congress has not created such statutory jurisdiction and procedures. See, e.g., Baker v. Carr, 369 U.S. 186, 215-16 n.43 (1962).)[56]

For example, it may be possible to minimize the application of the doctrine in the context of determining whether the armed forces have been introduced into "hostilities" or whether such use of the armed forces has been "terminated" by more precisely defining those terms. To the extent that courts refuse to decide such issues because they cannot gain access to the "facts," Congress could specifically identify which facts are relevant. In this regard, Congress might also impose a positive duty on the President or his agents to provide it with particular kinds of facts regarding a military operation. Of course, the provision of such facts was the intent of the reporting requirement of § 4(a)(1) in the first place.

D. Ripeness

To overcome Justice Powell's ripeness doctrine, Congress could unequivocally and specifically assert its constitutional prerogatives, and also state that it seeks a judicial resolution of the constitutional allocation of the war power between the Legislative and Executive Branches. It could do this either on a situation-by-situation basis or in a general statute. If this path is taken, the statute should specify who is authorized to assert these prerogatives in court -- both Houses pursuant to a concurrent resolution, either House pursuant to its own resolution, certain committees pursuant to the resolutions of their respective Houses or on their own motions, or even individual members without further collegial action. This kind of statute should suffice to constitute the official action that Justice Powell's doctrine would require. Of course, to the extent that courts apply the ripeness doctrine to require Congress to respond

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[56] The possibility of limiting application of the political question doctrine by statute is suggested in Michael J. Glennon, Constitutional Diplomacy 112-13 (1990), which cites the example of the act-of-state doctrine. Although that judicially-created doctrine is a "subset" or "species" of the political question doctrine with "constitutional underpinnings," id. at 112 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)), Congress has, by statute, "drastically limited" the application of the doctrine, id. (citing 22 U.S.C. § 2370(e)(2)). According to Glennon, courts have upheld the validity of this limitation. Id. (citing Banco Nacional de Cuba v. Farr, 383 F.2d 166, 178-83 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968)).

situation-by-situation, a general, one-time-only statute would not suffice.