

**A Critique of the War Powers Resolution  
of 1973 in Light of the Intelligence  
Accountability Act of 1980**

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A CRITIQUE OF THE WAR POWERS RESOLUTION OF 1973 IN LIGHT OF THE  
INTELLIGENCE ACCOUNTABILITY ACT OF 1980

Newell Highsmith

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## PREFACE

By what authority and through what instruments might the President of the United States choose to flex American muscles abroad? On its face, the questions impinges on everyone's vital interests. Less directly but nonetheless significantly it links up to specific concerns of the Program on Information Resources Policy by virtue of the policy of placing "intelligence" (information) and "special" (covert action) activities under common responsibility.

It has been observed that separating intelligence from covert action functions might "be useful from an intelligence professional's point of view, if only to get some distance from the 'dirty work' side of the house for the sake of public image." But there are as well factors for keeping these functions together, the observation that separation "is just not doable" among them.\* Another factor may be the flexibility this policy affords. It is this latter factor that Newell Highsmith analyses by comparing provisions of the War Powers Resolution of 1973 with provisions of the Intelligence Accountability Act of 1980.

In any event, the Executive Order 12333 that President Reagan promulgated in December 1981 to supersede E.O. 12036, President Carter's intelligence charter of January 1978, reaffirms the linkage in the following terms: "No agency except the CIA (or the Armed Forces of the United States in time of war declared by Congress or during any period covered by a report from the President to the Congress under the War Powers Resolution (87 Stat.855)

may conduct any special activity unless the President determines that another agency is more likely to achieve a particular objective."\*\*

Anthony G. Oettinger

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\* B.R. Inman, in "Seminar on Command, Control, Communications and Intelligence Guest Presentations," Program on Information Resources Policy, Incidental Papers I-80-6, I-81-9; Spring 1980: p. 159; Spring 1981: p. 214.

\*\* U.S., President, Executive Order 12333, "United States Intelligence Activities," Federal Register 46,no.235, 8 December 1981, 59946.

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## EXECUTIVE SUMMARY

The Constitution provides that the President is the Commander in Chief of the armed forces, but that only Congress may commit the nation's people and resources to war. Throughout this country's history, however, the constitutional separation of war-making powers has been ignored -- by both Congress and the President -- more than it has been observed. Only a small percentage of U.S. military engagements have been authorized by Congress through a declaration of war or a joint resolution.

This long history of "noncompliance" is undoubtedly due in part to the muddiness of the war powers doctrine. Some constitutional scholars would give the Executive significant freedom to authorize military involvements short of full-scale war, while others would require congressional approval for any military action not essential for the defense of the nation against sudden attack. This paper does not attempt to determine the "correct" or "better" view of the constitutional doctrine, but it does probe -- and leave unresolved -- the difficult question of whether we ought to swing the war powers pendulum toward the executive or the legislative branch.

It is in this context that the War Powers Resolution ("WPR") and Title V of the National Security Act (passed in 1980) are examined. The WPR was Congress' attempt to recover at once the role in war-making that it had consistently relinquished during the previous 200 years. A reaction against American involvement in Southeast Asia, the Resolution was passed in 1973 without the benefit of cooperative input from the executive branch. Indeed, it was passed over President Nixon's veto. Although recent presidents have selectively complied with its requirements, the WPR has for the most part failed to give Congress a timely and meaningful

role in the decision-making processes preceding the use of military force. Critics can point to weaknesses in the procedural and substantive terms of the WPR to explain this failure, but the underlying flaw in the Resolution may be that it seeks to establish an unworkable balance -- a balance that neither Congress, the President, nor the American people are eager to enforce.

In contrast, Title V ("Accountability for Intelligence Activities") codifies a scheme of congressional oversight of intelligence activities that was developed during the Carter administration. While the WPR embodied a constitutional doctrine that was inconsistent with the historical balance of war powers, Title V, in most respects, reflects a relationship between Congress and the Executive that experience has proven to be workable and acceptable to both branches. The effectiveness of Title V in increasing Congress' role in intelligence matters remains to be seen, but the cooperative manner in which the oversight scheme was developed should improve its chances.

Perhaps the most important question for a decision-maker confronting the WPR and Title V is which act to comply with in a situation where military and intelligence forces may be involved. Although the intelligence community may be as capable of prompting or conducting a war as the armed forces, the WPR, by its terms, does not cover intelligence operations -- regardless of their nature or magnitude. Since differences between the two acts arguably make it less burdensome to comply with Title V, the President might have an incentive to plan a war-risking or war-like operation so as to avoid the WPR's requirements in favor of Title V's. In fact, regardless of the Executive's motives, it is not clear which act would -- or should -- govern certain kinds of operations involving military and intelligence personnel. Because Title V and the WPR do not intermesh, their applicability will depend on the facts of each case -- the kind of operation

conducted, the country where it is conducted, the personnel involved, etc. And, perhaps more importantly, their applicability will depend on political considerations -- the relative strength of Congress and the President at the time, and public opinion concerning the operation and its goals. The ultimate question addressed in this paper is whether it is desirable to have a unified legislative scheme setting the balance of power with respect to both military and intelligence activities, or whether the existing, disjointed system provides a degree of executive flexibility that we cannot afford to eliminate.



A CRITIQUE OF THE WAR POWERS RESOLUTION  
IN LIGHT OF THE INTELLIGENCE  
ACCOUNTABILITY ACT OF 1980

The United States has interests in every region of the world, and these interests are increasingly being described as "vital interests." In Europe, we have vital interests based on cultural ties and common strategic goals. In Asia and Africa, particularly Southern Africa and the Middle East, we have a vital interest in the flow of essential natural resources. And in Latin America, we have a vital interest in preserving the relatively nonhostile hemisphere that we have enjoyed for centuries. These interests have been varyingly defined in proclamations ranging from the long-entrenched Monroe Doctrine to the more recent and controversial Carter pledge to keep the Persian Gulf open to tanker traffic. Bernard Brodie has observed that:

Vital interests, despite common assumptions to the contrary, have only a vague connection with objective fact. A sovereign nation determines for itself what its vital interests are . . . , and its leaders accomplish this exacting task largely by using their highly fallible and inevitably biased human judgment to interpret the external political environment.<sup>1</sup>/

In the United States, the subjectivity and the biases are somewhat institutionalized and therefore somewhat representative of the public's views. However, the views of one individual have overwhelming weight:

The persons who at any particular moment determine what our vital interests are, and how they should be defended if menaced, are naturally the political leaders of the nation. The responsibility and prerogative is centered first and foremost -- by a wide margin -- in

the President, whose authority in these matters, at least over the short term, is awesome.<sup>2/</sup>

The Executive's power to formulate foreign policy -- or, define vital interests -- is perhaps constrained only by his ability to maintain credibility -- i.e., to avoid debilitating opposition at home. On the other hand, the President's power to execute foreign policy, while very broad indeed, is under more concrete restraints. Brodie too hastily linked the two separate and distinct questions: "What are our vital interests?" and "How should they be defended if menaced?" The President's freedom to define vital interests is not equalled by his power to act upon those determinations.

The constitutionally mandated supremacy of the Executive in foreign affairs, formulated "in an era that could quite sharply distinguish action abroad from action at home",<sup>3/</sup> is significantly lessened in an era in which actions abroad almost inevitably impact on domestic concerns -- and vice versa. Moreover, the President's power to act abroad is constrained from time to time by acts of Congress, by the appropriations process, and by the Constitution itself. Article II, Section 2 of the Constitution grants the President the authority to make treaties and appoint ambassadors only "by and with the Advice and Consent of the Senate", and any direct action contemplated by the President as "Commander in Chief of the Army and Navy of the United States,"<sup>4/</sup> is constrained by Congress's exclusive authority "to declare war."<sup>5/</sup>

When the President decides that some sort of action is necessary to defend our vital interests, the questions arise: What range of actions can be taken without congressional authorization? What must be done to gain authorization for more serious actions? The Executive's freedom to

act is most directly limited by two recent congressional enactments that deal with the two principal groups conducting non-diplomatic actions abroad -- the military and the intelligence community. One of these acts, the War Powers Resolution of 1973<sup>6/</sup> ("WPR"), was prompted by the reaction of Congress and the public to the use of military forces in the Vietnam War generally and the Cambodian incursion specifically. The other, the 1980 amendment to the National Security Act of 1947<sup>7/</sup> (hereinafter referred to as Title V), was a compromise between Congress's desire to give our intelligence organizations sufficient freedom to protect our vital interests and its desire to provide the constraints necessary to prevent the kinds of abuses that were disclosed in post-Watergate congressional investigations.

Title V and the WPR impose specific constraints and requirements on the Executive's freedom to act abroad, purportedly sharpening the more general provisions in the Constitution governing the balance of power over foreign affairs. The thrust of Title V is to require notification of the intelligence committees in Congress prior to significant intelligence operations. In short, Title V is aimed at the so-called "special activities" or covert actions that have been used from time to time to achieve foreign policy objectives without U.S. involvement being apparent. Title V does not require that Congress authorize a proposed intelligence operation, but only that Congress be informed of it. The WPR, on the other hand, purports to codify the constitutional doctrine that permits the involvement of United States Armed Forces in significant hostilities -- i.e., wars -- only upon the authorization of Congress.<sup>8/</sup>

While Title V and the WPR impose significantly different requirements, there is not such a clear line between the kinds of actions they cover. The intelligence community and the military largely overlap, most obviously in the

Defense Intelligence Agency and the National Security Agency. The overlap becomes even more complicated given that military personnel may be "borrowed" by intelligence organizations for certain operations; CIA personnel may be trained, equipped, or supported by the military; CIA-recruited foreign operatives may be used to perform military operations; military intelligence collectors may serve the civilian intelligence community; and so on. In short, the same operation -- for example, the attempted rescue of the hostages in Iran -- might trigger the requirements of either act depending on how it was conducted and who was involved.

A final question that must be considered in gauging the Executive's power to act is: What will be the consequences of a perceived violation of the WPR or of Title V? Since it is unclear whether the courts would entertain a lawsuit against the Executive, Congress's alternative means of enforcing the two acts -- joint resolutions, legislation, budgetary pressure, even impeachment -- must be taken into account by a President who is contemplating action abroad.

#### I. THE WAR POWERS RESOLUTION OF 1973

The separation of war-making power between Congress and the Executive received only sporadic attention between 1789 and 1970. In May of 1970, however, President Nixon ordered the invasion of Cambodia without consulting Congress, prompting a bitter debate on the respective war-making powers of the executive and legislative branches. Despite vigorous opposition from the Nixon administration, including a veto, the WPR became law in 1973.<sup>9/</sup>

In the WPR, Congress states that:

The purpose of this joint resolution  
[is] to fulfill the intent of the  
framers of the Constitution of the



United States and insure that the collective judgement of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . .<sup>10/</sup>

However, even if it can be said that the WPR fulfills the framers' intent (an arguable proposition in itself), there is little doubt that the WPR fails to clarify the permissible parameters of Executive action. The President's power to act is checked primarily by Section 3 (entitled "Consultation") and by Section 5 (entitled "Congressional Action"). Yet the vagueness and ambiguity of Section 3 render it toothless in theory as well as in practice,<sup>11/</sup> and the provisions of Section 5, vigorously challenged by the Executive and by others prior to enactment as unconstitutional and inadvisable,<sup>12/</sup> have not been tested to date. Moreover, the resolution not only fails to clarify the balance of authority and thereby give the President clear guidelines by which to act, but it is clouded by uncertainty as to its enforceability as well.<sup>13/</sup>

The effectiveness and enforceability of the terms of the WPR will determine the latitude within which the President can act, for those terms purportedly effectuate the constitutional balance of war-making powers. However, the history of the war powers controversy must be examined before turning to the terms of the WPR itself. The balance between congressional and executive authority that the WPR attempted to set is a product of both the theoretical balance set by the framers and the de facto balance of power developed over our nation's history.

#### A. Background

The war powers dispute is based on a conflict between two weighty authorities: the Constitution on the one hand, and two hundred years of history and tradition on the other.

The Constitution vests in Congress alone the authority to declare war,<sup>14/</sup> naming the President the "Commander in Chief of the Army and Navy of the United States . . . when called into the actual Service of the United States."<sup>15/</sup> These provisions seem relatively unambiguous: the President is to direct the armed forces that Congress chooses to establish and maintain in such endeavors as Congress chooses to have pursued.<sup>16/</sup> This allocation of power was the "result of a deliberate decision by the framers to vest the power to embark on war in the body most broadly representative of the people."<sup>17/</sup>

In practice, however, the war powers have usually been wielded by the President alone: between 1798 and 1973, U.S. armed forces were involved in hostilities on 204 occasions, only five of which were pursuant to a declaration of war.<sup>18/</sup> In vetoing the WPR, President Nixon objected to the claim that the act reflected the historically and constitutionally mandated balance of war powers:

[The WPR] would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years.<sup>19/</sup>

Supporters of this view argued that the existing balance of authority was consistent with the Constitution, construed in light of history. Constitutional analysis, it was argued, involved the accommodation of 18th Century notions to our "highly complex, interrelated society."<sup>20/</sup>

The courts have contributed little, if anything, in the way of constitutional clarification. The dispute between the Executive (with two hundred years of history on its side) and the Congress (with the express terms of the Constitution on its side) has been judged a political question and therefore nonjusticiable by the courts.<sup>21/</sup> However, even in the absence of a definitive court ruling, some have

argued that the terms of the Constitution cannot be altered in any way by historical practices.<sup>22/</sup> Professor Raoul Berger has described "adoption by usage" and "ratification by acquiescence" as:

. . . euphemisms for the proposition that presidential powers may be expanded over the years without resort to the people. . . . Such "adoption" theories would circumvent the exclusive provision for amendment by the machinery of article V.<sup>23/</sup>

Though perhaps irrelevant to academic constitutional analyses, history is an important practical factor in actual instances of unauthorized Presidential action. Because challenges to Executive actions are nonjusticiable,<sup>24/</sup> Congress must deal politically with actions it deems unconstitutional. Yet the incentive to confront the President is usually low during a crisis, when the public and, indeed, many members of Congress are rallying around the President and endorsing his use of the armed forces.<sup>25/</sup> The public is accustomed to seeing the President in his historically assumed role as the leader in times of hostilities, and the President seldom cares to relinquish his traditional role.

#### B. The Sudden Attack Doctrine

While the Constitution vests in Congress the sole authority to involve the U.S. in war, the framers recognized the need for unfettered executive power to repel sudden attacks on U.S. territory.<sup>26/</sup> The sudden attack doctrine is based on the notion that:

. . . the power [to defend the nation] need not rest on any specific provision of the Constitution; as a necessary concomitant of sovereignty itself, the inherent right of national self-defense gives the President full power to defend the country against sudden attack with

whatever means are at his disposal as  
Commander in Chief.<sup>27/</sup>

The scope of this inherent executive authority has been the focus of much of the war powers controversy.

The courts, in upholding executive actions in the 19th Century, validated the theory that defense of the U.S. encompasses protection of American lives and property abroad<sup>28/</sup> as well as the notion that the President's actions may go beyond mere preservation of the nation until Congress can act.<sup>29/</sup>

While the precise parameters of the President's inherent authority to defend the U.S. are not clear, it seems unlikely that all -- or even most -- of the 199 unauthorized military actions between 1798 and 1973 were needed to "defend" the nation. Rather, various presidents deemed those actions necessary to protect U.S. "interests". Such was the case with the war in Vietnam<sup>30/</sup> -- the war that escalated discussion of the President's power to defend the U.S.

The WPR embodied Congress's conclusion that the President's authority existed only in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."<sup>31/</sup> As early as 1967, the Senate Foreign Relations Committee under Senator Fulbright had reported that the President could only "repel sudden attacks."<sup>32/</sup> Testifying before the Committee, Senator Ervin stated that:

. . . any use of the Armed Forces for any purpose not directly related to the defense of the United States against sudden armed aggression, and I emphasize the word "sudden", can be undertaken only upon congressional authorization.<sup>33/</sup>

The Prize Cases<sup>34/</sup> made it clear that the President alone must evaluate sudden threats and decide whether they

warrant a military response prior to obtaining congressional authorization. However, in Congress's view, the President's decision must take into account constitutional limitations on his war powers. Any action not absolutely required to repel an attack would be unconstitutional unless authorized by Congress.

Not surprisingly, the Executive has usually taken a contrary view, asserting presidential power to defend broader national interests without congressional authorization.<sup>35/</sup> The State Department noted that:

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 much smaller. An attack on a country far from our shores can impinge directly on the nation's security.<sup>36/</sup>

This analysis runs squarely into the objection that only the amendment process, and not historical exigencies, can alter the dictates of the Constitution.<sup>37/</sup> One commentator has suggested that the President's authority extends to all crises that threaten consequences as grave as those that the framers feared from sudden attacks.<sup>38/</sup> This approach shifts the focus from the narrow concept of an attack on U.S. territory, but it also requires that a threat be very serious before Presidential authority will be triggered.<sup>39/</sup> President Nixon's veto of the WPR was prompted by his belief that the President's power to protect American interests extended to a very broad range of threats, many of which would not entail such serious consequences.

The perceived danger of the expanded sudden attack doctrine was that once the President had authority to protect U.S. "interests", the scope of potential U.S. military involvement (without congressional authorization) would be as broad as the President's definition of "interests." The

U.S., indeed, has interests of some sort in every corner of the globe, and many are threatened in some degree. However, the President's unique ability to deal with these unpredictable, ever-changing threats as they arise does not negate the scheme established in the Constitution. Under the Constitution, only Congress can commit the nation's people and resources to war unless attackers threaten American lives or territory so suddenly that Congress cannot respond. It is unclear whether even a mutual defense treaty, ratified by the Senate only, constitutes authority to act without the approval of the full Congress.

The effort to expand the sudden attack doctrine to encompass hostilities such as those in Vietnam (which surely was not "sudden") demonstrated just how fully the Executive had absorbed the war powers. Accustomed to congressional acquiescence in executive military actions, the Nixon administration justified American involvement with traditional rationales that were weak but long-accepted. It took an unpopular war to focus attention on Congress's historical neglect of its war-making duties.<sup>40/</sup>

#### C. What Constitutes Authorization?

Ironically, though the nation's involvement in Indochina brought attention to the issue of Presidential authority to wage war without congressional authorization, the Vietnam war had in fact been authorized by Congress. The Gulf of Tonkin Resolution, passed in 1964, declared that the U.S. was "prepared, as the President determines, to take all necessary steps, including the use of armed force," in the defense of our SEATO allies.<sup>41/</sup> The Constitution has consistently been interpreted as not requiring that congressional authorization take the form of a formal declaration of war.<sup>42/</sup> Joint resolutions, such as the Gulf of Tonkin



Resolution, have been used to authorize intervention on four other recent occasions.<sup>43/</sup> The President has even relied on legislation as indirect as military appropriation bills for this kind of authority.<sup>44/</sup>

While good reasons exist for not requiring a formal declaration of war whenever military force is used,<sup>45/</sup> allowing less formal and direct acts of Congress to suffice often results in "rubber-stamping [of] executive decisions."<sup>46/</sup> The Executive becomes tempted to read authorization into all sorts of legislation, and Congress is allowed to commit the nation's people and resources to war without a direct, deliberate consideration of the reasons for and against involvement. The very formality of a declaration of war makes Congress's intent unequivocal and forces Congress to treat the issues with all due seriousness.

The utility of less formal acts of authorization (particularly when minor hostilities are involved) makes it unwise to require a declaration of war in all instances. Joint resolutions, which require the approval of both houses of Congress, are unobjectionable if they are specific enough in goals, scope, and duration to avoid giving the President a blank check for military action.<sup>47/</sup>

Other acts, such as appropriation bills and mutual defense treaties, provide less satisfactory bases for inferring congressional authorization. War-making authorization can too easily be inconspicuously buried in appropriation acts. Even those bills that unequivocally earmark funds for a military operation may be passed simply because Congress does not want to "abandon our boys" in what is essentially a "fait accompli."<sup>48/</sup> Mutual defense treaties, which require the consent of the Senate only, cannot function as "inchoate declarations of war"<sup>49/</sup> because Congress as a whole does not authorize them. Moreover, treaties such as the North Atlantic Treaty, while treating an attack on one member as an

attack on them all, require only that members respond as they "deem necessary", and the Senate ratification debates indicate that the U.S. is not "automatically committed" in such instances, but may act in accordance with its constitutional processes.<sup>50/</sup>

#### D. The Terms of the WPR

Prior to 1973, the war powers were exercised primarily by the Executive Branch, with its superior capacity for flexible crisis management and its unique position in foreign affairs (including primary access to all foreign intelligence). The President's constitutional authority was based on his inherent power to defend the nation and on any additional authorization that Congress chose to confer. While the parameters of inherent authority and congressional authorization were subject to theoretical debate, it was clear that the de facto balance of war powers was weighted heavily toward the Executive. For good or for bad, the WPR attempted to change that balance.

Senator Eagleton, one of the sponsors of the Senate version of the WPR, actually opposed the bill that was finally passed because he believed that it granted the President too much power to make war. President Nixon, on the other hand, vetoed the WPR because he believed that it unconstitutionally constrained the inherent authority of the Executive. This divergence in opinion partly reflects the polar political beliefs of these two men, but it also reflects the ambiguities and uncertainties in the WPR itself.

The WPR is intended to "fulfill the intent of the framers"<sup>51/</sup> and not to "alter the constitutional authority of Congress or of the President."<sup>52/</sup> The key provisions of the WPR are Sections 2 through 5 (see Appendix A), each of which has been the subject of some controversy.



## 1. Legislative Purpose

Section 2 ("Purpose and Policy") describes the instances in which the President can "introduce the United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances":<sup>53/</sup> 1) following a declaration of war; 2) pursuant to specific statutory authorization; or 3) in a national emergency caused by an attack on U.S. territory or armed forces. The WPR thus embodies Congress's narrower view of the scope of the "sudden attack" doctrine.<sup>54/</sup>

However, this description of the scope of executive war powers may not, in fact, be anything more than descriptive. While the Senate bill included such language in a substantive provision, the House bill had no such provision at all, so the Conference Committee compromised by making Section 2 a prefatory provision.<sup>55/</sup> Objecting to the theoretically nonbinding effect of the amended Section 2, Senator Eagleton asserted that the definition of executive authority had been rendered a "pious pronouncement of nothing."<sup>56/</sup> Nonetheless, Section 2 may well be a useful statement of where Congress draws the line on executive war powers, a statement that the President is on notice not to disregard lest he risk a political confrontation.<sup>57/</sup>

## 2. Consultation and Reporting

Sections 3 ("Consultation") and 4 ("Reporting"), in conjunction, detail the procedures that the President must follow whenever the military engages in "non-routine" activities, which range from involvement in hostilities to the mere build-up of U.S. forces in a foreign country.<sup>58/</sup> Though free from controversy prior to passage,<sup>59/</sup> sections 3 and 4 have been the focus of each of the subsequent disputes arising under the WPR.<sup>60/</sup> The issue in each case has been

whether the action taken required prior consultation under Section 3 or merely post hoc reporting under Section 4.

Section 3 requires that the President "in every possible instance consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."<sup>61/</sup> Section 4 requires the President to report to Congress whenever the armed forces are introduced into hostilities, introduced into the territory of a foreign nation while equipped for combat, or significantly built up in a foreign nation.<sup>62/</sup> Pursuant to Section 4, the President has reported to Congress following all but one of the "incidents" that have occurred since 1973<sup>63/</sup> (including one incident to which the WPR was thought by the Executive to be inapplicable.)<sup>64/</sup> However, the prior consultation requirement of Section 3 was not complied with in any of these cases.

While the reporting requirement is a reasonable mechanism for insuring some degree of congressional involvement in war-making decisions, it is not a significant constraint on the President's freedom to act.<sup>65/</sup> Therefore, it has met with uncoerced compliance. The consultation requirement, on the other hand, significantly alters the Executive's process of decision-making during a crisis. Yet in most cases, the President will consider himself uniquely suited to making the necessary decisions without Congressional involvement.<sup>66/</sup> More often than not, the men who reach the presidency want to make the final decisions on such matters, particularly in crisis situations. As a result, recent Presidents have sought to circumvent Section 3, pacifying Congress with a post hoc report under Section 4.<sup>67/</sup>

The terms of Section 3 have proven to be easy to circumvent. One commentator blames "Congress's failure to devote sufficient attention to the language of Section 3 when it was originally drafted."<sup>68/</sup> He asserts that:

. . . the consultation clause was never the subject of debate on the floor of either chamber of Congress. Because the consultation clause met no challenge in Congress, the vagueness of its language was not brought to light prior to its passage.<sup>69/</sup>

Rather than clarifying the constitutional responsibilities of the President, Section 3 raises more questions. When is consultation not "possible"? Is consultation required even when the President's proposed actions are in fulfillment of his duty to defend U.S. territory?<sup>70/</sup> Who in Congress must the President consult?<sup>71/</sup> What procedures will be deemed to constitute "consultation"?<sup>72/</sup>

Recent experience has pointed out where the vaguely worded Section 3 can be circumvented. First of all, Section 3 covers only hostilities and imminent hostilities, whereas Section 4 also covers the introduction of combat forces into foreign nations that are free of hostilities.<sup>73/</sup> Though Section 3 seems to require a determination of the presence or imminence of any hostilities in the area, two administrations have looked instead to whether or not the involvement of U.S. armed forces in hostilities was "anticipated."<sup>74/</sup> Thus, without consultation, the President might deploy troops in an area close to a full-scale war - where the risk of involvement is not insignificant - as long as involvement is not "intended" or "anticipated." President Ford essentially did just that with the Saigon evacuation.<sup>75/</sup>

Another potential source of circumvention is the phrase "in every possible instance." In some cases, the need for immediate action will make consultation impossible. Moreover, "immediacy" will vary from case to case: 48 hours between the beginning of a crisis and the decision to use force in its resolution may present ample opportunity for consultation in one case but no opportunity in another.

Because of the vague wording of Section 3, the Executive will often be able to argue that the need for immediate action made consultation impossible.<sup>76/</sup>

Alternatively, the Executive could argue that the need for secrecy prevented consultation with members of Congress.<sup>77/</sup> However, this argument is an insult to Congress. While security problems clearly exist with over 500 legislators and their staffs, private consultation is surely "possible" with a few congressional leaders. Experience with the two intelligence committees suggests that secrets can be kept by discrete portions of Congress. Since the WPR gives no clue as to who specifically must be consulted, there is surely sufficient flexibility in the requirements to tailor the scope of consultation to the exigencies of a particular crisis.

Finally, Section 3 has been circumvented, if not violated, by merely informing congressmen of a decision that has already been made rather than consulting them on a pending decision.<sup>78/</sup> Following the Mayaguez operation, the Legal Adviser to the State Department contended that Section 3 had been complied with because Congressional leaders had been informed of the President's decision and their comments had been relayed to the President.<sup>79/</sup> This interpretation of "consultation" was plainly inconsistent with the definition given by the legislative history of the WPR.<sup>80/</sup>

Eight years under the WPR have resulted in five reports pursuant to Section 4 but no instances of true consultation pursuant to Section 3. Clearly, the WPR cannot "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities"<sup>81/</sup> unless Section 3 is fully enforced. The question, then, becomes whether collective judgment is desirable in all circumstances, and if so whether Congress can enforce Section 3 so as to insure it.<sup>82/</sup>

### 3. Congressional Action

Sections 3 and 4 have been the subject of controversy only since the WPR became law. Their terms apply to even the least significant uses of combat troops, such as evacuations. However, Section 5 ("Congressional Action") was controversial only prior to the passage of the resolution. Its terms are triggered by more prolonged uses of combat troops in actual hostilities, and, to date, no such military involvement has arisen to test its provisions.

Challenged as unconstitutional, Section 5 (particularly subsection (b)) was the source of most of the Nixon administration's objections.<sup>83/</sup> Subsection (b) provides that the President must terminate the involvement of the armed forces in hostilities within 60 days of his report to Congress under Section 4(a)(1),<sup>84/</sup> unless Congress: 1) has specifically authorized his action; 2) has extended the 60-day period; or 3) is physically unable to meet due to armed attack.<sup>85/</sup> Subsection (c) directs the President to terminate U.S. involvement in hostilities prior to the expiration of the 60-day period if so ordered by a concurrent resolution of Congress.<sup>86/</sup>

Section 5(c) is essentially a statement of the pre-existing constitutional law: U.S. involvement in hostilities is subject to termination by act of Congress because only Congress can declare war. The effect of Section 5(b) is less obvious. Senator Eagleton believed that Section 5(b) would give the President a 60-day license to use the armed forces as he wished unless the definition of executive war powers in Section 2 was given statutory effect.<sup>87/</sup> In fact, however, regardless of the effect of Section 2, any use of the military by the President is constrained by the constitutional scheme that Section 2

attempts to describe. The President can act only under congressional authorization or to defend against an attack, no matter what Section 2 does or fails to do.<sup>88/</sup> Thus, Section 5 does not necessarily permit any military action of less than 60 days.

Another fundamental objection, voiced by congressmen as well as administration officials, was that Section 5 codified a pattern of congressional decision-making by inaction. Opposing the automatic termination provision in Section 5(b), President Nixon stated that:

. . . the proper way for the Congress to make known its will [is] through a positive action. [O]ne cannot become a responsible partner unless one is prepared to take responsible action.  
(Emphasis added.)<sup>89/</sup>

Similar sentiments were expressed in the supplemental opinions of seven members and the minority opinion of four members of the House Foreign Affairs Committee (which reported on the bill).<sup>90/</sup> Favoring a requirement of affirmative congressional action to terminate military involvement, House Minority Leader Gerald Ford complained that "we will stop a war by sitting on our hands and doing nothing."<sup>91/</sup>

Representative Whalen offered an amendment that would require Congress to act within the expiration period to either approve or order the termination of U.S. involvement in hostilities.<sup>92/</sup> The amendment was defeated. Opponents of the amendment argued that it created an ". . . undesirable presumption in favor of Presidential action . . .".<sup>93/</sup>

Despite the valid arguments against the Whalen amendment, the sentiments expressed by Minority Leader Ford and others were well-founded. If indeed the "'balance' of authority over war-making has swung heavily to the President in modern times",<sup>94/</sup> Congress has primarily itself to blame.



After 199 instances of undeclared hostilities, none of which moved Congress to confront the President, Congress finally acted in 1973 only when spurred by a highly unpopular war and confronted by a politically crippled President. Moreover, its 1973 response, rather than reversing two hundred years of congressional acquiescence, blandly codified the existing system of "participation" by noncommitment. Section 5 does not require the continuation of this system, as the Section 5(c) termination provision duly attests, but neither does it discourage its continuation. As long as the President's military actions have met with public approval, as they usually have,<sup>95/</sup> Congress has been content to blow with the winds of public opinion.<sup>96/</sup> The WPR does not seem to alter this situation.

Another provision relevant to "congressional action" is Section 8(a), which provides that congressional authorization "shall not be inferred" from any act, including any appropriation act, that does not specifically state that it is intended to satisfy the WPR.<sup>97/</sup> This section should prevent future Presidents from basing their authority to commit armed forces to hostilities on congressional acts that have not received the study and deliberation due a declaration of war (or comparable resolution).

The terms of the WPR were praised and criticized prior to their passage, and they continue to evoke diverse reactions. However, the crucial issue may involve not the terms themselves but the questions: 1) Is the WPR enforceable? and 2) Is it in the nation's interest for the WPR to be enforced?

#### E. Desirability and Enforceability

The broad policy behind the WPR is the same as the policy behind the constitutional provision giving Congress

alone the power to declare war: the decision to commit the nation's people and resources to war should be made by the branch of government most broadly representative of the people. Moreover, war involves a moral commitment that arguably should be made only on the basis of a consensus.

However, wars are no longer the relatively slow-moving affairs they were in the 18th century. Brief skirmishes can be of great strategic and/or political significance, and even major confrontations may be concluded in a matter of days.<sup>98/</sup> All such crises, plus an unlimited range of potential and imminent crises, must be dealt with initially by the President, supported by a communications, intelligence, and advisory system that is designed for crisis management. On the other hand, the deliberative decision-making processes of the Congress are clearly ill-suited to crisis management.<sup>99/</sup>

Prolonged engagements do allow Congress to make its will known before hostilities end, and, eventually, Congress has usually acted in such cases, albeit after the fact.<sup>100/</sup> However, the critical point in the war-making decision -- and the focus of Sections 3 and 4 of the WPR -- is the initial introduction of troops into hostilities or into nations where conflict is imminent. Congress must participate at that point if it is to be a full partner in the exercise of war powers. Yet congressional involvement at that point removes the advantages of speed, decisiveness, and, most importantly, flexibility.<sup>101/</sup>

One solution to the dilemma was worked out over the course of history. The President assumed the authority to take military action as he deemed it necessary, and Congress subsequently acted in those instances in which it became apparent that a major national commitment was involved. Of the 199 instances of hostilities between 1789 and 1973 not covered by a declaration of war, the vast majority involved



only a few ships or a company of Marines. Historically, Congress seems to have considered minor police actions and shows of strength to be within executive discretion. When the "flexible approach" turned a minor commitment into a significant involvement, as it did in Vietnam, Congress stepped in to express its will. Thus, the Executive's unique capacity for action was complemented by congressional deliberation on operations that involved a large-scale moral, fiscal or physical commitment. Even if this balance of war powers was arguably inconsistent with constitutional doctrine, was it desirable to destroy that well-developed balance in the wake of one unpopular war?

The historical "solution", though perhaps more workable than the "constitutional" scheme as interpreted by Congress in the WPR, was not without its flaws. First of all, Congress's judgment concerning on-going military actions was inevitably affected by the timing of its decision. Whether to get involved in hostilities is an entirely different question from whether to withdraw from on-going hostilities. Congress has never ordered the President to terminate hostilities,<sup>102/</sup> yet it seems unlikely that in all 199 cases Congress would have agreed in the first instance with the President's judgment as to the necessity of using force. This deferral to executive judgment may also have occurred in cases of major military involvement, when Congress's exclusive power to authorize war is unquestioned and when congressional deliberation and judgment is most needed.

Moreover, the volatility of the modern world may require increased congressional involvement in decisions concerning the use of the military. In the nuclear age, small confrontations can quickly escalate into major commitments or, worse, a nuclear exchange. With the world order in such a precarious balance, there is a plausible argument that even the least significant military actions create a

substantial risk of severe consequences for the nation -- consequences that only Congress should decide to risk. Of course, the speed at which hostilities can escalate also makes legislative decision-making impractical and burdensome, so the dilemma cannot be totally resolved -- only an optimum balance struck.

The fact that an historical balance of war powers was worked out and functioned without major objection for almost two centuries cannot be ignored, the Constitution notwithstanding. Perhaps it was wise for Congress to acquiesce in the de facto balance, reserving its participation for the more important military actions such as the two World Wars, the War of 1812,<sup>103</sup> Vietnam,<sup>104/</sup> etc.

The optimum balance of war powers seems to fall somewhere between the almost total power held by the Executive prior to 1973 and the unnecessarily constrained Executive power that the WPR seeks to effect. Specifically, the consultation requirement of Section 3 burdens the executive decision-making process without a significant, countervailing increase in congressional participation.<sup>105/</sup> Moreover, since Section 3 seems to be easily circumvented,<sup>106/</sup> a less burdensome, more enforceable provision may be preferable.

For example, Section 3 might be amended to require consultation with specific congressional leaders or committee chairmen at least 48 hours prior to the introduction of U.S. forces into hostilities. This provision would have several advantages over the current Section 3. By specifying the persons to be consulted and the required interval between consultation and the initiation of military action,<sup>107/</sup> the proposed provision would: 1) make it easier for the President to determine what he must do to comply; and 2) make it easier to determine when a violation has occurred -- thus enhancing enforceability. Standard security procedures could be established if the persons who were

to be consulted were known before a crisis developed (as, again, the intelligence committees have done). The 48-hour interval would insure that congressional leaders, at an early date, had sufficient information to determine whether immediate action by the full Congress was warranted. Congress would then be able to check egregious misuses of the armed forces in the initial stages of an operation or possibly even before it commenced. Yet congressional leaders would also be free to permit the execution of minor operations that did not warrant legislative action and that might become overblown if subjected to open scrutiny by the full Congress. Close, but discreet, scrutiny of proposed operations by specified congressional representatives seems a desirable compromise between the scheme described in the WPR and the scheme that has in fact existed.<sup>108/</sup>

The balance of war powers that the WPR theoretically imposed is at odds with the expectations of the Executive (as well as a number of legislators), the expectations of the public, the realities of history, and the demands of the modern world. The President is widely expected to be the leader and the decision-maker whether the military is responding to a crisis or is protecting U.S. interests around the globe. The Vietnam war produced a backlash against excessive presidential authority, but the WPR may have carried that reaction too far.

Recent examples of noncompliance with the WPR suggest that the act has not brought about the balance that its terms describe. The resolution seems to be less a proscriptive statute than an instrument in the political tug-of-war between Congress and the President. This political working out of the balance will undoubtedly continue whether the WPR is amended or not, and it is in this political arena that the enforceability issue arises.

Enforceability is probably the key to the balance of war powers whether the scheme Congress seeks to enforce is constitutional or statutory. The historical assumption of war-making power by the Executive and the alleged violations of the WPR by Presidents Nixon, Ford, Carter, and possibly even Reagan<sup>109/</sup> have been immune from judicial sanction due to the political question doctrine.<sup>110/</sup> There is no reason to think that the courts will suddenly lose their reluctance to become involved in political disputes between the other two branches.

Under such circumstances, the only mode of enforcement available to Congress seems to be political confrontation and pressure. However, Congress's desire and ability to confront the President is inevitably undermined by the tendency of the public to rally behind the President and the armed forces in times of conflict.<sup>111/</sup> In fact, after the successful rescue of the Mayaguez crew, some congressmen were more interested in publicly praising the President than in pointing out his Section 3 violation -- a task that was left to a few congressional leaders.<sup>112/</sup> Thus, regardless of the provisions of the Constitution and the WPR, the President, as Commander in Chief, will retain de facto authority to use military force as long as Congress acquiesces in his actions.

Yet Congress need not rely on voluntary compliance by the President, for it has several techniques for forcing compliance. One commentator has written that:

. . . the Congress seems to be without enforcement power. Impeachment would be ludicrous in a time of real emergency.<sup>113/</sup>

However, though impeachment would certainly be unwise during a Cuban Missile Crisis, it would not have been an implausible way to stop the Vietnam war. The mere initiation of impeachment proceedings would probably force compliance, and

removal from office would then be unnecessary. Obviously, this measure is an extreme form of confrontation. It might be useful for dealing with egregious violations or particularly risky or costly involvements, but it would not be appropriate for dealing with common violations such as have typically occurred.<sup>114/</sup>

Another way of enforcing the WPR is by controlling appropriations. But although Congress can pass a resolution barring the use of funds in a particular conflict,<sup>115/</sup> the legislative process is slow. Many military involvements, such as the Mayaguez and Iranian rescue operations, are completely terminated before Congress has time to act. In addition, the President will, in most cases, veto the cut-off of funds for his operation.<sup>116/</sup> Thus, manipulation of appropriations is a cumbersome method for enforcing the WPR. And it will often be an ineffective method, as well, for many congressmen who oppose involvement may "hesitate to withdraw the funds which support U.S. troops once American prestige is committed to the battlefield."<sup>117/</sup>

In the case of an ongoing conflict, Congress can always pass an act banning further involvement and ordering the withdrawal of U.S. forces. The President would clearly have no constitutional basis for his actions at that point, and, presumably, would rarely ignore an act of Congress governing the subject.<sup>118/</sup> Should the President do so, Congress would have grounds for the initiation of impeachment proceedings. Public opinion would then be an important factor in the resolution of the political confrontation, but it is unlikely that Congress would pass an act ordering withdrawal in the first place unless its effort enjoyed broad public support.

The "garden variety" violation of the WPR, however, would seldom be affected by such measures because the general public's lack of interest in technical questions con-

cerning minor involvements would deprive Congress of the incentive and power to confront the President. Furthermore, many uses of the armed forces are too short-lived to give Congress time to act. In these cases, Congress's only alternative is to bar U.S. involvement prospectively, as it sees the likelihood of involvement developing.<sup>119/</sup> This approach will often be prohibitively inflexible, though, for Congress can seldom say with assurance that military involvement in a particular region will not be warranted no matter how the circumstances may change.<sup>120/</sup>

Enforcing the terms of the WPR will remain an arduous task until Congress clarifies them and develops the resolve to insist on strict compliance with them.<sup>121/</sup> The vagueness of the provisions will undermine enforcement as long as the Executive finds it useful to ignore the spirit of the WPR and capitalize on the loopholes in its wording. A revision of Section 3 is needed, for example, to enhance enforceability by defining who must be consulted, when consultation must occur, and what must be communicated.<sup>122/</sup>

Equally important is Congress's determination to prevent noncompliance with the Resolution. Discussing Section 3 in particular, one commentator has written that:

The President's awareness of congressional oversight is particularly vital to the enforcement of Section 3 during short emergencies such as the Mayaguez affair, when lack of both time and information are likely to prevent an outcry demanding compliance. In such circumstances the President must know from prior experience that neither Congress nor the public will quietly tolerate violation of the Resolution, and that he will be called upon to account for any failure to comply with Section 3.<sup>123/</sup>

However, congressional and public vigilance in the enforcement of the WPR has not materialized. And a myriad of



political factors will affect any effort to develop and sustain such wide spread vigilance.<sup>124/</sup> The Vietnam conflict may be the only war in our history that has produced such a resolve to challenge the President. Yet the WPR will hardly achieve its purpose if it can be enforced only against the most unpopular uses of the armed forces. In short, it is easier to call for congressional and public vigilance than it is to produce it.

The enforceability question, being dependent on public opinion and congressional determination, is thus inseparable from the desirability question. If neither Congress nor the public finds executive discretion to use military force objectionable enough to put an end to it, particularly after the perceived abuses of that discretion in Southeast Asia, then perhaps some degree of discretion is desirable. During eight years of experience under the WPR, violations of the resolution have usually provoked strong reactions only from those congressmen who either expected to be personally consulted<sup>125/</sup> or had a particular interest in enforcement.<sup>126/</sup> Maybe the political accommodation that has come about in this area is in the nation's interest, even if arguably inconsistent with constitutional theory.

During the floor debate on the WPR, Senator Eagleton pointed out what he considered yet another "loophole" in the resolution: its failure to encompass so-called covert wars.<sup>127/</sup> The Senator proposed an amendment to bring civilian combatants and "regular or irregular foreign forces" paid by the U.S. within the provisions of the WPR.<sup>128/</sup> Arguing for the amendment, he said that:

What we are trying to do is refurbish the process by which America goes to war -- trying to restructure it, so that it is no longer the decision of one man who happens to occupy 1600 Pennsylvania Avenue. And so that when Americans,

whether wearing a uniform or not, are sent into hostile situations around the world, Congress is to see that the U.S. Congress, under its constitutional mandate, will share and participate in that decisionmaking process -- the process to determine how, where, and when we go to war. (Emphasis added.)<sup>129/</sup>

Senator Eagleton's "CIA Amendment" was defeated because, as Senators Muskie and Javits argued, it might endanger the initial passage of the WPR or the more difficult task of overriding the anticipated veto by President Nixon. Moreover, it was noted that separate legislation and a more thorough review of all CIA activities were needed to bring about the desired congressional control over "paramilitary activities of the Central Intelligence Agency."<sup>130/</sup> The following section deals with the steps that were ultimately taken in this direction.

## II. TITLE V - ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES

Soon after Congress imposed its 1973 restraints on executive war powers, it followed with an altogether different set of restraints on intelligence activities, embodied in the Hughes-Ryan Amendment of 1974.<sup>131/</sup> Like the WPR, Hughes-Ryan was to some extent a product of the post-Vietnam, post-Watergate reaction against seemingly unchecked executive power. The ongoing investigations of the Church Committee (the Senate Select Committee to Study Government Operations With Respect to Intelligence Activities) were revealing the intelligence community's involvement in domestic spying, plots to assassinate foreign leaders, the use of journalists, academics, and clergymen in intelligence operations, and other activities perceived as abuses of authority. In an effort to curb such abuses, Congress passed Hughes-Ryan, prohibiting the expenditure of



funds for any CIA foreign operation -- other than for the collection of "necessary intelligence" -- until the President reported, "in a timely fashion, a description and scope of such operation to the appropriate committees of Congress."<sup>132/</sup>

Prior to 1974, the CIA functioned with neither comprehensive congressional oversight nor a statutory charter, guided solely by the broad definition of its mission in the National Security Act of 1947.<sup>133/</sup> The Constitution does not mention an intelligence agency or "intelligence activities," which is hardly surprising given that intelligence activities in the eighteenth century were sporadic and limited in scope. Consequently, there has never been a constitutional doctrine governing Congress's role in intelligence matters. Indeed, traditional intelligence activities abroad such as basic collection and analysis have long been deemed to fall within the President's exclusive authority over foreign affairs. However, as the range of intelligence activities has become more expansive, Congress has sought a more significant role concerning intelligence matters.

The Hughes-Ryan Amendment was an historic piece of intelligence legislation in that it was the first statute to provide expressly for oversight of the U.S. intelligence community. But Hughes-Ryan was to be only the first and not the final word on intelligence oversight. In 1978, the Carter Administration issued an executive order requiring notification of the House and Senate intelligence committees in circumstances arguably not covered by Hughes-Ryan.<sup>134/</sup> Nonetheless, despite the comprehensive restrictions placed on the intelligence community by Carter's E.O. 12036, Congress began consideration in 1980 of a broad intelligence charter (S.2284), which included new standards and procedures for congressional oversight.<sup>135/</sup>

For three years prior to 1980, the Senate Select Committee on Intelligence<sup>136/</sup> had been working on a draft of charter legislation, but had made little progress due to disputes with the Carter Administration over specific provisions. However, the fall of the Shah of Iran and the invasion of Afghanistan by the Soviet Union, both widely viewed as reflecting intelligence failures, gave impetus to the charter legislation effort in a manner favorable to the Executive. With an "atmosphere in Washington conducive to a harder line on national security issues",<sup>137/</sup> the administration and the intelligence committee leadership felt Congress might be receptive to the new effort.

Hughes-Ryan had been under attack from two sides prior to the 1980 initiative. The Carter Administration termed the requirements "unwarranted restraints", and one congressman stated that they "unduly hampered the ability of the United States to effectively conduct foreign policy."<sup>138/</sup> These critics of Hughes-Ryan objected to allowing access to intelligence secrets to eight congressional committees (and their staffs), all of which were deemed "appropriate" under Hughes-Ryan. On the other hand, many critics believed that the amendment was not restrictive enough and that it allowed the President to withhold notification until after an operation was completed. Numerous other factions were set to do battle over various charter provisions.

The Senate Intelligence Committee's charter -- a comprehensive 172-page document -- was eventually scuttled for the time being (though the committee asserted that it remained "fully committed to carrying that enterprise forward to completion" as separate legislation).<sup>139/</sup> The Committee instead focused on the two-page congressional oversight provisions of S.2284. As amended by the Conference Committee, the oversight provisions (Title V) were included in the Intelligence Authorization Act For Fiscal

Year 1981 as an amendment to the National Security Act of 1947.<sup>140/</sup>

The failure of the comprehensive charter may have been due to the squabbling of groups with special interests,<sup>141/</sup> the shortness of the legislative year,<sup>142/</sup> or the imminence of the 1980 elections.<sup>143/</sup> In any event, the provision that did pass -- Title V -- created a framework for oversight that was "at once more limited and more encompassing" than Hughes-Ryan:

. . . more limited in that reports to Congress under the bill would go to only the two intelligence committees; but more encompassing in that the bill would apply to special activities conducted by any agency, not just CIA, and prior notification to Congress would, for the first time, be required by statute.<sup>144/</sup>

Title V adopted almost verbatim the provision in E.O. 12036 for congressional oversight, while adding additional provisions as well.<sup>145/</sup> Yet the Carter Administration opposed key provisions of Title V identical to those in its own regulations because the President did not want those restraints to be given the force of law.<sup>146/</sup> How, then, does Title V balance the need for executive flexibility with the desire for accountability to Congress?

#### A. The Terms of Title V

The oversight provisions of S.2284 were the result of a cooperative venture among the intelligence committees, the intelligence community, and the Carter Administration.<sup>147/</sup> All parties emphasized the vital importance of their previous four years of experience. During that time, the intelligence committees and the executive branch worked out procedures to keep the committees as fully informed of intelligence activities as possible consistent with ensuring

that "sensitive information is securely handled so that the interests of the United States are protected."<sup>148/</sup>

Based on that experience and the established language of E.O. 12036, Title V imposed four duties on executive branch officials:

- 1) to keep the intelligence committees "fully and currently informed" of intelligence activities;
- 2) to provide prior notification of "significant anticipated intelligence activities," chiefly covert actions;
- 3) to furnish any information or materials requested by the intelligence committees concerning intelligence activities; and
- 4) to "report in a timely fashion" on any illegal intelligence activities or significant intelligence failures.

Title V further provides for notice to only eight congressional leaders when there exist "extraordinary circumstances affecting vital interests of the United States",<sup>149/</sup> and it directs the establishment of security procedures to "protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods" furnished to the committees.<sup>150/</sup> Finally, in contrast to the WPR, Title V notes that the prior notification requirement does not require the approval of the committees as a "condition precedent to the initiation of any such anticipated intelligence activity."<sup>151/</sup>

While administration and intelligence officials, including two Directors of Central Intelligence,<sup>152/</sup> supported the concept of a charter containing congressional oversight provisions, they opposed several of the requirements of S.2284. Specifically, they objected to: 1) the prior notification requirement; 2) the absence of a provision for

waiver in times of war; and 3) the failure to specifically mention the duty of the DCI to protect intelligence sources and methods.<sup>153/</sup> The wartime waiver objection never developed into a divisive issue, though a Defense Department spokesman expressed particular concern over the matter.<sup>154/</sup> And the Senate Intelligence Committee inserted the desired statement of the DCI's duty to protect sources and methods, thus satisfying the administration on that issue.<sup>155/</sup> However, the prior notification dispute was not so easily resolved.

S.2284 required prior notification of the intelligence committees concerning "significant anticipated intelligence activities." The Senate Intelligence Committee report contained the following definition:

An anticipated activity should be considered significant if it has policy implications. This would include, for example, activities which are particularly costly financially, as well as those which are not necessarily costly, but which have . . . [significant] potential for affecting this country's diplomatic, political, or military relations with other countries or groups . . . It excludes day-to-day implementation of previously adopted policies or programs.<sup>156/</sup>

Covert actions were deemed to be within this definition, while intelligence collection and counterintelligence activities might or might not be, depending on the facts of each case.<sup>157/</sup> Any activities not subject to the prior notification requirement, including routine intelligence gathering, were covered by the requirement that the intelligence committee be kept "fully and currently informed."

Admiral Turner, spokesman for the Carter Administration, stated that the statutory prior notification requirement was an "excessive intrusion by the Congress into the

President's exercise of his powers under the Constitution."<sup>158/</sup> While an identical requirement had been imposed by E.O. 12036 in 1978, Turner believed that by giving the regulation the force of law, Congress would "reduce the President's flexibility to deal with situations involving grave danger to personal safety, or which dictate special requirements for speed and secrecy."<sup>159/</sup> Moreover, Turner asserted that:

. . . we must also recognize that rigid statutory requirements requiring full and prior congressional access to intelligence information will have an inhibiting effect upon the willingness of individuals and organizations to cooperate with our country.<sup>160/</sup>

The administration, favoring the reporting system that had been developed under E.O. 12036, proposed a continuation of "existing oversight arrangements by requiring that the intelligence committees be kept fully and currently informed."<sup>161/</sup> It was argued that:

A strong system of oversight and accountability already exists and is functioning effectively . . . Executive Order 12036 and the Attorney General guidelines which have been issued pursuant to it set forth rigorous standards of conduct for intelligence activities. The proper execution of the Executive Order and the Attorney General's guidelines is subject to congressional oversight.<sup>162/</sup>

Admiral Turner's enunciation of the administration's views on S.2284 did not go unopposed. One witness before the Senate Intelligence Committee noted that the committees would have no veto over planned operations; therefore, "to remove prior notification would be to nullify the Congress' role in these matters completely."<sup>163/</sup> The American Civil Liberties Union urged the Senate Intelligence Committee to



go even further and ban all operations that are not "essential" to national security, while also advocating an expansion of the category of "significant activities" that would be subject to the requirement of prior notification.<sup>164/</sup>

#### B. Critique of Title V

It was the administration, not the ACLU, that obtained changes in the congressional oversight provisions. While the Senate Intelligence Committee did not withdraw the requirement that prior notice be given for operations other than routine intelligence collection, it inserted a provision permitting the President to notify only eight congressional leaders when "it is essential . . . to meet extraordinary circumstances affecting vital interests of the United States."<sup>165/</sup> Moreover, Title V provides for those cases in which prior notice cannot be given at all, requiring the President to report merely "in a timely fashion" on any covert action that is already under way, stating the reasons for not giving prior notice.<sup>166/</sup> Thus, for "special" operations requiring extreme speed or secrecy, the Executive has two options: 1) notify the eight leaders specified in Title V; or 2) withhold prior notice with the understanding that the President (not the responsible intelligence official) will have to inform the intelligence committees of the justifications for the delay.

The balance struck by the Senate Intelligence Committee on the prior notice issue responds both to the Executive's desire for flexibility to meet fast-moving crises and to Congress's demand for a role in authorizing intelligence activities. Though the committees' approval is not needed prior to initiating an operation, consultation inevitably results in different, and possibly better, decisions concerning intelligence activities.<sup>167/</sup> The Executive has some



leeway to dispense with prior notice in exigent circumstances so that national interests will not be compromised by an excessively rigid requirement.

The provisions creating exceptions to the prior notice requirement -- Sections 501(a)(1)(B) and 501(b) -- cannot as yet be viewed as undesirable loopholes. While these provisions do represent a compromise with the administration's position, only Section 501(b) allows prior notice to be dispensed with altogether, and there are two factors that lessen the likelihood that that provision will be abused. First, Section 501(b) requires the President himself to justify the failure to give prior notice. Presidents usually prefer not to be too closely associated with intelligence activities -- particularly intelligence failures -- and they never like having to justify executive decisions to Congress. Therefore, it is likely that prior notice will not be dispensed with as lightly as it would be if the DCI, for example, was chiefly responsible for satisfying the intelligence committees.

Second, the legislative history accompanying Title V emphasizes that neither of the exceptions applies except in "rare extraordinary circumstances."<sup>168/</sup> An example of such circumstances would be if the President learned late at night of an "opportunity to do something of vast importance" -- something demanding an immediate decision.<sup>169/</sup> The legislative history puts the Executive on notice that only such extreme situations will warrant noncompliance with the prior notice requirement and that each case of noncompliance will be carefully reviewed.<sup>170/</sup>

Whether or not the prior notice exceptions will prove to be loopholes for the Executive to exploit remains to be seen. However, monitoring the effectiveness of the congressional oversight provisions is very different from monitoring compliance with the WPR because intelligence activities

are necessarily secret and the intelligence committees function under strict security procedures. The public will ordinarily not be informed of Title V compliance disputes due to the sensitivity of the activities involved. Consequently, evaluation of the prior notice requirement and its exceptions will primarily be the duty of the intelligence committees, at least in the near future.

The same political factors affecting the enforceability of the WPR will affect the enforcement of Title V. The courts will probably find compliance disputes to be non-justiciable political questions; appropriation cut-offs will prove to be too ponderous a method of forcing compliance; and impeachment proceedings will still be too drastic a measure for dealing with ordinary violations. Again, enforcement will depend on congressional leaders' ability to mobilize Congress and the public against the Executive's defiance of the law. However, a final factor affecting enforceability of Title V makes it unlikely that such political confrontations will occur, and that is the manner in which Title V evolved and was passed.

The adversarial and sometimes bitter relationship between Congress and the Executive with respect to the passage of the WPR foreshadowed the disputes that would occur after it became law. Congress's assertion of what its constitutional role in war-making should be was diametrically opposed to the President's view of the constitutional scheme. With a political environment in 1973 that was not conducive to compromise, it was not surprising that Congress enacted its own theory of war powers over the protestations -- and the veto -- of the President.

The evolution and passage of Title V, on the other hand, was marked by cooperation, consultation, and compromise between Congress and the Executive. The Senate Report on Title V stated that:

The Executive branch and the intelligence oversight committees have developed over the last four years a practical relationship based on comity and mutual understanding, without confrontation. The purpose of Section 501 is to carry this working relationship forward into statute. [Emphasis added.]<sup>171/</sup>

The cooperation that led to the passage of Title V was further evidenced by: 1) the positive attitudes of the intelligence officials who testified before the Senate Select Committee;<sup>172/</sup> 2) the receptiveness of the Committee to the administrations's prior notice objections; and 3) the adoption by the committee of the concepts embodied in E.O. 12036.<sup>173/</sup> While the WPR was the product of a "restraint" mentality, Title V was the product of a "cooperative" mentality. This "partnership" between Congress and the Executive concerning the passage of Title V cannot but affect the future relations between the branches under the act.

Perhaps the lack of constitutional doctrine regarding intelligence matters facilitated the working out of this "practical relationship."<sup>174/</sup> (Certainly, the clash of constitutional theories concerning the balance of war powers did little to promote cooperation and compromise in the WPR.) Noting that an accommodation must be made between constitutional theory and practice, the Senate Intelligence Committee wrote that:

The preambular clause referring to authorities under the Constitution is an indication that a broad understanding of these matters concerning intelligence activities can be worked out in a practical manner, even if the particular exercise of the constitutional authorities of the two branches cannot be predicted in advance.<sup>175/</sup>

Thus, the balance of authority that had been developed over time was not subordinate to an ancient, rigid balance of

authority mandated by the Constitution, as was arguably the case with the balance of war powers.

Congress's willingness to strike a balance in Title V may have been deemed a sell-out by those groups that urged even stricter oversight provisions.<sup>176/</sup> However, it could equally be argued that Congress -- specifically, the Senate Intelligence Committee -- legislated in accordance with its view that rigid restraints and an adversarial relationship would not be in the nation's best interest. The strict-restraint psychology that flourished after Watergate, the Vietnam war, and the Church Committee investigation had been waning for some time. The fall of the Shah of Iran and the Soviet invasion of Afghanistan swung the pendulum even further in the direction of permitting executive freedom and flexibility. Significantly, two of the witnesses that appeared before the Senate Intelligence Committee emphasized that the problem in the intelligence community was not abuse, but performance.<sup>177/</sup> They called for a "skeletal" charter, provisions for secure, limited congressional oversight, and standards to insure the high level of intelligence performance required by modern decision-makers.

Congress struck a balance in Title V that not only made cooperation and compliance more likely, but that also reflected the views of its members and the public concerning the foreign policy needs of the United States. Those needs included: 1) an efficient, accurate intelligence community relatively free of morale problems; 2) a range of foreign policy options unhampered by unwarranted restraints; 3) a President with the authority and the flexibility to handle fast-moving world situations; and 4) a thorough but secure system of congressional oversight to provide valuable input into intelligence decisions and to shift some responsibility to the most representative body in the government. Title V represents Congress's judgment of the best way to balance

those needs.

### III. THE LEGISLATIVE SCHEME

Senator Eagleton, one of the original sponsors of the WPR, voted against the version of the bill that was finally passed by Congress. One of the reasons he opposed the act was that, in his view, it failed to ensure congressional involvement in all war-initiating decisions. Specifically, it failed to deal with covert hostilities or covert actions that might reasonably lead to hostilities. Many of Senator Eagleton's remarks on his proposed "CIA Amendment" are equally relevant to Title V and the WPR:

To anyone engaged in a combat operation, it is irrelevant whether they are members of the Armed Forces, military advisers, civilian advisers, or hired mercenaries.

...  
Wars do not always begin with the dispatch of troops. They begin with more subtle investments . . . of dollars and advisers and civilian personnel.

...  
What payroll you are on is really secondary; whether you get it from the Pentagon or whether you become a member of the Armed Forces, the end result is the same: Americans are exposed to the risk of war. And as they are exposed to the risk of war, the country then makes a commitment to war.<sup>178/</sup>

As Senator Eagleton suggests, the argument for treating certain intelligence operations under the same standard as military operations is that both can create a risk of war, and, therefore, Congress should be involved in the "war-risking" decision.

Covert actions are certainly not the only non-military actions that can create a risk of war. For example, the President's authority in foreign affairs unquestionably

extends to the imposition of embargoes and the sale of arms or supplies to a nation at war. Such actions may well create the risk that the embargoed nation or the nation whose enemy is receiving American supplies will declare war on the United States. Nonetheless, though economic and diplomatic measures can be quite serious, they are not generally perceived as being assaults on a nation's sovereignty, as covert actions often are. This is true in spite of the fact that economic measures may be just as coercive and just as threatening to a foreign country's government as covert measures. Whether or not a rational distinction separates the two, international standards treat the former as "legitimate" and the latter as an improper assault on a nation's right to an independent existence.<sup>179/</sup> (By the same token, as will be discussed below, covert actions do not present as direct an affront to a foreign nation as military actions.) In any event, Senator Eagleton's objections cannot be casually dismissed simply because actions other than covert actions may also create a risk of war.

Senator Eagleton drew support for his arguments from this country's involvement in Southeast Asia. Prior to the 1964 Gulf of Tonkin Resolution,<sup>180/</sup> President Johnson allegedly authorized extensive covert military operations under the code name Operation Plan 34A, which ultimately became a provocation strategy designed to provide "a pretext for bombing North Vietnam."<sup>181/</sup> Moreover, not only were intelligence activities purportedly used to "hoodwink" Congress into authorizing war,<sup>182/</sup> but they were used to actually conduct a "secret war" in Laos.<sup>183/</sup> And finally, civilians -- including former military personnel -- were allegedly under contract to the U.S. government to perform military and paramilitary operations following the U.S. withdrawal from Vietnam.<sup>184/</sup>

These activities in Southeast Asia are certainly not the only examples of covert actions that might be labeled as "war-making" or "war-risking."<sup>185/</sup> Whether or not the allegations in those examples are true, it is clear that, at least conceivably, covert actions can be used for a variety of purposes either before, during, or after official involvement in hostilities. Without legislation governing intelligence activities, Senator Eagleton felt that "the potential for use of covert civilian forces by a President to achieve military objectives [was] restricted only by the imagination of man."<sup>186/</sup> Congressional involvement pursuant to the WPR would be triggered only when combat troops were introduced -- possibly long after the beginning of U.S. involvement, when our commitment had become unavoidable.

Though sympathetic to Senator Eagleton's goals, Senators Muskie and Javits opposed his "CIA Amendment" because: 1) the amendment might jeopardize passage of the WPR or override of the inevitable presidential veto; 2) the achievements of the WPR were deemed "historic" and urgent even without the amendment; and 3) the CIA problem deserved careful attention and study as separate legislation. The question of congressional review and oversight of intelligence activities seemed to require comprehensive treatment encompassing a broad range of activities, not just intelligence community involvement in actual hostilities. Such comprehensive treatment was promised by Senator Stennis, chairman of the Senate Armed Services Committee (which had jurisdiction over the CIA at that time).<sup>187/</sup>

Legislation ensuring congressional oversight of the full range of intelligence activities was indeed forthcoming -- in 1974 with the Hughes-Ryan amendment and in 1980 with Title V. However, neither of those acts directly addressed the situation that Senator Eagleton described.



Title V did not complete a unified legislative scheme governing all types of U.S. involvement in hostilities. Rather, it created a scheme separate from that in the WPR to govern all intelligence activities -- even those that would be covered by the WPR if performed by military personnel. The question therefore arises whether certain war-risking intelligence activities -- or, perhaps, all intelligence activities -- should be subject to the kind of congressional approval requirements that are in the WPR.

#### A. Contrasting Provisions

The language of Title V makes it obvious that an inter-relationship with the WPR was not intended. Not only is the language different, but the underlying requirements of Title V are arguably less restrictive than those in the WPR in several substantial respects.<sup>188/</sup> Thus, the President may have an incentive to tailor involvements in hostilities so that they fall within the terms of Title V rather than the more demanding terms of the WPR. The President would not avoid congressional oversight altogether by introducing civilian rather than military personnel into hostilities, but he might lessen the degree of congressional involvement while achieving the same objectives . . . and incurring the same risks. (Senator Eagleton would argue that in such cases, the purposes of the WPR are subverted by the President's waging war "through this loophole.")<sup>189/</sup>

The "substantial respects" in which the requirements of Title V and the WPR differ relate to: 1) congressional approval of proposed operations; 2) consultation with Congress; and 3) formal reporting to Congress.

First, Congressional approval of intelligence activities is explicitly not required by Title V.<sup>190/</sup> Section 2 of the WPR, on the other hand, states that the introduction

of armed forces into hostilities requires congressional approval through a declaration of war or "specific statutory authorization" unless its purpose is to meet an attack upon U.S. territory or armed forces.<sup>191/</sup> Although it reflects Congress's view of the preexisting constitutional scheme, this approval requirement is in the section titled "Purpose and Policy." Its substantive effect has therefore been questioned.<sup>192/</sup> Indeed, actual practice under the WPR indicates that the act's substantive provisions -- particularly Sections 3, 4, and 5 -- are looked to almost exclusively in judging presidential actions, while Section 2 and the underlying constitutional doctrine receive little attention. To date, prior approval has consistently been dispensed with in lieu of post hoc notification, making it necessary to obtain only subsequent approval within 60 days.<sup>193/</sup> Thus, in practice, it seems that neither act imposes an unavoidable prior approval requirement.

The 60-day subsequent approval requirement of the WPR still constitutes a significant -- if not strict -- constraint that is absent in Title V. Congress must act affirmatively with appropriate legislation to force the discontinuance of an intelligence operation after its initiation. However, the termination provision in the WPR is automatic and therefore not subject to the difficulties of mustering congressional support to confront the President. Moreover, in the WPR, the statutory acknowledgement of the concurrent resolution as a mechanism by which Congress can force the early termination of an operation enhances the effectiveness and likelihood of use of that mechanism. No such recognized mechanism exists for the forced termination of intelligence activities.

Consultation with Congress is required under Section 3 of the WPR "in every possible instance" prior to the introduction of U.S. Armed Forces into hostilities. Similarly,

Title V requires prior notice to the intelligence committees of "significant anticipated intelligence activities." While there is some dispute as to what "consultation" entails,<sup>194/</sup> the Section 3 consultation provision seems roughly the equivalent of the Title V requirement that the committees be kept "fully and currently informed." Both provisions explicitly or implicitly require that a limited number of congressmen be informed of the scope and nature of the proposed operation, and that they be given some opportunity to express their views on the operation.<sup>195/</sup> Neither provision gives these members of Congress any veto power.

Nevertheless, the consultation provisions of the two acts are not identical. Title V requires consultation between officials of the intelligence community and the permanent intelligence committees -- two groups that have an ongoing, cooperative relationship, as well as established security procedures. The WPR, on the other hand, does not specify which members of Congress must be consulted by the President. Since the President obviously cannot consult each congressman or the Congress as a whole prior to all military operations, he necessarily must choose which congressional leaders to consult. And since American involvement in hostilities tends to be sporadic, consultations under the WPR will inevitably be one-shot affairs, with little opportunity for the participants to build a working relationship. As a result, the President might conceivably prefer to invoke Title V so as to deal with a more familiar, predictable consultation mechanism. Of course, this conclusion is unavoidably speculative, but it seems reasonable that the President might see an advantage in consulting congressmen with whom his administration has had a chance to develop a relatively nonadversarial working relationship.<sup>196/</sup>

Formal presidential reports to Congress are required by both acts but in very different circumstances. The WPR provides that the President must report to Congress on any significant use of the armed forces, even in cases in which hostilities are not imminent.<sup>197/</sup> Conversely, although intelligence officials must keep the oversight committees informed of all intelligence activities, the President is only required to make a report to the committees when prior notice is not given regarding a covert operation in a foreign country.<sup>198/</sup> By choosing to comply with Title V, the President can limit his audience to only two congressional committees rather than the entire Congress.<sup>199/</sup> Moreover, the security procedures observed by the intelligence committees ensure that unintentional disclosures will not occur. The Executive's freedom of action may be less constrained in the absence of public awareness and discussion of the nation's actions abroad. Adverse public reactions and undesired political consequences might be avoided by waging war through covert intelligence operations of which only the committees would have knowledge.

Title V is generally less burdensome than the WPR with respect to its approval, consultation, and reporting provisions. Therefore, the Executive may often have an incentive to devise intelligence operations that can achieve the same goals as a military operation.

#### B. Applying the Acts

The differences between the acts are relevant whenever there is ambiguity as to whether Title V, or the WPR, or both apply. The applicability of Title V depends on the existence of "intelligence activities," while the applicability of the WPR depends on the involvement of "military personnel." However, the question of which act applies to a given operation is complex and as yet untested.

The attempted rescue of the hostages in Iran demonstrates the difficulty of the problem. The dispatch of U.S. forces into Iranian territory probably should have been preceded by consultation under the WPR, particularly since the prelaunching of U.S. fighter-bombers made it clear that hostilities were anticipated.<sup>200/</sup> But would the WPR have been triggered if CIA personnel had attempted the rescue?<sup>201/</sup> Would the involvement of military air support affect the answer to that question? What if the military's support of the operation involved merely training and equipping CIA personnel? What if the helicopter pilots were the only military personnel involved? In that case, would it matter whether they flew into Teheran or merely dropped the CIA personnel in a desert staging area? What if military aircraft flown by military pilots picked up CIA personnel that had infiltrated Teheran individually, performed the operation, and then fled to a desert rendezvous point? Would it matter whether the civilians performing the mission were American or foreign? As these hypotheticals suggest, the factors to consider in determining whether Title V or the WPR will apply include: 1) the identities of the participants -- military or nonmilitary; 2) the nature and scope of the military's involvement; and, most importantly, 3) the exposure or risk of exposure of military personnel to hostilities.

By devising operational plans that minimize military involvement, the Executive could conceivably manipulate these factors so as to trigger only Title V rather than the WPR.<sup>202/</sup> An operation that is conceived, developed, and carried out by civilian personnel would probably bypass altogether the requirements of the WPR. It is unlikely, however, that significant paramilitary operations can currently be conducted by civilian intelligence personnel without some degree of military support. The civilian

intelligence community relies too heavily on the military intelligence services, and the Executive would have to expand dramatically the physical capabilities of the CIA if it desired to eliminate entirely the involvement of the military.<sup>203/</sup> Consequently, most covert actions will continue to be in that twilight category in which military and civilian personnel are involved, and the applicability of the two acts will therefore depend on each operation's unique set of facts with respect to the scope and nature of military involvement. And in each case, those facts will be subject to a broad range of characterizations and interpretations.

In 1980, for example, when Congress was not consulted prior to the hostage rescue attempt, President Carter defused much of the ensuing criticism for noncompliance with the WPR by characterizing the operation as a "humanitarian mission".<sup>204/</sup> Carter's handling of that case illustrates that there will almost always be a plausible argument to support the President's interpretation of his obligations under the WPR and Title V. While Congress is obviously not bound to accept the President's characterization of his obligations, the existence of a plausible interpretation will further complicate the already difficult task of mustering support for a confrontation. Some members of Congress and the public will latch onto any arguable basis for supporting the President, particularly in a crisis,<sup>205/</sup> and the complex overlapping of the two acts ensures that an arguable basis will usually be available.

The enforceability of the WPR in cases involving military and civilian personnel will also be directly affected by the susceptibility of the facts to different interpretations. Moreover, the President's freedom to choose which act he will comply with gives him a strategic edge in any confrontation with Congress. By satisfying selected provisions of one of the acts, the President can show his "good



faith" and shift the burden to Congress to show that such compliance is insufficient. Compliance with one statute (Title V) will undoubtedly reduce public and congressional outrage over noncompliance with the WPR, since some level of congressional involvement will have been achieved. Thus, the President might order a covert paramilitary operation with significant involvement by U.S. Armed Forces, comply only with the provisions of Title V, and still avoid a confrontation concerning compliance with the WPR.

### C. Desirability

The remaining question is whether the scheme set up by Title V and the WPR is desirable in spite of any shortcomings.

That scheme almost certainly leaves the President with room to avoid the provisions of the WPR by using civilian intelligence agencies to perform some of the kinds of operations that were contemplated under the WPR. Did Congress have a reason for not closing this so-called loophole? Perhaps so. Congress's actions concerning Title V reflected the reemerging national view that executive freedom of action is essential to the protection of America's vital interests. The intelligence community's involvement in extensive covert operations -- such as the "secret war" in Laos -- was widely criticized in 1973. But in 1980, it was not the CIA's performance, but its inability to perform that was deemed abominable.<sup>206/</sup> Events in Iran, Afghanistan, and elsewhere buttressed the argument that the need to conceal U.S. involvement in hostilities may be legitimate in certain cases. Application of the reporting requirement of the WPR would make such clandestine U.S. involvement impossible. It is therefore not surprising that Congress did not intermesh the provisions of Title V and the WPR.<sup>207/</sup> Title V could



have provided that intelligence activities of a paramilitary nature would be covered by the WPR, but by not doing so, it left the President with somewhat greater flexibility to protect the nation's interests.

The reasons given so far for congressional tolerance of the "paramilitary loophole" have been political rather than constitutional. Because the balance between executive and congressional power over intelligence matters is not set in stone by explicit constitutional provisions,<sup>208/</sup> political factors played a weighty role in the evolution of Title V. Conversely, the WPR is explicitly based on relatively established constitutional doctrines, and, at least in theory, neither accepted practice nor political exigencies can alter the constitutionally mandated balance of war powers.<sup>209/</sup> When intelligence actions become the equivalent of war-making, however, they arguably should be governed by constitutional principles (perhaps as embodied in the WPR), for political factors favoring executive flexibility are then rendered less relevant. The terms of Title V do not provide for such treatment of covert war-making. Moreover, even though the WPR's provisions may not be perfectly coextensive with the underlying constitutional requirements, the WPR has so far been treated as virtually preemptive in dealing with war powers issues.<sup>210/</sup> Perhaps in recognition of the fact that large-scale, covert paramilitary operations would be impossible if the constitutional requirement of prior congressional authorization was imposed,<sup>211/</sup> Congress treated such operations the same under Title V as it treated intelligence activities that do not involve hostilities.

The most prominent advocate of strict restraints on presidential war-making, Senator Eagleton, stated in 1973 that the Constitution requires congressional authorization for any action involving hostilities or imminent hostilities. According to this theory, a unified legislative scheme would be constitutionally required.

However, one might justify the existing dual scheme by distinguishing actions involving U.S. Armed Forces from covert paramilitary operations on the basis of custom and tradition. It has been noted that economic sanctions are regarded differently from intelligence or military operations, even though the former may be equally destructive and coercive.<sup>212/</sup> Similarly, clandestine operations are usually viewed differently from military operations. Members of the international community generally tolerate the presence of hostile intelligence agents within their borders, yet they vigorously denounce the presence or introduction of hostile troops as an affront to their independence. Moreover, if a ring of foreign agents engages in sabotage, the agents will simply be imprisoned or deported and the foreign nation will be denounced, whereas an attack by foreign military units will more likely lead to war. But what if intelligence personnel conduct an operation on the same scale as a military attack? While it is doubtful that the intelligence community has the present capacity to conduct a naval bombardment or to launch a large-scale invasion, the capacity for lesser but significant operations, if deemed desirable, could be developed, acquired, or "purchased". Under such circumstances, would it be possible to distinguish the international attitude towards covert operations from the international attitude towards military actions?

One argument justifying different constitutional treatment of paramilitary operations under these circumstances is that such operations carry a lesser risk of full-scale war.<sup>213/</sup> The threat or use of military force by one nation against another puts the national honor of both countries at stake. The threatened nation is often backed into a corner where it must fight or declare war to avoid losing credibility in the international community. With covert operations, the risk of war may be lessened by the absence of a frontal

assault on a nation's independence. Even if the targeted nation is aware of the involvement of U.S. intelligence, its interest in avoiding an open military confrontation with the U.S. might often induce it to merely respond in kind. In this way, a covert operation might give the foreign nation the option not to escalate the confrontation into actual war.

However, speculation as to what "might" happen in "some" cases provides thin support for distinctions that carry constitutional consequences. Whatever the political justifications for the dual legislative scheme, the constitutional doctrine of war powers may not allow for the exemption of paramilitary operations from its requirements. Although Congress has implicitly enacted this exemption, and although the exemption may be politically desirable, a legislative scheme that conflicts with the Constitution is simply not satisfactory.

The problem with this conclusion is that the constitutional conflict is caused by Title V, an act that promises to be both more effective than the WPR and less objectionable to the Executive than the WPR.<sup>214/</sup> The WPR was passed in an atmosphere of antagonism between Congress and the Executive; the relationship created by its terms is adversarial and confrontational. Title V, on the other hand, evolved from a practical working relationship between the intelligence committees and the Executive. Its provisions, resulting from compromises on both procedural and substantive issues, establish a cooperative relationship. Because of its cooperative characteristics, Title V is more palatable to the Executive and is therefore likely to meet with compliance. Conversely, presidential noncompliance with the WPR has occurred a number of times since 1973 despite the absence of any significant U.S. involvements in hostilities.<sup>215/</sup>

The decision-making process in times of imminent hostilities has not changed much since the passage of the WPR. The President continues to make independent decisions on when and how to use military force and he continues to act on his own best judgment, complying only with the WPR's reporting requirement. While this de facto balance of war powers may be advantageous, given the need for quick, decisive action in international affairs, it is preferable not to have reality and the law at odds. Each time the President uses the armed forces without consulting Congress, the President's authority to act is publicly brought into question and the nation's foreign policy suffers from the appearance of disunity.<sup>216/</sup> The WPR was intended to produce the opposite result: to ensure that American actions abroad would be strengthened by a singleness of congressional and executive purpose and a sharing of responsibility for the underlying decisions. This goal can perhaps be achieved if the WPR and the de facto balance of war powers can be reconciled, thus minimizing debilitating disputes over compliance.

#### IV. A Legislative Alternative

The two major problems outlined in this paper -- non-compliance with the WPR and the "paramilitary loophole" -- might be resolved if presidential attitudes and the terms of the WPR change. It is the conclusion of this paper that changing the latter might result in a change in both. This conclusion is based on the view that: 1) the terms of the WPR are weak in and of themselves, irrespective of presidential intransigence; and 2) the system embodied in Title V demonstrates the feasibility of a cooperative, compliant relationship between Congress and the Executive.

The trouble with the WPR is that it is too vague and therefore too demanding. The traditional, de facto balance of war powers resulted in insufficient congressional involvement, but the balance established in the WPR provides for increased involvement through procedures that are unpalatable to the Executive (particularly in a crisis). For example, the Section 3 consultation requirement provides for a moderate, reasonable level of congressional involvement. Consultation must occur only if it is "possible" under the circumstances, and the President need only consult a reasonable number of congressional leaders.<sup>217/</sup> However, the act does not specify who must be consulted or establish security procedures to ensure the nondisclosure of sensitive information -- both measures that would encourage compliance in a crisis. In addition, Section 3 provides no guidelines for when consultation is justifiably not possible. When contemplating a military operation, the President will often prefer to dispense with consultation altogether and let his lawyers justify the decision later rather than become bogged down with questions of how to comply with the WPR and whether Congress will find such compliance sufficient. Because the WPR lacks specificity and concreteness, it demands too much; and because it demands too much, it gets nothing.

Title V may provide a useful model for reshaping the process by which war-making decisions are made. The WPR might produce a meaningful sharing of involvement in and responsibility for such decisions if it was less vague and, consequently, from the Executive's perspective, less intrusive. For example, the consultation requirement, which has been the focus of most noncompliance disputes, might specify exactly who must be consulted prior to the introduction of armed forces into hostilities. The provision could specify existing committees (such as the foreign affairs committees), new committees created expressly for the purpose,<sup>218/</sup>

or a group of congressional leaders chosen on the basis of authority and/or expertise.<sup>219/</sup> In any event, the specified committees could periodically meet independently and with the President, even when there is no current crisis, so as to encourage the development of a cooperative, consultative relationship.<sup>220/</sup> Such standing committees would be able to monitor the escalation of minor involvements and thus foresee when various WPR requirements might be triggered.<sup>221/</sup> Moreover, the act could require that rigid security procedures be in effect and functional at all times, so that the President could responsibly communicate the necessary sensitive information in a crisis. Finally, the act might recognize the President's freedom to act on his own judgment when necessary, suggest guidelines for when such independent action would be justified, and establish procedures under which the President would have to justify his decisions to Congress.<sup>222/</sup>

This system, like the system embodied in Title V, represents a compromise -- a compromise between the theory of congressional authorization and the practical realities of executive decision-making. The likelihood of presidential compliance with the consultation provision might increase if the President is faced with a clearly defined requirement rather than a vague, potentially over-intrusive restraint. The President would not have to waste time trying to determine what his duty is or what Congress will think it is. The proposed requirement might prove both easier to comply with and more difficult to circumvent since specific provisions allow less room for inventive arguments justifying noncompliance. The system might promote trust and cooperation between the President and the specified congressional representatives, while protecting sensitive information and minimizing intrusions into the executive decision-making process. The relatively smooth development



and functioning of the intelligence oversight system embodied in Title V suggests that similar results might be reached with the balance of war powers.

An inevitable result of the above-described option is that the specified congressional representatives -- however defined -- would have both heavy responsibilities and significant political leverage. The responsibilities arise from the representatives' role as surrogate decision-maker for the Congress as a whole on questions of international importance -- e.g., questions of war. The leverage results from the representatives' special influence over executive decisions and their power to require the President to obtain full congressional authorization prior to initiating a proposed operation. This last power arises from the fact that the representatives would not have the constitutional power to authorize war, that being the exclusive power of Congress as a whole. The specified representatives would be able to express their views on proposed military operations that carried a risk of war, but they would also necessarily have the duty of determining whether proposed hostilities amounted to full-scale war. In such a case, the proposal would have to be referred to the full Congress for authorization. The power to refer the question to Congress would give the committees political leverage over the President -- for good or bad -- and would ensure careful consideration of the members' views by the President.

This particular option would also put paramilitary operations on the same footing with military operations: the committees specified in the WPR and the intelligence committees would essentially consult with the Executive whenever possible prior to an operation and screen out operations that amounted to the waging of war. Operations in the latter category would be considered by the full Congress, and a declaration of war or specific statutory



authorization would be required for the operation to proceed. The disparity between the treatment of military and intelligence operations might thereby be lessened. All proposed operations that amounted to war would be referred to the full Congress for expedited consideration and action.<sup>223/</sup>

The scheme that has been outlined is only one of many possible options, one that might prove to be both effective and enforceable. It would almost certainly guarantee significantly increased involvement by the specified committees in executive decisions to take military action abroad. However, the proposal would also change the current scheme in ways that would draw criticism from two sides.

First, advocates of strict restraints on the Executive might deem this option unconstitutional because it would statutorily recognize the President's de facto authority to use limited force without congressional authorization. They might argue that whatever practical and historical reasons might exist in favor of recognizing this de facto balance of war powers, constitutional provisions cannot be altered without a constitutional amendment. However, it would be extremely difficult and probably unwise to amend the Constitution to remove such inconsistencies.<sup>224/</sup>

If constitutional doctrine cannot accommodate the recognition of the de facto balance of power, why not simply allow the constitutional conflict to exist as it arguably has for the past two hundred years? Aside from the philosophical problem of ignoring a possible constitutional conflict, the proposed legislative changes might well be challengeable in court, since they would codify the alleged constitutional conflict that has heretofore been simply ignored or tolerated. The political question doctrine may render constitutional violations nonjusticiable, but that result might not extend to unconstitutional legislation.<sup>225/</sup>

Thus, the effort to effect a moderate compromise in the statutory provisions governing war powers might fail altogether if the courts interpreted the constitutional balance of war powers in a manner that conflicted with the new provisions.

One possible solution to this dilemma would be for Congress to adopt the interpretation that its exclusive power to declare war governs only major conflicts, not every conceivable use of military (or paramilitary) force. Indeed, some commentators have written that Congress's constitutional power extends only to conflicts involving serious moral or political consequences, or involving major commitments of men, money, and equipment.<sup>226/</sup> This interpretation would neatly fit the proposed two-level system of congressional oversight and authorization. However, other constitutional experts have asserted that the constitutional provision embraces all uses of the armed forces except in the defense of the nation against sudden attack.<sup>227/</sup> Of course, if Congress enacted a scheme such as the one discussed here, it could also amend its interpretation of the constitutional balance of war powers -- as expressed in Section 2 -- so as to accommodate the new scheme.

The question of when congressional authorization is constitutionally required prior to an operation has not been conclusively answered, Section 2 notwithstanding. The conflict caused by the desire to enact a workable balance of war powers and the need to fit it into the constitutional scheme may present the most difficult challenge to reform of the existing legislative scheme.

The second objection to the option outlined here is that it is too restrictive of the President's freedom to take advantage of available foreign policy options. Specifically, it might render "secret wars" a less viable option if such intelligence operations could be referred by the

designated committees to the full Congress for consideration. Clearly, in such a case, the operation would no longer be "secret". Many critics would undoubtedly applaud this result on the conviction that there can be no justification for a secret war under any circumstances. However, it might be argued that Title V implicitly acknowledges the legitimacy of clandestine paramilitary operations by not sanctioning them or bringing them under the terms of the WPR.

Assuming that it wanted to retain the paramilitary option, Congress could provide for an exception to the requirement that the committees refer to Congress those operations that are the equivalent of full-scale war. For example, the intelligence committees might be empowered to authorize such an operation only if the operation and the need for secrecy were essential to the vital interests of the nation. However, an exception that explicitly permitted the intelligence committees to authorize "war" would probably be unconstitutional under almost any theory of the balance of war powers. It would encroach not on some gray area of shared power, but on Congress's sphere of exclusive power. There is no basis for the notion that Congress can delegate its war-making duties to congressional committees.

## V. CONCLUSION

The experience so far under the WPR suggests that, if Congress is dissatisfied with the way recent chief executives have functioned under the WPR, it should reassess, and possibly reform, the statutorily mandated balance of war powers. The existing provisions have proven difficult to enforce. Congressional involvement in decisions concerning the use of U.S. Armed Forces has been minimal and usually after the fact.

It may not be possible, however, to make the WPR an effective piece of legislation simply by redefining terms and replacing vague requirements with specific ones. The circumventions that have occurred reflect a fundamental discomfort on the part of the Executive with the system established under the WPR. If the President does not want to consult with Congress prior to a particular action, he can usually find a way to defend his failure to do so. Past presidents have justified their military actions by saying that hostilities were not "anticipated" or that the action was a "humanitarian mission." Future presidents may find similar methods of circumventing the WPR even if its provisions are strengthened through reform measures. Again, however, Congress must first determine whether it even wants to strengthen the WPR, or whether it is content with the practical balance of war powers that has been worked out since the WPR was passed.

The balance of war powers under the present system is subject to the overall balance of political power between Congress and the Executive, for the enforcement of the WPR depends on political leverage. The system embodied in the WPR will continue to depend on political power despite any efforts to tighten the provisions of the Resolution. If Congress wants to eliminate this confrontational dimension of the war powers "partnership", it will probably have to reform the basic system of consultation and reporting to make it more palatable to the Executive. Title V may offer an encouraging model for any systemic reform of the WPR. Though it is too early to evaluate the effectiveness of Title V, the experience under E.O. 12036 prior to and during the passage of the act gives grounds for optimism.

With respect to both military and intelligence matters, increased congressional participation in the decision-making process would carry with it greater responsibility

for the resulting decisions. Any such changes would have to take place with due regard for the protection against disclosure of sensitive information and for the flexibility needs of the Executive in a fast-moving world. To protect the nation's vital interests, the President should be able to act swiftly, with a broad range of foreign policy options available to him. Yet there is a steadily decreasing margin of error in protecting those interests due to American vulnerability and international volatility, so it is important that we strive for the optimum balance between decisiveness and collective judgement.



NOTES

- 1/ BRODIE, WAR & POLITICS 2 (1973).
- 2/ Id. at 358-359.
- 3/ TRIBE, AMERICAN CONSTITUTIONAL LAW 163 (1978).
- 4/ U.S. Const., art. II, § 2, cl. I.
- 5/ U.S. Const., art. I, § 8, cl. II.
- 6/ 50 U.S.C. §§ 1541-48 (1976) (H.R.J. Res. 542 adopted over presidential veto on Nov. 7 1973). For text of the Resolution, see Appendix A.
- 7/ See Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, 94 Stat. 1975 (1980) (adding "Title V -- Accountability for Intelligence Activities" to the National Security Act of 1947, 50 U.S.C. §§ 401-405 (1980). For text of the amendment, see Appendix B.
- 8/ In defining "war", the courts have looked primarily to the size of a conflict -- e.g. the quantity of men, money and equipment committed -- as well as to its duration. See Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970). Implicit in these cases is an additional factor cited by commentators: the magnitude of the "qualitative" commitment to the conflict. See King and Leavens, Curbing the Dog of War: The War Powers Resolution, 18 HARV. INT'L. L. J. 55, 58-60 (1977); Note, Congress, the President, and the Power to Commit Forces to Combat, 81 HARV. L. REV. 1771, 1774-1775 (1968). These qualitative measures focus on the moral and legal consequences of the military involvement, recognizing that a minor use of force against a tiny nation may constitute war while a major commitment of resources (such as in Western Europe) may not. Id. King and Leavens suggest that between the two extremes of war (which Congress must authorize) and peacetime military maneuvers (which the President may authorize alone) is a vast range of military involvements. Within that range, they argue, Congress and the President share the power to commit the military to combat. If the two come into conflict, their relative political power at the time determines whether hostilities can proceed without congressional authorization. Under this theory, The War Powers Resolution would be a political statement -- in statutory form -- of Congress's power in that gray area.



- 9/ For a detailed history of the passage of the WPR, see Spong, The War Powers Resolution Revisited: Historical Accomplishment or Surrender, 16 WM. & MARY L. REV. 823 (1975). Spong indicates that the dispute was not only between Congress and the Nixon administration, but was also between a Senate seeking tight constraints on the Executive and a House favoring less burdensome constraints. The compromise bill was hailed as historic by some senators (Javits, for example) and branded a "surrender" by others (Eagleton). Id. at 823.
- 10/ 50 U.S.C. § 1541(a) (1976).
- 11/ For a thorough analysis of the failure of § 3 to serve its intended purpose, see Zutz, The Recapture of the S.S. Mayaguez: Failure of the Consultation Clause of the War Powers Resolution, 8 N.Y.U. J. INT'L L. & POL. 457 (1976).
- 12/ The constitutionality of § 5, which describes the procedure for termination of U.S. involvement in hostilities, is still subject to dispute. See Emerson, The War Powers Resolution Tested: The President's Independent Defense Power, 51 NOTRE DAME LAW. 187 (1975); King and Leavens, supra note 8, at 83-90; Spong, supra note 9.
- 13/ See Zutz, supra note 11, at 472; Angst, 1973 War Powers Legislation: Congress Re-Asserts Its War-Making Powers, 5 LOYOLA U.L.J. (Chicago) 83 (1974).
- 14/ U.S. Const., art. I, § 8, cl. II. In addition, Congress has exclusive power to "raise and support armies" (cl. 12), to "provide and maintain a Navy" (cl. 13), and to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . ." (cl. 18).
- 15/ U.S. Const. art. II, § 2, cl. 1.
- 16/ See Berger, War, Foreign Affairs, and Executive Secrecy, 72 N.W.U.L. REV. 309, 319-320 (1977):

[Alexander] Hamilton was driven to explain that the President's authority "would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral . . ." [The Federalist No. 69 (A. Hamilton).]

That the face of the Constitution clearly evidences a severely limited allocation of war powers to the President seems to me beyond dispute; it shuts off the President from waging a war not "begun" or "authorized" by Congress.

This interpretation of the framers' intent is supported by the fact that in 1789 there was no standing army. The framers assumed that only Congress could authorize military action because only Congress could raise an Army and a Navy.

17/ Note, supra note 8, at 1773.

18/ Emerson, War Powers Legislation, 74 W.VA. L. REV. 53 (1971), reprinted in 119 CONG. REC. 25057 (1973) (the author was legal counsel to Senator Goldwater). The absence of a declaration of war does not necessarily mean that Congress was not involved in the decision to engage in hostilities. Congress may authorize an action without a declaration of war, as the Vietnam war was arguably authorized by the Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964). Nonetheless, a review of this list of 199 hostilities involving the U.S. military makes it clear that unilateral executive decision-making has been the norm. (The five declared wars were the War of 1812, the War Between the U.S. and Mexico, the Spanish-American War, World War I and World War II.)

19/ VETO MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H. R. DOC. NO. 93-171, 119 CONG. REC. 34990 (1973).

20/ Emerson, supra note 18, at 84. Emerson frames the following questions:

Does the Constitution unequivocally deposit the controlling power over military matters with Congress? Is there a line of court decisions clearly supporting the view that Congress can forbid the sending of troops outside the country? Does historical practice bear out the doctrine of Congressional supremacy over the use of force in foreign affairs?

Id. at 57-58. These skillfully framed questions avoid the real issue: Historical practice notwithstanding,

does the Constitution vest in Congress not "controlling power over military matters" but sole authority over one military matter -- the commitment of troops to hostilities? Emerson never quite addresses this question of constitutional doctrine. See also, U.S. Department of State, The Legality of U.S. Participation in the Defense of Vietnam, 75 YALE L.J. 1085, 1100-1101 (1966). Compare King and Leavens, supra note 8, at 57-68.

- 21/ See, e.g., Mora v. McNamara, 387 F.2d 862 (D.C. Cir. 1967), cert. denied, 389 U.S. 934 (1967) (Stewart and Douglas, JJ., dissenting to denial of cert.). See also, Note, supra note 8, at 1794; Spong, supra note 9, at 855. Senator Javits, a sponsor of the WPR, stated that:

I doubt very much that any court would have decided [the constitutionality of the Resolution] before or would decide it now. It is almost a classic example of what the courts have considered a "political question." That was the reason we had to settle it through legislation, including a veto override.

119 CONG. REC. 20,116 (1973).

- 22/ See Berger, supra note 16, at 310-311. The commentators almost uniformly concur in this view. See also, Powell v. McCormack, 395 U.S. 486 (1969):

That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.

Id. at 546-547.

- 23/ Berger, supra note 16, at 310-311.

- 24/ See supra note 21.

- 25/ The latter stages of the Indochina War are aberrational in this regard. The use of the U.S. Armed Forces ordinarily prompts patriotic public responses almost regardless of the policy goals being pursued. See, e.g., Zutz, supra note 11, at 476-477 (congressmen sought favorable public notice by praising President Ford on Mayaguez operation, despite Ford's non-compliance with the WPR).

- 26/ See, 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, 318-319 (1911).
- 27/ Note, supra note 8, at 1778. See also, King and Leavens, supra note 8, at 70-71.
- 28/ Durand v. Hollins, 8 F. Cas. 111 (C.C.S.D.N.Y. 1850) (No. 4186).
- 29/ The Prize Cases, 67 U.S. (2 Black) 635 (1863). The Prize Cases acknowledged Lincoln's authority to blockade Southern ports after the Fort Sumter incident. Though this conclusion was dicta (the decision being based on the characterization of the hostilities as insurrection rather than war), it has been embraced by commentators and Presidents alike as authority for the expansion of the sudden attack doctrine.
- 30/ See U.S. Department of State, supra note 20, at 1100-1101, 1106-1108.
- 31/ 50 U.S.C. § 1541 (1976).
- 32/ SENATE COMM. ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, SEN. REP. NO. 797, 90th Cong., 1st Sess. 3 (Nov. 20, 1967).
- 33/ Id.
- 34/ 67 U.S. 635, 668-670. See supra note 29.
- 35/ See VETO MESSAGE, supra note 19; U.S. Department of State, supra note 20; Emerson, supra note 18.
- 36/ U.S. Department of State, supra note 20 at 1101.
- 37/ See supra note 22.
- 38/ Emerson, supra note 18, at 84.
- 39/ Focusing on the consequences that were feared by the framers is not widely accepted by commentators other than Emmerson.
- 40/ The historical acquiescence of the public and of Congress in Presidential war-making raises the question of whether, given the President's unique position in foreign affairs, the de facto balance of war powers prior to 1973 was in fact preferable, irrespective of constitutional provisions. Perhaps practical necessity motivated the general acquiescence in the President's

exercise of the war powers, and an unfortunate war has now caused the happy balance to be upset. Perhaps, as King and Leavens suggest, the Constitution does not even cover less significant military involvements not amounting to "war". See King and Leavens, supra note 8.

- 41/ Southeast Asia -- Peace and Security, Pub. L. No. 88-408, 78 Stat. 384 (1964) (hereinafter cited as "Gulf of Tonkin Resolution"). The Resolution was repealed in 1970.
- 42/ See Note, supra note 8, at 1801-1803; U.S. Department of States, supra note 20, at 1106-1107.
- 43/ Joint resolutions authorized U.S. actions in Formosa, Pub. L. No. 4, 69 Stat. 7 (1955); Lebanon, Pub. L. No. 85-7, 71 Stat. 5 (1957); Cuba, Pub. L. No. 87-733, 76 Stat. 697 (1962); Berlin (1962); and Vietnam (1964).
- 44/ U.S. Department of State, supra note 20, at 1106.
- 45/ The advantage of using legislative acts short of a declaration of war to authorize presidential actions is that they: 1) prevent undue emphasis being put on minor uses of force (or significant uses of force when it is in our interest to downplay them); 2) avoid the disruption of domestic and international legal relationships that a declaration of war would entail; and 3) allow Congress and the President to deal effectively with crises that are as yet undefined or ambiguous.
- 46/ Note, supra note 8, at 1802.
- 47/ Id. at 1801-1803.
- 48/ Id. at 1801. The Nixon administration, however, may have justly believed that it had congressional approval based on Congress's 1965 appropriation of \$700 million specifically for the Vietnam buildup. President Johnson had explicitly linked the appropriation to support of the effort in Southeast Asia. Since existing funds would have prevented any "abandonment" of the troops that were already there, Congress's choice seemed deliberate and uncoerced. See U.S. Department of State, supra note 20, at 1106. Nonetheless, the use of appropriations bills is a practice that is best avoided.
- 49/ TRIBE, supra note 3, at 175.
- 50/ Note, supra note 8, at 1800.

- 51/ 50 U.S.C. § 1541(a) (1976).
- 52/ 50 U.S.C. § 1547(d)(1) (1976).
- 53/ 50 U.S.C. § 1541(c) (1976).
- 54/ Section 2(c)(3) covers only attacks on U.S. territory and armed forces. If it is intended to exclude all other defensive action by the President, such as the protection of American lives and property abroad, then it is inconsistent with the decision in *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1850) (No. 4186). However, though that decision and 150 years of accepted practice may render Section 2(c)(3) technically unconstitutional, the section would probably be read so as to avoid this conflict. There is no evidence in the legislative history to suggest that Congress meant to narrow the President's power in that particular area. See 1973 U.S. CODE CONG. & AD. NEWS 2346-66. It is more likely the result of careless draftsmanship.
- 55/ The Conference Report confirmed that "subsequent sections of the joint resolution are not dependent upon the language of [§ 2(c)], as was the case with a similar provision of the Senate bill."
- 56/ 119 CONG. REC. 18,992 (1973). Senator Eagleton believed that, unless Section 2 was given substantive effect, the WPR amounted to a 60-day license for executive adventurism.
- 57/ Section 2 is not alone in this regard, for the entire WPR relies more on good faith and political leverage than on strictly codified, judicially enforceable provisions. Congress would carry somewhat greater moral authority into a political confrontation if it could point to a specific violation of the WPR. But history has shown that enforceability depends as much on Congress's ability to muster support for a confrontation within its own ranks as on the existence of a specific concrete violation. For discussion of Enforceability, see text accompanying footnotes 109-126.
- 58/ 50 U.S.C. §§ 1542-1543 (1976).
- 59/ Zutz, supra note 11, at 464.
- 60/ While nothing approaching a "confrontation" has occurred between Congress and the President since the passage of the WPR in 1973, there have been several disputes. The controversies have arisen from: 1) the 1974 evacuation of Cyprus (Nixon); 2) the separate evacuations in



1975 of Danang, Saigon, and Phnom Penh (Ford); 3) the 1975 rescue of the Mayaguez crewmen (Ford); 4) the 1980 attempted rescue of the hostages in Iran (Carter); and 5) the 1981 introduction of military advisers into El Salvador (Reagan). The WPR was also triggered by the 1977 airlifts in Zaire (Carter) and was invoked by Congress to forestall intervention in Angola and military action against Iran without consultation with Congress. See infra note 119.

61/ 50 U.S.C. § 1542 (1976).

62/ 50 U.S.C. § 1543 (1976). The President must report on the circumstances that required the action, the "estimated scope and duration" of the action, and his authority for ordering the action, i.e., statute, resolution, Constitution, inherent power, etc. Id.

63/ President Nixon, who opposed the WPR from the beginning, did not submit a report on the evacuation of Americans from Cyprus in 1974. The effort involved five naval vessels and approximately thirty helicopter sorties. Spong, supra note 9, at 849. While Nixon undoubtedly had inherent authority to order the action, the WPR required a report nonetheless.

64/ President Carter asserted that the attempted rescue of the hostages in Iran was not an aggressive action but a "humanitarian mission", and that therefore the WPR did not apply at all. N.Y. Times, April 27, 1980, at A1, col. 4. Nevertheless, he submitted a 6-page report to Congress on the "objectives, planning, and execution" of the mission, describing the report as "consistent with" the WPR. Id. The applicability of § 4 is based not on intent, as Carter believed, but on an objective event, the introduction of military personnel into a foreign nation.

65/ The knowledge that he will have to articulate the basis for his authority at a later date may give the President a second's pause, but it will surely not constrain his actions. Clever State Department attorneys can always derive some kind of authority for the action after the fact.

66/ Indeed, the President is in a particularly advantageous position for crisis management. He has the benefit of expert advisors, but can act quickly on his own decisions; he has access to all available intelligence; his office is conducive to the maintenance of secrecy; etc. Congress, on the other hand, is perceived as acting



slowly, as being too large to be trusted with sensitive intelligence, and as being perhaps institutionally incapable of acting in secret (at least beyond the committee level). Senator John Glenn acknowledged this following the hostage rescue attempt. See infra note 77.

67/ For a list of actions arguably covered by the WPR, see supra note 60.

68/ Zutz, supra note 11, at 464.

69/ Id. It was also noted that even President Nixon deemed Section 3 a useful piece of legislation and did not oppose it. See VETO MESSAGE, supra note 19, at 34991.

70/ In The Prize Cases, 67 U.S. (2 Black) 635 (1863) (summarized supra note 29), the Supreme Court held:

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war but is bound to accept the challenge without waiting for any special legislative authority.

67 U.S. (2 Black) at 668 (emphasis added). The case further declares that the President's authority continues until Congress meets and passes an act governing the subject. 67 U.S. (2 Black) at 660. Thus, in the absence of such an act, the President is authorized to defend the nation as he sees fit, and consultation with members of Congress is constitutionally superfluous. The question then becomes whether Congress can constrain the President's constitutional war powers by statute.

71/ An address to the entire Congress certainly cannot have been intended. See Zutz, supra note 11, at 466-468.

72/ The House Foreign Affairs Committee, reporting on the bill, defined "consultation":

Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore,

for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

H.R. REP. NO. 287, supra note 8, at 6-7, reprinted in U.S. CODE CONG. AD. NEWS 2351. While this definition seems clear enough, Congress has yet to force strict compliance with its terms. President Ford asserted that he had complied with Section 3 when his aides notified certain congressional leaders of his already consummated decision to order the rescue of the Mayaguez crew. See Zutz, supra note 11, at 468-472. He consulted no Congressman personally; his decision was not "pending," and the notification occurred about an hour after the operation began. War Powers: A Test of Compliance Relative to The Danang Sealift, The Evacuation of Phnom Penh, The Evacuation of Saigon, And The Mayaguez Incident: Hearings Before The Subcomm. on International Security and Scientific Affairs of The House Comm. on International Relations, 94th Cong. 1st Sess. 105-08 (1975) (Appendix: A Chronology of Events in the Mayaguez Incident, prepared by the Congressional Research Service, May 30, 1975) [hereinafter cited as War Powers Hearings].

73/ For example, if the President had sent U.S.-manned combat aircraft rather than reconnaissance aircraft to Saudi Arabia during the 1980 Iran-Iraq war, Section 4(a)(3) would have been triggered and a report would have been required; but Section 3 might not have applied because hostilities were neither present nor imminent in Saudi Arabia.

74/ President Ford denied the applicability of Section 3 to the 1975 Saigon evacuation because, even though fighting raged just outside the city, the U.S. forces did not "anticipate" getting involved in the hostilities. See War Powers Hearings, supra note 72, at 2-8 (statement of Monroe Leigh, Legal Adviser of the Department of State); Zutz supra note 11. Of course, the U.S. forces would have fought to protect themselves and the people they were evacuating. In 1980, President Carter made a similar argument, asserting that the military personnel involved in the hostage rescue attempt were on a "humanitarian mission" and did not "intend" to use force. N.Y. Times, April 27, 1980, at A1, col. 4. Again, the risk of hostilities was high. Moreover, the intent not to use force was belied by the pre-launching of C-130 gunships and A-7 and F-14 fighter-bombers in case air support was required. N.Y. Times, May 3, 1980, at A5, col. 1.

- 75/ See Zutz, supra note 11. While President Ford's authority to protect Americans abroad would probably not be questioned (see supra note 54) Section 3 seems to require consultation even when the President has the authority to act as he pleases (at least, until Congress passes an act governing the subject). See supra note 70.
- 76/ President Ford ordered the rescue of the Mayaguez crewmen 57 hours after he learned of the ship's seizure. War Powers Hearings, supra note 72, at 105-07. Zutz concludes that consultation was clearly possible in this amount of time. Zutz, supra note 11, at 465. However, two and a half days can be a very short period of time in the management of a crisis. Advisers must be consulted; intelligence reports must be absorbed; the situation must be closely monitored; etc. Whether or not consultation is possible depends on the unique facts of the case. President Ford might have had a plausible argument that immediate action was needed and that time did not permit consultation. Conversely, President Carter clearly had time to consult Congress prior to the hostage rescue attempt, which was five months after the seizure of the embassy. (Of course, Carter asserted that the WPR was inapplicable anyway.)
- 77/ Senator Glenn, supporting President Carter's refusal to consult Congress prior to the hostage rescue attempt, suggested the secrecy argument: "If I were on that raid, I wouldn't want it all over Capitol Hill." N.Y. Times, April 27, 1980, at A11, col. 4.
- 78/ See supra note 72.
- 79/ Zutz, supra note 11, at 470.
- 80/ See supra note 72.
- 81/ 50 U.S.C. 1541(a) (1976).
- 82/ For discussion of Enforceability, see infra text accompanying notes 109-126.
- 83/ See VETO MESSAGE, supra note 19.
- 84/ Only reports concerning involvement in ongoing or imminent hostilities will trigger Sections 5(b) or 5(c). Reports on non-routine deployments of combat force under Sections 4(a)(2) and 4(a)(3) do not trigger the 60-day limitation.
- 85/ 50 U.S.C. 1544(b) (1976).
- 86/ 50 U.S.C. 1544(c) (1976).

87/ See supra note 56, and accompanying text.

88/ Senator Eagleton is correct, however, to the practical extent that the WPR shifts attention from the underlying constitutional scheme to its own provisions. If the President's actions are judged solely by the terms of the resolution, then the President might use the armed forces in almost any way without technically violating the WPR. While a court would look to the underlying constitutional framework as well as the WPR, it is unlikely that the courts will tackle such a "political question." See supra note 21. In a political confrontation to force compliance, Congress might fare better if it could point to a violation of the resolution rather than relying solely on technical constitutional arguments.

89/ VETO MESSAGE, supra note 19, at 34991.

90/ See H.R. REP. NO. 287, 93d Cong., 1st Sess., reprinted in 1973 U.S. CODE CONG. & AD. NEWS 2346, 2358-2363. Representatives Buchanan and Whalen wrote that:

The language in section [5(b)] troubles us. It permits the exercise of congressional will through inaction. It is our opinion that in order to fulfill its constitutional responsibility, Congress must act, whether in a positive or negative manner.

Id. at 2359.

91/ 119 CONG. REC. 8656-57 (1973).

92/ Spong, supra note 9, at 829.

93/ Id. at 830. They also feared that a congressional majority opposing military involvement could be defeated under the proposed amendment due to: 1) a disagreement between the House and the Senate; 2) a Senate filibuster; or 3) a presidential veto. Id.

94/ H.R. REP. NO. 287, supra note 90, at 2349.

95/ See supra note 25.

96/ Congress's reassertion of its war powers in the WPR was undoubtedly another example of its inability to act without fully galvanized public support. The reaction against President Nixon and the Indochina War gave it

that support. Following the Mayaguez operation, only a few congressional leaders criticized President Ford's noncompliance with the WPR, while most of the legislators sought to publicly register their support of the successful rescue. Zutz, supra note 11, at 476-477. If Congress can act only when confident of its constituents' views, then its full participation in war-making decisions may not be particularly desirable.

- 97/ 50 U.S.C. § 1547(a) (1976).
- 98/ For example, the Six Day War between Egypt and Israel in 1967 was strategically and politically important to the region and to the world.
- 99/ Legislative decision-making lacks not only speed, but also decisiveness and flexibility. Presidential decisions, particularly regarding military actions, are usually supported throughout the Executive branch at least while they are still operative. This decisiveness tends to galvanize public support, give our allies confidence in our actions, and convince our opponents of our resolve. The airing of dissenting views in Congress, however salutary, undermines decisiveness (as does decision-making by compromise). The President's flexibility in being able to monitor and respond to changing circumstances allows the tailoring of U.S. involvement to necessity. Congress, however, is not equipped either to monitor crises or to measure its response from day to day.
- 100/ The prolonged involvement in Vietnam, for example, gave Congress time to approve the 1961-62 build-up of U.S. forces with the 1964 Gulf of Tonkin Resolution (see supra note 18), and to repeal its approval in 1970. Of course, Congress's withdrawal of its resolution did not end the war. The peace agreement did not end U.S. involvement until January, 1973.
- 101/ Prior to the 1975 Saigon evacuation, President Ford requested authorization for the operation. Congress was too slow and indecisive to meet the crisis with legislation. After Ford ordered the operation on his own authority and the evacuation was completed, Congress rejected the legislation as moot. Spong, supra note 9, at 851-854.
- 102/ The repeal of the Gulf of Tonkin Resolution in 1970 may have been such an order to terminate hostilities, but it was certainly not enforced as such. The war continued until January, 1973.

- 103/ Other declared wars were the War Between the U.S. and Mexico (1846-48) and the Spanish-American War (1898). Emerson, supra note 18.
- 104/ Other involvements in hostilities or imminent hostilities that were approved by joint resolutions were: the defense of Formosa (1955); the support of the Lebanese government during a period of civil unrest (1957); the naval quarantine of Cuba (1962); and the Berlin crisis (1962). See note 43, supra.
- 105/ Since Congress cannot insure that the President will withhold his final decision pending consultation, any resulting "consultation" will often be superfluous because the President will have made up his mind already. President Ford, in fact, did just that, informing congressional leaders of his Mayaguez decision as the operation was beginning. President Carter "consulted" Senate Majority Leader Robert Byrd regarding the hostage rescue mission, but led Byrd to believe the plan would not be executed in the near future (when in fact it took place later that week). N.Y. Times, April 27, 1980, at A17, col. 1.
- 106/ See supra text accompanying notes 58-82.
- 107/ If consultation did not occur before the specified interval, any ensuing consultation or report would have to include a statement of the reasons justifying immediate military action. The proposed Section 3 might also provide for consultation by administration officials other than the President when events made it impossible for the President to comply personally. Again, a statement of justification for the President's absence would be required.
- 108/ This proposal and its advantages and disadvantages are discussed more fully in Section III D, entitled "A Proposal". See infra.
- 109/ Nixon's refusal to make a Section 4 report on the Cyprus evacuation of 1974 was branded a violation of the WPR by Senator Eagleton. Spong, supra note 9, at 849. Ford's notification of congressional leaders at the time the Mayaguez operation began was deemed a violation of Section 3 by congressmen and commentators alike. Zutz, supra note 11, at 464-472. Carter's failure to consult Congress prior to the hostage rescue attempt was considered a Section 3 violation by some legislators, but not others. N.Y. Times, April 27, 1980, at A17, col. 1. Finally, Reagan's build-up of



military advisers in El Salvador in March, 1981, unaccompanied by a report under Section 4(a)(2)-(3), was considered a possible violation of the WPR by some congressmen. See NEWSWEEK, March 16, 1981, at 38.

110/ See supra note 21, and accompanying text.

111/ See supra note 25, and accompanying text.

112/ Zutz, supra note 11, at 476-477.

113/ Angst, 1973 War Powers Legislation: Congress Re-Asserts Its Warmaking Power, 5 LOY. U. CHI. L.J. 83, 105 (1974).

114/ See supra note 109, for a list of arguable WPR violations.

115/ In 1973, Congress passed a bill (31 U.S.C. 655 (1976)) ending the use of appropriations for the bombing of Cambodia. However, to avoid a veto of the bill, Congress had to make the cut-off date 45 days after the passage of the bill. Moreover, the success of its efforts also rested on the threat of a general cut-off of funds to the government. For a thorough discussion of this confrontation, see Eagleton, The August 15 Compromise and the War Powers of Congress, 18 ST. LOUIS L.J. 1 (1973).

116/ Senator Eagleton, writing about the cut-off of funds for bombing in Cambodia, asserted that:

Such confrontations should not occur within our system. Where reason and respect for the Constitution prevail there is simply no necessity for conflict.

Id. at 5. However, the President will invariably have a good-faith belief that his actions are necessary, and that congressional meddling is unwarranted.

117/ Zutz, supra note 11, at 474.

118/ To ignore Congress's expression of its will would be both unconstitutional and contrary to The Prize Cases, 67 U.S. (2 Black) 635 (1863). See also, King and Leavens, supra note 8, at 66-68.

119/ On the very day of the hostage rescue attempt in 1980, the Senate Foreign Relations Committee sent President Carter a letter invoking Section 3 of the WPR. The



letter requested that Carter consult Congress prior to any military action, particularly the naval blockade of Iran that Carter had been considering. N.Y. Times, April 26, 1980, at A1, col. 6. The same message, perhaps taking a more prohibitive tone, could have been conveyed by congressional resolution. Indeed, in 1976, pursuant to the WPR, Congress forbade intervention in Angola in advance by legislation. See N.Y. Times, Dec. 20, 1975, at A1, col. 1; N.Y. Times, Jan. 18, 1976, at A18, col. 5; and N.Y. Times, Jan. 28, 1976, at A1, col. 8.

120/ Prospective congressional action also seems unlikely in light of Congress's tendency to take a stand only when a safe position becomes apparent.

121/ See Zutz, supra note 11, at 475-478.

122/ See supra text following note 106. The key to any modification of Section 3 must be specificity and clear definitions. The WPR currently lacks both.

123/ Zutz, supra note 11, at 478.

124/ Again, the key political factors may be the public perception of the President as the leader and decision-maker in these matters, and the public's tendency to support the President and the nation's military forces in times of hostilities. Public opinion is crucial because Congress probably will not confront the President unless most of its members are certain that their constituents favor a confrontation. However, the public is interested less in the balance of war powers than in the conduct of specific wars.

125/ For example, Senator Jackson, who would probably have been consulted under Section 3, condemned President Carter's failure to comply with Section 3 before the hostage rescue attempt. N.Y. Times, April 27, 1980, at 11, col. 4.

126/ For example, Senator Eagleton, a vigilant critic of each of the alleged WPR violations, has had a particular interest in war powers legislation from the start. He has written several law review articles on the subject, and was a sponsor of the Senate version of the WPR.

127/ See 119 CONG. REC. 25079-25086 (1973).

128/ Id. at 25079.

129/ Id. at 25080.

130/ Id. at 25081.

131/ See Foreign Assistance Act of 1961, 22 U.S.C. 2422 (1976). For text of Hughes-Ryan amendment, see Appendix C.

132/ "Covert operations" are activities that a nation wants to conduct without its involvement being known or apparent. These activities would include everything from the indoctrination of political cell groups in Italy to the alleged attempt to assassinate Salvador Allende; from the supply of guns to anti-communists in Angola to the so-called "secret war" in Laos. Covert operations would ordinarily not encompass normal intelligence gathering operations.

133/ 50 U.S.C. 401-405 (1980). The CIA was first established by the Act of 1947 with the mission simply "to correlate and evaluate intelligence relating to the national security . . .", 50 U.S. 403(d)(3) (1976) and to "perform such other functions and duties relating to intelligence affecting the national security as the National Security Council may from time to time direct." 50 U.S.C. 403(d)(5).

134/ Executive Order 12036, 43 Fed. Reg. 3674 (1978). This comprehensive piece of executive self-regulation dealt with most of the issues addressed by the CIA charter bill that was introduced February 8, 1980 (S.2284). In fact, much of the language of the bill was adapted from E.O. 12036. The few sections of S.2284 that were passed in 1980 -- those relating to congressional oversight -- fully incorporated the corresponding sections in E.O. 12036. Why, then, did the Carter Administration find it politically necessary or desirable to oppose many of the provisions of S.2284 adopted almost verbatim from E.O. 12036? See infra notes 144-145, 158-159 and accompanying text.

135/ S.2284, 96th Cong., 2d Sess. (1980).

136/ The Senate Select Committee was established in 1976. S.Res. 400, 94th Cong., 2d Sess., 122 CONG. REC. 14673 (1976). Its purpose was to provide centralized oversight of the intelligence community, in contrast to the previous system in which numerous committees gave only partial attention to intelligence matters.

137/ Felton, Intelligence Charter -- Disputes Emerge Again on Key Issues, 38 CONG. Q. WEEKLY REV. 537 (1980).

138/ Id. (Quotation from Rep. Robert McClory, R-Ill.)

139/ S. REP. NO. 730, 96th Cong., 2d Sess. 3, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4194.

140/ See supra note 7.

141/ National Intelligence Act of 1980: Hearings Before the Senate Select Committee on Intelligence, 96th Cong., 2d Sess. 9 (1980) [hereinafter cited as National Intelligence Hearings] (statement of Graham Allison, Dean of Kennedy School of Government, Harvard University).

142/ Id.

143/ Private statement of William G. Miller, former Staff Director, Senate Select Committee on Intelligence. Mr. Miller further concludes that action on charter legislation is several years away at least.

144/ National Intelligence Hearings, supra note 141, at 4 (statement of Admiral Daniel J. Murphy, Admiral, USN. (Ret.), Deputy Undersecretary of Defense).

145/ See supra note 134. For text of the oversight provision in E.O. 12036, see Appendix D. Compare text of Title V, Appendix B.

146/ The administration's key spokesman and its lead-off witness before the Senate Intelligence Committee was Admiral Stansfield Turner, Director of Central Intelligence. Opposing the requirement that the intelligence committees be given prior notice of anticipated intelligence activities, Admiral Turner said:

It would be improper to attempt to impose such requirements in statute. Such statutory requirements would amount to excessive intrusion by the Congress into the President's exercise of his powers under the Constitution.

National Intelligence Hearings, supra note 141, at 17 (statement of Admiral Stansfield Turner, D.C.I., before the Senate Select Committee on Intelligence). An identical provision for prior notification existed in E.O. 12036.

147/ Id. at 16.

148/ H.R. REP. NO. 1350, 96th Cong., 2d Sess. 15 (1980).

149/ Section 501(a)(1)(B). The eight leaders specified are the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House, and the majority and minority leaders of the Senate.

150/ Section 501(d).

151/ Section 501(a)(1)(A).

152/ DCI Stansfield Turner and former DCI William Colby heartily endorsed a charter to authenticate the work done by the CIA and to establish procedures, guidelines, and strictures. As Mr. Colby stated:

[The Charter] will set up procedures for different people who have to be consulted and take responsibility, [a] novel concept since the old idea was that nobody was responsible for intelligence. The President could deny it, the spy could be disowned, and you couldn't prove it to the contrary; that was the old theory: plausible denial. But now two congressional committees are seriously involved in responsibility under the separation of powers, knowing and keeping the secrets and exerting Congress' full constitutional role.

Harvard University: Incidental Paper of the Program on Information Resources Policy, Seminar on Command, Control, Communications and Intelligence (1980). See also National Intelligence Hearings, supra note 141, at 17 (statement of DCI Admiral Turner).

153/ National Intelligence Hearings, supra note 141, at 16-18 (statement of DCI Admiral Turner).

154/ Id., at 70-71 (statement of Admiral Daniel J. Murphy, Deputy Undersecretary of Defense).

155/ Title V requires that the DCI and other intelligence officials comply with its provisions "to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods." Title V, Section 501(a).

156/ S. REP. NO. 96-730, supra note 138, at 8.

157/ Id. at 7-9. Although many intelligence gathering activities are also "covert," the term "covert actions" refers exclusively to actions taken for foreign policy objectives without U.S. involvement being apparent.

158/ National Intelligence Hearings, supra note 141, at 17 (statement of DCI Admiral Turner).

159/ Id. at 9.

160/ Id. at 10. Turner based his observation on the fact that:

There are clearly situations in which I personally would not ask an individual to accept such risks to his welfare or place the reputation of the United States on the line if I were required to report such intention to more members of the Congress and their staffs than I would permit persons within the CIA to be privy to this information.

161/ Id. at 8-9.

162/ Id. at 21.

163/ Id. at 505 (statement of E. Drexel Godfrey, Jr.).

164/ Id. at 145-205 (statement of Jerry Berman and Morton Halperin, on behalf of the ACLU).

165/ Section 501(a)(1)(B). Clause (B) was not present in the initial draft of S.2284 or in E.O. 12036. In the case of E.O. 12036, of course, such a provision was not really necessary since enforcement of the self-imposed regulation could be waived in extraordinary circumstances.

166/ Section 501(b). Subsection (b) applies only to "intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence . . . ." Certain sensitive intelligence gathering operations will require prior notice under subsection (a), but failure to provide prior notice will trigger subsection (b) only for covert foreign operations. Though the President will not have to report on intelligence gathering operations when prior notice is not given, the responsible intelligence

official will still have to keep the committees "fully and currently informed" on the operation under subsection (a).

167/ The Senate Report accompanying S.2284 cited the testimony of Admiral Turner, then Director of Central Intelligence:

" . . . the actions of both [intelligence] committees in reviewing these covert action findings [have] influenced the way in which we have carried them out." He said further that the influence had been "absolutely" beneficial.

S. REP. NO. 730, supra note 139, at 8. The report also noted former Director William Colby's observation that consultation "'enables the Executive to get a sense of congressional reaction and avoid the rather clamorous repudiation which has occurred in certain cases . . . and I think that is a helpful device.'" Id.

168/ Id. at 12. Referring to Section 501(a)(1)(B), the Senate Report states that:

The purpose of this limited prior notice in extraordinary circumstances is to preserve the secrecy necessary for very sensitive cases while providing the President with advance consultation with the leaders in Congress and [those] who have special expertise and responsibility in intelligence matters.

Id. at 10. The description of Section 501(b) also refers to "rare extraordinary circumstance."

169/ Id. at 9. This example, cited in the Senate Report, was suggested by former DCI William Colby in testimony before the Senate Intelligence Committee.

170/ "The further requirement of a statement of the President's reasons for not giving prior notice is intended to permit a thorough assessment by the oversight committees as to whether the President had valid grounds for withholding prior notice and whether legislative measures are required to prevent or limit such action in the future." Id. at 12.

171/ Id. at 5.

172/ For example, see statements of Admiral Turner and Mr. Colby, note 167, supra.



173/ Much of Title V consists of language identical to that in E.O. 12036. Moreover, administration lawyers worked with congressional aides on the language of Section 501(e) -- a provision that was inserted by the Conference Committee to resolve a dispute within that body. CONG. Q. WEEKLY REV., Sept. 27, 1980, at 2875. In short, administration views and language were accommodated by the committees whenever possible throughout the legislative process.

174/ The constitutional basis for the requirements of Title V is not enunciated in the legislative history. The Senate Report states that:

There is no mention in the Constitution of intelligence activities. Whatever Constitutional authorities may exist must follow from other constitutionally conferred duties [of the two branches].

Those powers concerning national security and foreign policy are in a "zone of twilight" in which the President and Congress share authority whose distribution is uncertain.

S. REP. NO. 730, supra note 139, at 5, 9 [citing U.S. v. American Tel. & Tel. Co., 567 F.2d 121, 128 (D.C. Cir. 1977); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637-638 (1952), opinion of Mr. Justice Jackson]. The legislative history suggests that Title V is based less on constitutional theory than on the practical needs and desires of both branches of government.

175/ Id. at 9.

176/ It was suggested, for instance, that absent a prior notice requirement, Congress would lose its role in intelligence matters altogether. National Intelligence Hearings, supra note 141, at 505 (statement of E. Drexel Godfrey, Jr.). The exceptions created in the requirement might similarly be viewed as a surrender to the administration's position. The ACLU, which argued for much stricter guidelines on covert operations, would presumably take such a view.

177/ Id. (statements of Graham Allison, Dean of Kennedy School of Government, Harvard University, and James Schlesinger).

178/ 119 CONG. REC. 25079-25080 (1973).



- 179/ Covert interference in a nation's affairs is generally deemed subversive of that nation's freedom whether it is the government that is being aided or some group that seeks to topple or gain control of the government.
- 180/ See supra note 41.
- 181/ 119 CONG. REC. 25080 (1973).
- 182/ Id.
- 183/ In 1961, three years prior to any official U.S. involvement in Laos, the CIA began to "organize and advise Meo tribesmen in Laos." Soon, "civilian pilots under contract to the CIA-associated Air America participated with the Royal Laotian Air Force in an extensive air operation against the Pathet Lao." Id.
- 184/ 119 CONG. REC. 25083 (1973) (Senator Eagleton quoting passages from an article by Fred Branfman in the May, 1973 HARPER'S magazine).
- 185/ The Bay of Pigs invasion, for example, was arguably a U.S. attack on Cuba, carried out so as to conceal U.S. involvement. As such, it might be a case of executive war-making without congressional authorization, or at least a case in which a high risk of war was created without input from Congress. Similarly, in 1954, a small force organized and equipped by the CIA invaded Guatemala, which was then ruled by a left-wing junta. See SCHNEIDER, COMMUNISM IN GUATEMALA, at 311 (1959).
- 186/ 119 CONG. REC. 25080 (1973) (statement of Senator Eagleton).
- 187/ Id. at 25082 (letter from Senator Stennis read to the Senate by Senator Muskie).
- 188/ As this section will discuss, Title V and the WPR have very different requirements regarding congressional approval, consultation, and formal reporting. The enforceability of the acts and the likelihood of executive compliance with their terms also distinguish the acts. See infra text accompanying notes 204-205.
- 189/ 119 CONG. REC. 25080 (1973).
- 190/ Section 501(a)(1)(A).
- 191/ Section 2(c).
- 192/ The uncertain legal effect of the "Purpose and Policy" section (Section 2) is discussed in the text accompanying notes 53-57, supra.

- 193/ The requirement of "subsequent congressional approval" in Section 5 of the WPR is actually described in terms of an automatic, post hoc veto that becomes effective after 60 days (or sooner if Congress disapproves the President's action by concurrent resolution). The effect of the provision is the same in either case: without congressional approval, the action must be terminated.
- 194/ Ford Administration officials thought "consultation" meant simply notification of impending action, but the legislative history accompanying Section 3 makes clear that it means much more. See supra note 72.
- 195/ Title V explicitly requires the notification of the congressional intelligence committees. The opportunity to respond to proposals is only implied, but it has been the accepted practice prior to and since the passage of the act. The WPR does not explicitly limit the number of congressmen who must be consulted, but that understanding has been adopted by both branches. The legislative history of the act defines the Executive's duty as being to seek advice and opinions during consultation.
- 196/ It may stretch the argument too far to analogize between intelligence oversight and government regulation, in which there is apparently a tendency for the regulators to develop a symbiotic relationship with the regulated industries. However, the intelligence oversight relationship may not be totally different either. There have certainly been charges in the past that the intelligence committees are too sympathetic with the intelligence community.
- 197/ Section 4 of the WPR lists the types of actions that are subject to its reporting requirements. 50 U.S.C. § 1543.
- 198/ Section 501(b).
- 199/ Reports to Congress under the WPR are transmitted to the entire body through the Speaker of the House and the President pro tempore of the Senate. 50 U.S.C. § 1543.
- 200/ See supra note 74.
- 201/ Indeed, an unknown number of paramilitary agents reportedly infiltrated Teheran posing as European businessmen to assist in the hostage rescue attempt.

These agents bought a warehouse to serve as the final staging area for the assault on the embassy. The infiltrators, who quietly slipped out of Iran after the aborted attempt, included members of a Special Forces unit stationed in Europe and consisting of people who speak European languages. N.Y. Times, April 30, 1980, at A1, col. 4. Though military personnel conducted this covert operation, thus arguably invoking the requirements of the WPR, it might conceivably have been conducted solely by civilian agents.

- 202/ It is also possible to trigger both acts at once, since the scope of Title V is determined by the nature of the activities involved (intelligence activities) and the scope of the WPR is determined by the identities of the participants (military personnel). For example, a plan for the covert bombing of Salvadoran guerrilla forces by military personnel working under CIA direction would arguably trigger: 1) the prior notice requirement of Title V governing significant anticipated intelligence activities; and 2) the prior consultation requirement of the WPR (Section 3) governing the introduction of U.S. Armed Forces into hostilities. Even if the plan called for covert reconnaissance rather than bombing missions, the reporting requirement of the WPR (Section 4) would probably apply along with the requirements of Title V. This situation raises a dilemma: what good is a covert operation involving the military if it must be formally reported to Congress under the WPR within 48 hours?
- 203/ The CIA probably cannot presently conduct significant paramilitary operations without military support. In 1973, Senator Javits believed that while the CIA might have some "clandestine agents with rifles and pistols engaging in dirty tricks . . . there is no capability of appreciable military action that would amount to war." 119 CONG. REC. 25082 (1973). As soon as combat forces are employed, he noted, the WPR will be triggered. While the extent of the CIA's physical assets is not public information, it seems unlikely that the agency possesses the wide variety of capabilities that would be required to accomplish an unforeseeable range of military objectives without involving the U.S. military. Since it has always been able to co-opt military personnel and equipment, the CIA has had little incentive to expand in that direction. Only a presidential directive to expend large sums to create the capability to by-pass the WPR would overcome that shortcoming. Such a blatant move would undoubtedly spur Congress to take corrective action in the provisions of the WPR.

- 204/ Senator Byrd, for example, was furious over President Carter's failure to consult congressional leaders. N.Y. Times, April 26, 1980, at A11, col. 1. The next day, however, Byrd concluded that there was no WPR violation because no aggressive acts against Iran were intended. N.Y. Times, April 27, 1980, at A17, col. 1.
- 205/ Even after President Nixon's resignation, polls showed that some 25 percent of the American people still believed him innocent of all wrong-doing. The desire to support the President is usually even stronger in foreign affairs (see supra note 25) and the egregiousness of the President's actions is usually less obvious.
- 206/ James Schlesinger, a former Director of Central Intelligence, and Graham Allison, Dean of the Kennedy School of Government at Harvard, assert that the problem with the intelligence community is its performance, not its abuses. See supra note 177.
- 207/ The lack of intermeshing between the acts is largely due to the way in which Title V evolved. After two years of minimal progress on the bill, the events in Iran and Afghanistan prodded the legislative process into action. However, those events increased the political leverage of the administration, not that of the strict-restraint advocates. So the working out of the act's provisions in the political arena did not create an atmosphere conducive to congressional tightening of restrictions. Title V was a significant legislative accomplishment resulting from realistic political compromises, but it was not an interlocking work of legislative art.
- 208/ See supra notes 174-175, and accompanying text.
- 209/ See supra text accompanying notes 22-23.
- 210/ The WPR may arguably be deemed the embodiment of constitutional doctrine only with respect to the armed forces, leaving traditional constitutional analysis to deal with non-military war-making. However, this theory has not been advanced by Congress as yet. Moreover, since its passage, the WPR has been looked to exclusively in dealing with war powers questions, while the underlying constitutional theory has received little attention.
- 211/ Congressional authorization, as a constitutional matter, must involve action by both full houses of Congress. See supra text accompanying notes 41-50. The authority to wage war cannot be given by a few congressional

committees, yet the security procedures required to protect sensitive information concerning covert operations can only be effective with such limited groups.

212/ See supra paragraph of text accompanying note 179.

213/ This argument assumes that the constitutional requirement of congressional authorization is triggered not by any involvement in hostilities at any level, but by involvement in hostilities that create a risk of full-scale war. Thus, if the risk is lessened sufficiently, the requirement might not apply to a given operation. See supra note 8.

214/ A constitutional amendment could be drafted to remove the conflict in Title V, but the likelihood of its ratification would be -- in a word -- nonexistent.

215/ Of the eight U.S. military actions since 1973 that arguably triggered the WPR, only one -- the Mayaguez rescue operation -- resulted in actual U.S. involvement in hostilities. The other seven were conducted either in hostile territory or in territory where hostilities were in progress -- i.e., in Iran, Vietnam, Cambodia, Cyprus, Zaire, or El Salvador. See supra note 60. None led to a combat engagement by U.S. troops.

216/ After eight years under the WPR, the President has never consulted with Congress prior to initiating a military operation. In the one instance where the President sought prior authorization for an operation, Congress moved so slowly that the President had to order the mission to proceed anyway, and the mission was completed before Congress could act. See supra note 101..

217/ The WPR does not explicitly limit the number of congressmen who must be consulted, but such a limitation seems implicit in the requirement. Moreover, congressional leaders seem to concur in this interpretation of Section 3.

218/ This arrangement would be similar to the provisions in Title V for dealing with the Senate and House intelligence committees.

219/ This scheme would be similar to the procedure in Title V for limited prior notice to the speaker and minority leader of the House, the majority and minority leaders of the Senate, and the chairmen and ranking minority members of the intelligence committees. Section 501(a)(1)(B).



- 220/ The problem with war-making decisions, as opposed to intelligence activities, is that they tend to be required sporadically on a one-shot basis. Clearly, brief, intensive consultations during crises that may be years apart are not conducive to the development of a productive, smooth-running relationship. The requirement of periodic meetings might minimize that problem, while keeping the members of Congress informed on potential areas of hostilities so they could better perform their duties. In short, the requirement attempts to duplicate the ongoing relationship of consultation and information-giving that exists between the intelligence committees and the Executive under Title V -- a very difficult task.
- 221/ Under the current provisions of the WPR, no such official monitoring occurs until the initial report or consultation takes place. After that, the President must report on the status of U.S. involvement at least every six months. However, the President makes the initial determination that a report or consultation is required under the act. (Congress can, of course, consider and act on a given situation on its own initiative, but the WPR itself does not provide for congressional action prior to a report or consultation.) Under the proposed system, the committees would be able to monitor U.S. involvement in a region almost continuously prior to and during the actual outbreak of serious hostilities. The committees would determine if and when the hostilities amounted to the waging of war and refer the matter to the full Congress at that time. See infra paragraph of text accompanying note 223.
- 222/ Other provisions of the WPR could undoubtedly be improved as well. These suggestions focus on Section 3 because it has so far been the center of all the noncompliance controversies. The other controversial provision, Section 5, is as yet untested, so its practical shortcomings are not as clearly apparent.
- 223/ The WPR currently contains provisions for expedited consideration of joint and concurrent resolutions introduced pursuant to Section 5 in order to terminate, extend, or authorize the use of U.S. Armed Forces during the allowed 60-day period. 50 U.S.C. §§ 1545 and 1546.
- 224/ A constitutional amendment shifting some of the power to authorize the use of the armed forces to the President would be inadvisable because it might be an invitation to abuse by the Executive. Though the present balance

of political power might prevent such abuses, that balance cannot be guaranteed in the future. It is one conclusion of this paper that Congress should retain the power to control the balance of war powers, though it should not necessarily reserve to itself a greater proportion of that power.

225/ The full implications of the political question doctrine are beyond the scope of this paper.

226/ King and Leavens, supra note 8; Note, supra note 8. King and Leavens argue that lesser involvements are in a realm of shared power, where political strength determines how decisions will be made. See supra note 8. The option outlined in this paper would constitute a political compromise between the two branches on how to share authority within that twilight zone of power.

227/ See supra text accompanying note 33 (statement of Senator Ervin).





APPENDIX A

**WAR POWERS RESOLUTION**

*For Legislative History of Act, see p. 2346*

**PUBLIC LAW 93-148; 87 STAT. 555**

**[H. J. Res. 542]**

**Joint Resolution concerning the war powers of Congress and the President.**

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

**SHORT TITLE**

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

## PURPOSE AND POLICY

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

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

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

## CONSULTATION

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

## REPORTING

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

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

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

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

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

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

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

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

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

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

#### CONGRESSIONAL ACTION

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

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

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a decla-

ration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

#### CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

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

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

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

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

#### CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

Sec. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent

resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

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

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

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

#### INTERPRETATION OF JOINT RESOLUTION

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

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

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

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the head-



quarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

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

(d) Nothing in this joint resolution—

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

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

#### SEPARABILITY CLAUSE

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

#### EFFECTIVE DATE

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

Passed over Presidential veto Nov. 7, 1973.



APPENDIX B

CONGRESSIONAL OVERSIGHT OF INTELLIGENCE ACTIVITIES

SEC. 407. (a) Section 662 of the Foreign Assistance Act of 1961 (22 U.S.C. 2422) is amended—

(1) by striking out "(a)" before "No funds";

(2) by striking out "and reports, in a timely fashion" and all that follows in subsection (a) and inserting in lieu thereof a period and the following: "Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947."; and

(3) by striking out subsection (b).

(b)(1) The National Security Act of 1947 (50 U.S.C. 401 et seq.) is amended by adding at the end thereof the following new title:

"TITLE V—ACCOUNTABILITY FOR INTELLIGENCE  
ACTIVITIES

"CONGRESSIONAL OVERSIGHT

"Sec. 501. (a) To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall—

"(1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the 'intelligence committees') fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate;

"(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

"(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned to be taken in connection with such illegal activity or failure.

"(b) The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) and shall provide a statement of the reasons for not giving prior notice.

"(c) The President and the intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of subsections (a) and (b).

"(d) the House of Representatives and the Senate, in consultation with the Director of Central Intelligence, shall each establish, by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information and all information relating to intelligence sources and methods furnished to the intelligence committees or to Members of the Congress under this section. In accordance with such procedures, each of the intelligence committees shall promptly call to the attention of its respective House, or to any appropriate committee or committees of its respective House, any matter relating to intelligence activities requiring the attention of such House or such committee or committees.

"(e) Nothing in this Act shall be construed as authority to withhold information from the intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods."

(2) The table of contents at the beginning of such Act is amended by adding at the end thereof the following:

**"TITLE V—ACCOUNTABILITY FOR INTELLIGENCE ACTIVITIES**

**"Sec. 501. Congressional oversight."**

APPENDIX C

**§ 2422. Intelligence activities**

**Limitations: Presidential report to Congress**

(a) No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives.

**Military operations exception**

(b) The provisions of subsection (a) of this section shall not apply during military operations initiated by the United States under a declaration of war approved by the Congress or an exercise of powers by the President under the War Powers Resolution.

Pub.L. 87-195, Pt. III, § 662, as added Pub.L. 93-559, § 32, Dec. 30, 1974, 88 Stat. 1804.



APPENDIX D

**8-4. Congressional Intelligence Committees.** Under such procedures as the President may establish and consistent with applicable authorities and duties, including those conferred by the Constitution upon the Exec-

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utive and Legislative Branches and by law to protect sources and methods, the Director of Central Intelligence and heads of departments and agencies of the United States involved in intelligence activities shall:

**3-401.** Keep the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate fully and currently informed concerning intelligence activities, including any significant anticipated activities which are the responsibility of, or engaged in, by such department or agency. This requirement does not constitute a condition precedent to the implementation of such intelligence activities;

**3-402.** Provide any information or document in the possession, custody, or control of the department or agency or person paid by such department or agency, within the jurisdiction of the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate, upon the request of such committee; and

**3-403.** Report in a timely fashion to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate information relating to intelligence activities that are illegal or improper and corrective actions that are taken or planned.

