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## FUTURE TRENDS IN THE ADMINISTRATION OF CRIMINAL JUSTICE\*

B. J. George, Jr.\*\*

It is a privilege to have been invited to prepare this paper as the Fourth Annual Hodson Lecture at The Judge Advocate General's School. There is personal pleasure as well because of the years of association with Major General Kenneth J. Hodson in the work of the American Bar Association Criminal Justice Section Council. I hope that what follows will be as trenchant and relevant as his inaugural lecture in this series.<sup>1</sup>

The focus of discussion in what follows (however broad the title) is the changing constitutional framework for the investigation, trial and review of criminal prosecutions; the nature of appropriate legislative response; and the potential magnification of state constitutional interpretation and legislation that has begun to flow from altered federal constitutional doctrines.

From time to time, I refer to the "Warren Court" and the "Burger Court." This is purely by way of convenience, referring in the first instance to the United States Supreme Court as it was constituted during the period 1963-1970 (obviously, not the exact span of Chief Justice Warren's distinguished service on the Court), and in the second to the Court since 1971. Although the personal influence of these two eminent jurists cannot be denied, the institution is of course larger than any single individual. Consequently, we are in fact examining a collective shift of emphasis in constitutional interpretation, a shift which has a multitude of counterparts in the nearly two hundred years of the Court's existence; a further shift most probably will ensue in the decade ahead. Nor is it appropriate to talk of "swings back-and-forth of the pendulum." No reconstituted Supreme

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<sup>1</sup> Hodson, *The Manual for Courts-Martial—1984*, 57 MIL. L. REV. 1 (1972).

Court ever repudiates wholly the doctrines of its predecessors; the doctrine of stare decisis retains enough vitality to temper whatever desire there may be to wipe away completely certain inherited precedents. This is as true of the Burger Court as of many of its predecessors.

As far as I am able, I will endeavor to maintain a stance of neutrality as far as which doctrine or which Court is "better." Judgments of that sort, while appropriate for after-hours discussions, should not affect a lawyer's analysis of cases in which he or she is professionally involved. Therefore, I hope that what follows lies within acceptable bounds of doctrinal interpretation and is not unduly skewed in one direction or another.

At the usual risk of oversimplification, the criminal procedure precedents of the Warren Court seem to be characterized by certain tenets of constitutional philosophy. First, fundamental standards affecting criminal cases must be set by the Supreme Court and other federal courts. Accordingly, there should be no variation in practice from state to state, or between the state and federal jurisdictions. Second, the critical stage of a criminal case is the investigation, and it is the component of the criminal justice system most in need of judicial supervision. Assuming that law enforcement officials afford defendants their right to counsel, relatively little additional judicial attention is required beyond confirming that most of the provisions of the Bill of Rights, the grand jury indictment requirement excepted, apply to the states through the fourteenth amendment due process clause. Third, the traditional concepts that due process is a relative matter and that a criminal case must be shot through with fundamental error thoroughly infecting the fairness of a criminal conviction before it will be reversed provide no satisfactory instrument to control constitutionally undesirable practices, particularly those of the police. Therefore, it is necessary to lay down quite specific constitutional standards with which officials must comply. Concomitantly, relatively little reliance can be placed on the legislative process in bringing about needed reforms in criminal procedure.

If indeed these premises are among those that can be gleaned from the decisions of the Warren Court, then an examination of the Supreme Court's decisions in the present Burger Court era, particularly those announced since 1973, clearly reveals a substantial shift toward other directions. This shift can be illustrated and analyzed in terms of (1) the proper judicial role in control of police investigation, (2) appropriate techniques of managing judicial caseloads, (3)

the restoration and expanded use of the relative due process standard, and (4) a modification of the assignment of responsibility to regulate criminal procedure between the state and federal courts.

## I. JUDICIAL CONTROL OF POLICE INVESTIGATION

### A. CARDINAL PRINCIPLES OF THE WARREN COURT

Judicial control of searches and seizures is, of course, the tool the Supreme Court has used most often to control police investigations.<sup>2</sup> The scope and frequency of invoking fourth amendment principles escalated geometrically, however, after the prohibition against unreasonable searches and seizures was incorporated into the concept of due process of law under the fourteenth amendment.<sup>3</sup> In this area, three important constitutional principles emerge from the Warren Court precedents.

#### 1. *The principle of the neutral and detached magistrate*

One mandate of the warrants clause of the fourth amendment is that any warrant must be issued by a "neutral and detached magistrate."<sup>4</sup> Since the official issuing the warrant in *Coolidge* was a police official specially designated as a justice of the peace, the requisite neutrality was lacking and the search warrant fell. Although the decision came at the break-point between the Warren Court and Burger Court eras, its roots go back into the most basic holding of the Warren Court in the search and seizure area.<sup>5</sup>

#### 2. *Paramountcy of the warrants clause*

Before *Chimel*, it had generally been assumed that the two clauses of the fourth amendment, the "warrants" clause and the "reasonableness" clause, were coequal. The initial choice as to which clause to invoke lay with law enforcement officials. If the decision was to seek a warrant, then the officers bore the practical burden of advancing enough data upon which the judicial officer could find the requisite probable cause. If, however, officers felt that they had an adequate basis to arrest without first securing a warrant, they would arrest the individual and then search him. Perhaps they would even

<sup>2</sup> In federal practice it dates from *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>3</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>4</sup> *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

<sup>5</sup> *Chimel v. California*, 395 U.S. 752 (1969).

search a portion of the premises in which the arrest was made. Except for a very brief period when the Court appeared to prefer the warrants clause,<sup>6</sup> the clauses were in a position of parity.<sup>7</sup>

The Warren Court reordered the priorities in *Chimel*. Because of the importance of judicial interposition between police officials and the individual citizen, particularly if he was a homeowner or occupant, the warrants clause was viewed as the standard and the "reasonableness" clause the exception. Therefore, it was no longer sufficient to show that a valid arrest had been made before the search or that there was some other lawful basis upon which the officers initiated the search, and that the physical and temporal scope of the search was reasonable. Even though those two conditions might be satisfied, the officers still had to show that exigent circumstances were present which made it probable that the evidence would have been lost, damaged or destroyed during the period of time it would have taken to procure a search warrant. A corollary apparently was that officers could keep the property in question under effective control during the period in which a search warrant was sought.<sup>8</sup>

### 3. *Restricted scope of physical search*

Consistent with the premise that warrantless searches are acceptable only as an emergency measure, the Court in *Chimel* also restricted physical search to the clothing of the arrested person and any spot within his immediate reach or toward which he might lunge in an effort to obtain a weapon or destroy evidence. In short, protection of the safety of the officers or other persons present, and prevention of the immediate destruction of evidence were the only objectives which might outweigh the primary standard—judicial authorization for a search and seizure. In a related fashion, *Coolidge* appeared to confirm earlier precedent<sup>9</sup> that a vehicle can be searched only if it is being used to transport bulky contraband or if the occupants have access to weapons or evidence within the passenger compartment.<sup>10</sup>

<sup>6</sup> *Trupiano v. United States*, 334 U.S. 699 (1948).

<sup>7</sup> *United States v. Rabinowitz*, 339 U.S. 56 (1950).

<sup>8</sup> Cf. *United States v. Van Leeuwen*, 397 U.S. 349 (1970) (detention of unopened, undelivered mail packages while search warrant sought).

<sup>9</sup> *Preston v. United States*, 376 U.S. 364 (1964).

<sup>10</sup> Exploration of the many complicated aspects of vehicle searches is beyond the scope of this paper.

Other decisions rendered during this same period of time placed restrictions on administrative inspections and searches. First, in the absence of an emergency either consent or advance judicial authorization was necessary for an administrative inspection of premises;<sup>11</sup> second, protective frisks were apparently restricted to those instances in which an officer had a reasonable basis to suspect that the person searched was armed and dangerous;<sup>12</sup> and third, any acquisition of evidence from a person without a valid preliminary arrest was outlawed.<sup>13</sup> These rulings, however, were but glosses on the three principal premises sketched above.

#### 4. Other rights

In the matter of confessions, the landmark case was, of course, *Miranda*,<sup>14</sup> which laid down what dissenting Justice Harlan characterized as a "constitutional code" to regulate police interrogation practices. The ban under *Miranda* extended not only to the primary confession itself, but to derivative evidence as well.<sup>15</sup>

Another area of police investigative practice which for the first time came under the watchful eye of the protectors of constitutional rights was the lineup.<sup>16</sup> Although the regulation of lineups was somewhat less specific than the regulation of confessions, the requirement for a specific warning and a valid waiver of rights was clear.

In each of these contexts, the Warren Court was careful to invoke an exclusionary rule in support of the fundamental rule, and to accord to that rule the status of a constitutional requirement.

### B. THE BURGER COURT'S REVERSION TO THE "REASONABLENESS" STANDARD

Even a cursory review of the Burger Court cases affecting the constitutional status of police investigations clearly reveals the sweeping extent to which the operative principles of the Warren Court era have either been abandoned or are being eroded.

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<sup>11</sup> *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541 (1967).

<sup>12</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>13</sup> *Davis v. Mississippi*, 394 U.S. 721 (1969).

<sup>14</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>15</sup> *Harrison v. United States*, 392 U.S. 219 (1968).

<sup>16</sup> *United States v. Wade*, 388 U.S. 219 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967).

### 1. Search and seizure

The authoritative status of *Chimel* and the decisions dependent on it has been largely destroyed in at least four ways.

a. *Power to institute search.* The premise that underlay such cases as *Davis v. Mississippi*<sup>17</sup> and *Coolidge*—a valid arrest is always a prerequisite to a search other than for weapons—is in tatters. For example, under some circumstances, a search for trace evidence can be conducted over a citizen's protests even though no arrest has been made, if that evidence is "highly evanescent" and "readily destructible." In *Cupp v. Murphy*,<sup>18</sup> the defendant, accompanied by his retained counsel, voluntarily appeared at a police station while the death of his wife, from whom he had separated, was under investigation. Investigating officers noticed a dark spot on one of Murphy's fingers, and asked whether they might take fingernail scrapings. Despite Murphy's refusal, the police acquired the demonstrative evidence which ultimately helped connect Murphy with his wife's death. The Burger Court relied on *Chimel* to justify seizures necessary to prevent the destruction of evidence. At the same time, however, it ignored the premise in *Davis* that a valid arrest must precede the acquisition of demonstrative evidence from the person.

The present majority on the Court also appears to avoid applying *Chimel* in some cases by refusing to characterize the investigative act as a search. In one instance,<sup>19</sup> the entry of a public inspector onto portions of a corporation's property from which the public was not excluded—the entry was for the purpose of testing for air pollution—was held not to be within the ambit of the fourth amendment through application of the so-called "open fields" doctrine.<sup>20</sup> Any invasion of privacy under such circumstances was but "abstract and theoretical."

In a second case,<sup>21</sup> a visual inspection of the defendant's impounded car and the taking of paint scrapings for laboratory analysis were held not to constitute a violation of the fourth amendment. Although the statements about the legal status of the police actions are in a plurality opinion (Justice Powell concurred on the ground that state prisoners should not be allowed to raise such questions collaterally

<sup>17</sup> 394 U.S. 721 (1969).

<sup>18</sup> *Cupp v. Murphy*, 412 U.S. 291 (1973).

<sup>19</sup> *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861 (1974).

<sup>20</sup> *Hester v. United States*, 265 U.S. 57 (1924).

<sup>21</sup> *Cardwell v. Lewis*, 417 U.S. 583 (1974).

through federal habeas corpus), one may safely assume that they represent the views of a functional majority of the present Court.

Another technique for limiting the scope of *Chimel*, *Coolidge* and similar cases is to find that the powers of the police extend beyond the powers of investigation and arrest. For example, in one case,<sup>22</sup> officers first inspected the defendant's wrecked rental car after he had left the scene of the accident and then had it towed to a garage. They conducted a further inspection of the car when they learned that the defendant was an off-duty police officer who might have had his service revolver in his car. In the course of the second inspection, evidence was discovered which connected the defendant with a murder. Noting that state officers have "community caretaking functions, totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute,"<sup>23</sup> the majority opinion sustained the later examination of the trunk of the rental car as "the type of caretaking 'search'"<sup>24</sup> that does not require advance judicial authorization.

The Burger Court also expanded the permissible scope of a frisk for weapons in *Adams v. Williams*,<sup>25</sup> by allowing such a frisk to be conducted on the basis of a citizen's tip that someone may be armed. Dictum in *Williams* also indicates that an officer is not restricted to either a valid probable cause arrest or inaction which may "allow a crime to occur or a criminal to escape."<sup>26</sup> Instead, an officer having an adequate basis for suspecting that a crime has occurred or will occur may adopt an "intermediate response" by making "a brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information."<sup>27</sup> Moreover, in terms of results, the majority in *Williams* also appears to allow the acquisition of incriminating evidence for use against the person frisked and not simply the disarming of the criminal.<sup>28</sup>

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<sup>22</sup> *Cady v. Dombrowski*, 413 U.S. 433 (1973).

<sup>23</sup> *Id.* at 441.

<sup>24</sup> *Id.* at 447.

<sup>25</sup> 407 U.S. 143 (1972).

<sup>26</sup> *Id.* at 145.

<sup>27</sup> *Id.* at 145-46.

<sup>28</sup> There is a measure of incongruity in the way the Court has dealt with "roving" or checkpoint searches of automobiles for unlawful aliens. *United States v. Ortiz*, 95 S.Ct. 2585 (1975); *United States v. Brignoni-Ponce*, 95 S.Ct. 2574 (1975). Either requires some awareness of "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles

There has also been some retrogression in the area of administrative searches. The opinion in *United States v. Biswell*<sup>29</sup> indicates that if an enterprise is "pervasively regulated," the licensees are on notice that the right to inspect the premises at reasonable hours has been reserved by the appropriate enforcement agency; and if inspection of the premises on an unannounced basis is essential to the effective enforcement and the deterrence of violations, these warrantless inspections are constitutional. While *Biswell* leaves intact the *Camara-See*<sup>30</sup> protection of dwellings, it allows the police to make warrantless entries onto premises of regulated businesses.

*b. Permissible scope of search.* The Burger Court has shown a relaxed attitude toward the physical scope of a search following a valid custodial arrest. It has held that once the custodial arrest is made, even for a traffic-related misdemeanor, the arresting officer may search both the clothing and person of the arrested individual.<sup>31</sup> The rationale for this search is distinct from the stop-and-frisk doctrine, and arises out of the fact of a lawful custodial arrest. Thus, the Burger Court majority has rejected the doctrine created by the federal court of appeals and compatible with the philosophy of the Warren Court, that no body search, even incident to a valid arrest, is legitimate unless it is justified under the stop-and-frisk doctrine or upon the ground that there is an independent basis to believe that a post-arrest search will turn up evidence of crime for which the arrest has been made. It is evident, therefore, that the Burger Court is unready to interpret the fourth amendment so as to restrict the scope of personal searches beyond requiring a valid custodial arrest, assuming the absence of the other bases for a search discussed above.

Nor has the Burger Court imposed any temporal limitations on searches. In *United States v. Edwards*<sup>32</sup> the investigating officers

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contain aliens who may be illegally in the country." *United States v. Brignoni-Ponce*, 95 S.Ct. at 2582. The basis for the majority's concern in both cases seems to be likelihood of harassment of Hispanic-Americans and lawful aliens. The Court makes it fairly plain that it does not want the *Terry-Adams* related probable cause requirements in the border search context extended to enforcement of "laws regarding driver's licenses, vehicle registration, truck weights, and similar matters." *United States v. Brignoni-Ponce*, 95 S.Ct. at 2581 n.8. See also *United States v. Ortiz*, 95 S.Ct. at 2589 n.3.

<sup>29</sup> 406 U.S. 311 (1972).

<sup>30</sup> *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. Seattle*, 387 U.S. 541 (1967).

<sup>31</sup> *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973).

<sup>32</sup> 415 U.S. 800 (1974).

took the defendant's clothing from him for purposes of laboratory analysis several hours after he had been booked and placed in a detention cell. The federal court of appeals sustained the validity of general booking searches, but ruled that the delayed acquisition of evidence at a time when a warrant might have been obtained violated the dictates of *Chimel*.<sup>83</sup> The Supreme Court reversed. The majority commented that to have taken the defendant's clothing immediately and required him to sleep nude—there being no jail clothing available at the time—would have been inhumane; moreover, what the majority opinion characterized as "reasonable delay" did not alter the fact that "Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention."<sup>84</sup>

c. *The availability of waiver.* Police compliance with various restrictive rules can be affected markedly by the extent to which waiver of the underlying right is encouraged or discouraged. While the Warren Court never ruled out the possibility of waiver of fourth amendment rights, it never went out of its way to promote the possibility. In fact, its decisions placed upon the prosecution the "heavy burden" of proving the validity of a consent to search and seizure.<sup>85</sup>

Under the Burger Court's approach, the only issue is whether the consent or waiver is voluntary under the factual circumstances of the case. That a law enforcement officer seeks the defendant's waiver of his rights is not enough to render the resulting apparent permission involuntary. Moreover, the majority opinion in *Schmeckloth v. Bustamonte*<sup>86</sup> expressly repudiates a condition that the lower federal court would have placed on waiver of fourth amendment rights—a condition the Warren Court would probably have placed on waivers had its philosophy remained operative: the officers must give an individual a preliminary warning about the scope of fourth amendment protections and about his right to insist that officers procure a search warrant. In the opinion of the Burger Court, the degree of knowledge of one's rights is one factor among many to be considered in evaluating whether a waiver is constitutionally valid.

The Court has also held that one who shares occupancy of the premises and control over personal property may consent to a police

<sup>83</sup> 474 F.2d 1206 (6th Cir. 1973).

<sup>84</sup> 415 U.S. at 805.

<sup>85</sup> *Bumper v. North Carolina*, 391 U.S. 543 (1968).

<sup>86</sup> 412 U.S. 218 (1973).

taking.<sup>37</sup> In the Court's language, it is not a mere property interest that counts, but rather "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."<sup>38</sup>

d. *Practice in suppression proceedings.* The Burger Court has also tended to ease the burden of the prosecution in hearings on motions to suppress. Although the context of these cases does not always involve search and seizure, the Court's approach is no doubt fungible, whatever the character of the evidence sought to be suppressed. For example, it is arguable that the requirements for a showing of "standing" to object to the admission of evidence seized during a police search by making a motion to suppress have been heightened. From the Court's opinion in *Brown v. United States*,<sup>39</sup> one can conclude that a person may assert standing only if (1) he was present at the time of search, and (2) he had a proprietary and possessory interest in the property at the time of seizure, and (3) possession at the moment of seizure is one element of the offense with which the moving party stands charged. If this analysis is correct, fewer defendants will be able to move for the suppression of evidence than could have done so under Warren Court principles.

The Burger Court has also confirmed that the prosecution, as well as the defense, may resort to hearsay evidence to establish the propriety of the constitutionally questioned police activity.<sup>40</sup> Moreover, the Court has also held that the burden of persuasion on the question of the voluntariness of a confession is by a preponderance of the evidence, not proof beyond a reasonable doubt.<sup>41</sup> Presumably, this same standard applies in search and seizure cases as well as in eyewitness identification cases.<sup>42</sup>

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<sup>37</sup> *United States v. Matlock*, 415 U.S. 164 (1974).

<sup>38</sup> *Id.* at 171 n.7.

<sup>39</sup> 411 U.S. 223 (1973).

<sup>40</sup> See *United States v. Matlock*, 415 U.S. 164 (1974).

<sup>41</sup> *Lego v. Twomey*, 404 U.S. 477 (1972).

<sup>42</sup> Cf. *Brown v. Illinois*, 95 S.Ct. 2254 (1975), interpreting the holding of *Wong Sun v. United States*, 371 U.S. 471 (1963), that a confession may be the illicit product of an unlawful fourth amendment seizure of the person, in light of *Miranda*. The Court holds that the burden of showing admissibility under the "attenuation" aspects of *Wong Sun* rests on the prosecution.

*e. The shreds of Chimel.* From an analysis of the Burger Court decisions over the past two years, it becomes evident that *Chimel* totters, and probably will soon collapse. In every one of the decisions summarized above, the investigating officers could have maintained the status quo while turning to a magistrate for a search warrant. Specifically, Murphy, Edwards, Robinson and Gustafson could have been kept under constant surveillance to prevent the destruction of evidence. If the officers did not then have sufficient information to make a probable cause showing before a magistrate, frustration of a successful prosecution was the conceivable price the Warren Court would have assessed against society for preservation of the supremacy of the warrants clause. In *Williams*, even if the initial bodily contact could have been justified by the need to safeguard the officer, there was no justification for further search of the defendant's automobile without a warrant; a similar stricture could also have been invoked in *Dombrowski* and *Cardwell*. Consents to search and seizure might have been limited by a condition precedent of adequate disclosure of the scope of fourth amendment rights and the citizen's power to insist that officers follow the preferred warrants route. Yet in every one of these cases, the Burger Court sustained the constitutional validity of the acquisition of evidence.

True, the Court has not overruled the doctrinal statements of *Chimel*, as its most recent citation of that case indicates.<sup>43</sup> Nevertheless, *sub silentio*, a majority of the Court appears to have reverted to the long-standing tradition, stated in *Rabinowitz*, that the two clauses of the fourth amendment stand on equal footing, and that election between them lies in the province of investigating officers. If so, *Chimel* has effective precedential value only as far as its limitations on physical scope of search are concerned; in that aspect, it may survive with earlier precedents construing the reasonableness clause.<sup>44</sup>

## 2. Confessions doctrine

If the Burger Court has not in fact substantially qualified *Miranda*, it has firmly indicated a theoretical base for future holdings in that direction.<sup>45</sup> *Tucker's* facts represented that vestigial class of cases in which the defendant was interrogated before the *Miranda* decision

<sup>43</sup> See *Gerstein v. Pugh*, 420 U.S. 103, 113 n.13 (1975).

<sup>44</sup> E.g., *Vale v. Louisiana*, 399 U.S. 30 (1970) (analysis on pre-*Chimel* grounds).

<sup>45</sup> *Michigan v. Tucker*, 417 U.S. 433 (1974).

but went to trial afterwards. The Warren Court had held that *Miranda* would serve to exclude the confessions in such cases,<sup>46</sup> but it had not reached the question of the application of its prohibition to derivative evidence. *Tucker* posed that issue: the identity of the prosecution's key witness was learned solely through Tucker's inadequately prefaced confession in which Tucker offered the individual's name as an alibi witness.

In terms of *Miranda*'s rationale itself, the *Tucker* opinion presages a restoration of the pre-*Miranda* due process standard of voluntariness as the constitutional norm. *Tucker* distinguishes the objective of the fifth amendment privilege against self-incrimination (the constitutional provision on which *Miranda* purportedly rested), from the objectives of the *Miranda* warning requirements: the prevention of compulsorily extracted statements, from the simply "prophylactic standards" in support of the primary constitutional right.<sup>47</sup> If there is actual compulsion, then such statements and any evidence derived from them must be excluded as a matter of constitutional law.<sup>48</sup> If, however, only the *Miranda* warning requirements have been transgressed, then the Constitution no longer controls. Instead, the question is one of the deterrence of undesired police conduct balanced against the need of the court system to have before it "all concededly relevant and trustworthy evidence which either party seeks to adduce."<sup>49</sup> Thus, before endeavoring to suppress derivative evidence, a trial court should look at several factors: (1) the degree of willfulness or negligence displayed by the offending officers. If the omission was inadvertent, then no deterrence is achieved through suppression; (2) the actual impact of distorted *Miranda* warnings on the particular defendant; (3) the inherent credibility or trustworthiness of the derivative evidence in question; (4) the deterrent effect, if any, which exclusion of evidence will have on the conduct of other officers in the future.<sup>50</sup>

Three concurring Justices in *Tucker* thought the case should simply be viewed as a special limitation on the scope of *Johnson v. New Jersey*, not a reinterpretation of *Miranda* itself.<sup>51</sup> Thus, the

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<sup>46</sup> *Johnson v. New Jersey*, 384 U.S. 719 (1966).

<sup>47</sup> 417 U.S. at 439-46.

<sup>48</sup> On the authority, e.g., of *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>49</sup> 417 U.S. at 450.

<sup>50</sup> A factor also referred to *Oregon v. Hass*, 420 U.S. 714 (1975).

<sup>51</sup> 417 U.S. at 458.

four policy considerations summarized above would speak to the propriety of declaring *Miranda* to have retroactive impact on derivative evidence, not to the fundamental character of the *Miranda* warning requirements themselves. Nevertheless, to read the principal opinion in *Tucker* is to conclude that indeed the underlying premises of *Miranda* have been significantly reworked.

Language in *Hass* seems to support this latter interpretation. *Hass* had been taken into custody on a charge of bicycle theft, and had been given proper *Miranda* warnings. In the patrol car, he indicated that he knew he "was in a lot of trouble," and desired to telephone an attorney. The arresting officer told him that he could do so as soon as they reached a police station, but before reaching the station *Hass* made incriminating statements. The chief issue in *Hass* related to the use of the statement to impeach the defendant's testimony. The opinion, however, suggests that even defective *Miranda* warnings may serve "as a deterrent to the officer who is not then aware of their defect,"<sup>52</sup> a statement which appears to adopt the premise that the offending officer's knowledge and motivation are facts to be considered before invoking *Miranda*'s exclusionary rule, at least where derivative evidence is concerned.

*Hass* and its predecessor case<sup>53</sup> also place a definite limitation on the scope of *Miranda*'s derivative evidence rule, in that a confession

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<sup>52</sup> 420 U.S. at 723 (opinion of the Court in which six Justices joined). Further confirmation of this trend is found in *Brown v. Illinois*, 95 S.Ct. 2254 (1975). *Brown*, according to the conclusion accepted by seven Justices (Justices Powell and Rehnquist dissented on this phase, believing that the matter should have been remanded for state court findings on the lawfulness of the arrest), had been unlawfully placed under arrest and held in detention overnight while he underwent interrogation; during that period he confessed. The state supreme court had held that valid *Miranda* warnings (which had been given to *Brown*) always serve to break the *Wong Sun* causal relationship between unlawful arrest and statement; the Court unanimously rejected that proposition. Noting that the purpose of the fourth as well as the fifth amendment exclusionary rule is to deter improper conduct, and characterizing the activity of the experienced investigating officers as an "expedition for evidence in the hope that something might turn up" and the manner of arrest apparently "calculated to cause surprise, fright, and confusion," the Court held on the basis of the record before it that the state had not discharged its burden of showing under *Wong Sun* that the taint of the original unlawful arrest had been dissipated by the time of the defendant's statement.

<sup>53</sup> *Harris v. New York*, 401 U.S. 222 (1971). There is nothing inconsistent with this or the *Tucker-Brown* rationale in *United States v. Hale*, 95 S.Ct. 2133 (1975), in which the Court refused to allow the defendant to be impeached at trial through proof that he had remained silent after being given his *Miranda* warnings. The rationale is not impairment of fifth amendment privilege under *Miranda*, but rather

made after defective warnings may be used to impeach the defendant's testimony if he takes the stand in his own behalf.<sup>54</sup> Any theoretical deterrence which exclusion of the confession for impeachment purposes might provide is far outweighed by the need to prevent a defendant's perjured testimony from going unanswered.

In short, the full *dénouement* of *Tucker* remains to be experienced. There is every indication, however, that the Burger Court is well along the path to a substantial alteration, perhaps even a repudiation, of the *Miranda* doctrine.

### 3. Eyewitness identification evidence

The Burger Court has also reduced substantially the impact of *Wade-Gilbert*: the right to counsel and the need to advise a defendant of that right apply only after some type of formal judicial proceeding has been undertaken.<sup>55</sup> As a result, large numbers of so-called field confrontations remain ungoverned by the claim to counsel; the only requisite is the due process requirement that the confrontation be fundamentally fair.<sup>56</sup> The second diminution of *Wade-Gilbert* is the Court's refusal to extend the post-charging right to counsel in lineup cases to photographic identifications;<sup>57</sup> the only requirement is that the procedures used in a photographic identification be fair.<sup>58</sup> The Court concluded that defense counsel's opportunity to contest the propriety of such identification procedures at trial affords a defendant adequate protection.

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the want of any rational basis under evidence law for using the fact of silence to support an inference of guilty knowledge, coupled with the significant potential for prejudice which such evidence would have. The nearest precedent was *Grunewald v. United States*, 353 U.S. 391 (1957), which prevented a like inference from being drawn from the refusal of a witness to respond to grand jury questioning; the factors in *Grunewald* of repeated assertions of innocence, the secretive nature of the tribunal, and the focus on the petitioner as a potential defendant were used to justify the application of *Grunewald* reasoning to *Hale*. Only the concurring opinions of Justices Douglas and White thought *Miranda* to provide the controlling doctrine.

<sup>54</sup> Under the *Tucker* analysis, actual compulsion would render the statement unavailable for any purpose.

<sup>55</sup> *Kirby v. Illinois*, 406 U.S. 682 (1972). The precise point at which the *Wade-Gilbert* right to counsel becomes effective is unclear because the Court uses inconsistent terminology at various points in its opinion.

<sup>56</sup> See *Neil v. Biggers*, 409 U.S. 188 (1972); *Stovall v. Denno*, 388 U.S. 293 (1963).

<sup>57</sup> *United States v. Ash*, 413 U.S. 300 (1973).

<sup>58</sup> See *Kirby v. Illinois*, 406 U.S. 682 (1972).

Whether the Warren Court would have modified its *Wade-Gilbert* doctrine or limited its scope of application cannot be determined. But it seems not an unreasonable assumption that it would not have emphasized the importance of the relative due process standard as prominently as the Burger Court has in its resolution of constitutional attacks on eyewitness identification procedures.

#### 4. Entrapment

The doctrine of entrapment is generally treated as an aspect of substantive criminal law. In early cases the Supreme Court invoked principles of statutory construction to hold that Congress did not intend violations of regulatory acts in which criminal intent had been implanted by the active importunities of undercover law enforcement agents to be viewed as crimes.<sup>59</sup> The special treatment of regulatory offenses left the Court the option of approving punishment for very serious offenses like murder even though provoked by *agents provocateurs*.

The Warren Court did not choose to reexamine the doctrine. The Burger Court, however, has, repudiating in the process a lower court effort to restructure the underlying theory into a true exclusionary rule.<sup>60</sup> In *Russell*, an undercover narcotics agent supplied the defendant with an ingredient needed for the illicit manufacture of methamphetamine; the chemical could have been obtained through licit channels, but with some difficulty. The federal court of appeals chose to reformulate the entrapment concept to include any "intolerable degree of governmental participation in the criminal enterprise";<sup>61</sup> the sanction against such participation was to be the discharge of the defendant. Thus, as with the other exclusionary rules, the price of improper police activity would be the loss of the product of the illegality, in this instance the defendant himself.

The Supreme Court rejected the reformulation by a narrow majority, and reaffirmed *Sorrells-Sherman* as the doctrine for federal cases. The only departure, however, was a recognition that in extreme cases the due process clause might be offended in a situation "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government

<sup>59</sup> *Sherman v. United States*, 356 U.S. 369 (1958); *Sorrells v. United States*, 287 U.S. 435 (1932).

<sup>60</sup> *United States v. Russell*, 411 U.S. 423 (1973), reversing 459 F.2d 671 (9th Cir. 1972).

<sup>61</sup> 459 F.2d at 673.

from invoking judicial processes to obtain a conviction."<sup>62</sup> This approach to the problem thus is fully consistent with the Burger Court's use of the due process clause, not to create codes and new exclusionary rules, but to objugate judicially conduct so grossly excessive that it crosses the boundaries of tolerance.

### 5. *The legal status of the exclusionary rules*

It had quickly become hornbook law during the 1960's that the exclusionary rules were not simply rules of evidence, but were integral elements of the various constitutional provisions themselves. This was the principal point of *Mapp v. Ohio*<sup>63</sup> in the setting of search and seizure law. The same is true of fifth amendment self-incrimination, both for denials of the privilege in formal proceedings and inquiries<sup>64</sup> and during custodial interrogation.<sup>65</sup> The exclusionary aspects of *Wade-Gilbert* regulation of eyewitness identification procedures also seemed firmly bottomed in the sixth amendment right to counsel.

According constitutional status to the exclusionary rules themselves during the Warren Court era was clearly not unintended or incidental. It was only by grafting the concept of exclusion into the Constitution itself that the Supreme Court (1) could insure uniformity of application throughout the United States, and (2) guard against legislative efforts to remove or seriously impair the rules. Actions by Congress show that the latter was not a chimerical concern. Congress endeavored legislatively to overrule both the eyewitness identification rule<sup>66</sup> and *Miranda*.<sup>67</sup> Such legislation had to be viewed only as an act of defiance as long as the exclusionary rules in question were part of the Federal Constitution itself.

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<sup>62</sup> 411 U.S. at 431-32 citing the famous stomach-pumping case, *Rochin v. California*, 342 U.S. 165 (1952), for comparison.

<sup>63</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>64</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964). *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964).

<sup>65</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>66</sup> 18 U.S.C. § 3502 (1970).

<sup>67</sup> 18 U.S.C. § 3501(a)-(b) (1970). Subsection (c) abrogates the so-called *McNabb-Mallory* rule [*Mallory v. United States*, 354 U.S. 449 (1957); *McNabb v. United States*, 318 U.S. 332 (1943)]. There should have been no difficulty with this doctrinally even under the Warren Court, because the rule purported to rest on a judicial interpretation of congressional policy expressed in Federal Rule of Criminal Procedure 5(a), and section 3501(c) represents a change in that policy.

During 1974 and 1975, the Burger Court majority apparently overthrew the basic premise that the Constitution itself requires the exclusion of offending evidence. In its decision refusing to extend the exclusionary rule to grand jury use of evidence conceded to have been obtained in violation of the fourth amendment,<sup>68</sup> the six-Justice majority characterized the exclusionary rule as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."<sup>69</sup>

This characterization also predominated in the language of the Court's decision refusing to make its border search holding<sup>70</sup> retroactive,<sup>71</sup> as the dissents in the case indicate. To the majority, the question of whether to make a fourth amendment interpretation retroactive, under the concept of "judicial integrity," must be determined in light of whether "law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution."<sup>72</sup> Such a consideration in the context of the retroactivity decision is "quite in harmony with the approach taken generally to the exclusionary rule"<sup>73</sup> as characterized in *Calandra*.

Then in its principal decision to date on the *Miranda* rule,<sup>74</sup> the Court denominated the *Miranda* warning requirements as "only the prophylactic rules developed to protect" the privilege against self-incrimination.<sup>75</sup> Thus, *Miranda's* regulatory guidelines are now simply "measures to insure that the right against compulsory self-incrimination was protected," but not "themselves rights protected by the Constitution." They are but "practical reinforcement for the [constitutional] right."<sup>76</sup> It was only on the basis of such a reinterpretation of *Miranda* that the majority bloc in *Tucker* was able to sanction a balancing of actual or potential deterrent impact of

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<sup>68</sup> *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>69</sup> *Id.* at 348.

<sup>70</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

<sup>71</sup> *United States v. Peltier*, 95 S.Ct. 2313 (1975). See also *Bowen v. United States*, 95 S.Ct. 2318 (1975) and cases cited note 28 *supra*.

<sup>72</sup> 95 S.Ct. 2313, 2317-18.

<sup>73</sup> *Id.* at 2318.

<sup>74</sup> *Michigan v. Tucker*, 417 U.S. 433 (1974).

<sup>75</sup> *Id.* at 439.

<sup>76</sup> *Id.* at 444.

evidence exclusion against "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce."<sup>77</sup>

What the Burger Court will do with this reformulation remains to be seen. But it makes it much more respectable to argue the constitutionality of section 3501(a)-(b) of title 18 in federal cases today than before *Tucker*. The reformulation also suggests that at least those eyewitness identification cases falling within *Kirby v. Illinois* (and arising within the federal jurisdiction) can be governed by section 3502 of title 18. It may also be that state legislation and rules similar to the federal statutes will survive constitutional attack. Moreover, there is great potential impact on state prisoner use of federal habeas corpus, a point reserved for further discussion.

## II. MANAGEMENT OF JUDICIAL CASELOADS

From a perusal of Warren Court decisions one does not glean any particular concern over the impact of its holdings on the dockets of trial and appellate courts. In contrast, the Burger Court appears to be much concerned over the burgeoning dockets in both federal and state courts, particularly at the appellate level. Through administrative calls for remedial legislation and sometimes through its own decisions, the Court is responding to these concerns.

### A. REDUCTION OF STATE CASES IN FEDERAL COURTS

The two principal avenues by which state matters come into the lower federal courts are (1) habeas corpus and (2) civil actions seeking injunctive relief or declaratory judgments affecting state law enforcement activity. The Burger Court has dealt significantly with both.

#### 1. State prisoner habeas corpus

A state prisoner who claims he is in custody in violation of "the Constitution or laws or treaties of the United States"<sup>78</sup> can apply for habeas corpus in the appropriate federal district court. The Warren Court moved far toward converting the traditional writ into a

<sup>77</sup> *Id.* at 450. See also the doctrinal discussion in *Brown v. Illinois*, 95 S.Ct. 2254 (1975).

<sup>78</sup> 28 U.S.C. § 2241(c) (3) (1970).

plenary form of post-conviction review.<sup>79</sup> Interestingly enough, Burger Court decisions amplify that trend.<sup>80</sup> In effect, once a state prisoner is allowed within the doors of a federal court, as few limitations as possible should be placed on his access to suitable relief. However, the Burger Court appears also to be in the process of significantly reducing the numbers of state prisoners who manage to pass the federal doorway.

One technique is to expand the concept of waiver, by requiring a state prisoner to assert federal constitutional grounds early and to continue to assert them in state post-conviction proceedings.<sup>81</sup> In *Mottram*, the state court urged the petitioner to include his federal constitutional grounds in his application for state habeas corpus, and not simply traditional narrow jurisdictional grounds; he refused. The Supreme Court ruled that no state prisoner has a right "to insist upon piecemeal collateral attack" on his conviction; if a state makes plenary post-conviction review available, then a prisoner cannot "cavalierly disregard that intended effect by simply announcing that he did not choose to be bound by it."<sup>82</sup> If grounds are not asserted in the state proceedings, they cannot be advanced in federal habeas corpus.

Indeed, a prisoner can impair or destroy his ability to present constitutional issues to a federal court by pretrial activities. For example, if there is a pretrial motion by which such issues can be presented and the counseled defendant fails to utilize it, the waiver doctrine applies to prevent later review.<sup>83</sup>

A valid plea of guilty also destroys the ability to use federal habeas corpus to attack what transpired before the plea.<sup>84</sup> Only if the petitioner lacked effective representation by counsel in the plea

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<sup>79</sup> See *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Walker v. Wainwright*, 390 U.S. 335 (1968); *Peyton v. Rowe*, 391 U.S. 54 (1968).

<sup>80</sup> *Hensley v. Municipal Court*, 411 U.S. 345 (1973); *Braden v. 30th Judicial Circuit*, 410 U.S. 484 (1973). *But cf.* *Pitchess v. Davis*, 95 S.Ct. 1748 (1975).

<sup>81</sup> *Murch v. Mottram*, 409 U.S. 41 (1972). *But cf.* *Pitchess v. Davis*, 95 S.Ct. 1748 (1975).

<sup>82</sup> 409 U.S. at 46.

<sup>83</sup> *Davis v. United States*, 411 U.S. 233 (1973) (*Davis I*). *Davis I* was a federal prisoner's "2255" motion case (28 U.S.C. § 2255). However, section 2255 proceedings must provide at least the same minimum level of protection as habeas corpus, *Davis v. United States*, 417 U.S. 333 (1974) (*Davis II*). Therefore, *Davis I* should apply to state prisoners who fail to utilize local pretrial motion opportunities.

<sup>84</sup> *Tollett v. Henderson*, 411 U.S. 258 (1973) (issue of constitutionality of grand jury composition).

negotiations, or if the court was utterly without jurisdiction,<sup>85</sup> will the federal constitutional issues survive.

A recent decision by the Court<sup>86</sup> may appear inconsistent with *Tollett v. Henderson*, by permitting a state prisoner to assert the unconstitutionality of a search and seizure after his plea of guilty. However, a New York statute allowed a guilty plea to be followed by a special appeal against an adverse ruling on a motion to suppress submitted before the plea was tendered. In approving the later submission of the fourth amendment point to a federal court on habeas corpus, the majority felt that it was reinforcing a commendable state effort to purge its trial dockets of cases tried solely to preserve a point of constitutional law for later appeal. To forestall subversion of that effort by precluding federal litigation under *Tollett v. Henderson*, which would have encouraged state defendants to insist on trial and normal appeal in order to preserve a contingent ability to seek later federal relief, the majority qualified its earlier holding to permit federal habeas in this narrow setting. In effect, to support state efforts to clear local trial court dockets, the court imposed a slight additional burden on the federal district courts.<sup>87</sup>

An additional damper on over-free use of federal habeas corpus is the ban on relitigation of factual issues recently determined by state courts.<sup>88</sup> Only if the petitioner sustains the burden of establishing by convincing evidence that the state court erred can a federal district court reexamine the matter.<sup>89</sup>

It may be that the most severe limitation yet on state prisoner habeas corpus may lurk in the Burger Court's redefinition of the legal status of the search and seizure and confessions exclusionary rules.<sup>90</sup> For if these rules are no longer part of the Federal Constitution itself, but rather rules of evidence created by the federal judiciary in aid of basic constitutional principles, then it is arguable that errors in their application no longer violate "the Constitution or laws or treaties of the United States" as required for federal habeas

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<sup>85</sup> *Blackledge v. Perry*, 417 U.S. 21 (1974).

<sup>86</sup> *Lefkowitz v. Newsome*, 420 U.S. 283 (1975).

<sup>87</sup> Justices White and Rehnquist and Chief Justice Burger would have preserved *Tollett v. Henderson* intact, while Justices Powell and Rehnquist and Chief Justice Burger restated the premise of their concurrence in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), that fourth amendment claims should not be available to state prisoners on federal habeas corpus.

<sup>88</sup> 28 U.S.C. § 2254(d) (1970).

<sup>89</sup> *LaVallee v. Delle Rose*, 410 U.S. 690 (1973).

<sup>90</sup> See notes 68-77 and accompanying text *supra*.

corpus jurisdiction.<sup>91</sup> Certain members of the Court already have expressed the desire to deny all federal review of issues not going directly to the fairness of trial.<sup>92</sup> Thus, it may be that the most important aftermath of *Calandra* and *Tucker* will be their use to overrule *Kaufman* and restrict state prisoner habeas corpus.

State courts, incidentally, have also been accorded fairly broad license to use waiver concepts to limit post-conviction review.<sup>93</sup> In the face of due process and equal protection attacks, the Court approved Texas statutes treating escape during the pendency of an appeal as grounds sufficient to extinguish any claim to further review.<sup>94</sup>

## 2. *Civil actions affecting state law enforcement*

The Burger Court has sought diligently to reduce the opportunity of persons who are being or may be prosecuted or investigated by state authorities to seek federal injunctive or declaratory judgment relief. Under the principal cases, one potentially or actually prosecuted under a state statute cannot seek either injunctive relief<sup>95</sup> or a declaratory judgment<sup>96</sup> unless he shows actual harassment and the threat of great and immediate irreparable harm that cannot be eliminated in the course of the state proceedings. Nor can a state prisoner utilize motions under Federal Rule of Criminal Procedure 41(e) to suppress material in the hands of state officers.<sup>97</sup> If the effect of a state prisoner's suit is to seek release because of violations, for example, of good time provisions, he must use federal habeas corpus, not a declaratory judgment action;<sup>98</sup> only if he seeks damages

<sup>91</sup> 28 U.S.C. § 2241(c) (3) (1970); see also *Lefkowitz v. Newsome*, 420 U.S. 283 (1975).

<sup>92</sup> E.g., the statements of four justices in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), opining that *Kaufman v. United States*, 394 U.S. 217 (1960) (the Warren Court's decision on which the power to utilize federal habeas corpus to review the investigative phase rests) should be overturned; Justice Powell's concurrence in *Cardwell v. Lewis*, 417 U.S. 583 (1974), to the same effect.

<sup>93</sup> *Estelle v. Dorough*, 420 U.S. 534 (1975).

<sup>94</sup> Indeed, the Court noted that it had applied the same rule as the Texas court's to an escape during the pendency of Supreme Court review, *Molinario v. New Jersey*, 396 U.S. 365 (1970).

<sup>95</sup> *Younger v. Harris*, 401 U.S. 37 (1971); cf. *Johnson v. Mississippi*, 95 S.Ct. 1591 (1975); *Hicks v. Miranda*, 95 S.Ct. 2281 (1975).

<sup>96</sup> *Boyle v. Landry*, 401 U.S. 77 (1971).

<sup>97</sup> *Perez v. Ledesma*, 401 U.S. 82 (1971).

<sup>98</sup> *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

as well, may he utilize the Civil Rights Act.<sup>99</sup> Not even allegations that members of the state's highest court have already been involved in the plaintiff's case so as to bias them against the plaintiff will show irreparable injury.<sup>100</sup> As a further extension, the Burger Court has applied the same threshold requirements to an injunctive action against state officials who invoked civil nuisance proceedings against a theater allegedly showing nothing but pornographic films.<sup>101</sup>

There are, of course, many technical aspects to the application of the Court's requirements which are beyond the scope of this paper. Certainly, a few state plaintiffs faced with gross deprivations of civil rights still obtain federal court review.<sup>102</sup> The cumulative impact of the decisions following *Younger v. Harris* and its companion cases, however, is to limit substantially the power of federal district courts to consider attacks on state law enforcement activity, and thus to squelch a category of cases which had become a major component of crowded court dockets.

### B. PROMOTION OF THE CONCEPT OF A UNIFIED APPEAL

In most of the world's legal systems, parties to litigation have a claim to only one plenary review of lower court proceedings. Additional review is possible only when the highest appellate court in the system takes the case in order to regularize practice or procedure (or

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<sup>99</sup> *Wolff v. McDonnell*, 418 U.S. 539 (1974).

<sup>100</sup> *Kugler v. Helfant*, 95 S.Ct. 1524 (1975).

<sup>101</sup> *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). A related motivation may underlie the Court's decision that a federal court cannot award counsel fees unless Congress specifically allows the practice by statute. *Alyeska Pipeline Service Co. v. The Wilderness Society*, 95 S.Ct. 1612 (1975). This may have impact on those criminal justice system-related class actions not brought by indigents.

<sup>102</sup> *Cf. Allee v. Medrano*, 416 U.S. 802 (1974) (frustration of legitimate union organizational activities through police and prosecutorial harassment); *Steffel v. Thompson*, 415 U.S. 452 (1974) (threat of arrest for distributing handbills in a public place); *Ellis v. Dyson*, 95 S.Ct. 1691 (1975) (loitering prosecution remanded for reconsideration in light of *Steffel v. Thompson*). See also *Doran v. Salem Inn, Inc.*, 95 S.Ct. 2561 (1975), which found no abuse in a federal court injunction against enforcement of a local ordinance banning "bare-breasted" nudity when the plaintiffs had complied with the ordinance but indicated a likelihood of success on the merits and substantial injury, but held improper similar relief when an establishment violated the ordinance and was criminally prosecuted for the violation the day after the federal action was commenced.

legal doctrine) or to correct fundamental error affecting the intermediate review process itself.

In contrast, the American legal system appears to place a premium on endless litigation of the same case, so that finality in cases of long-term prisoners is difficult to achieve. One source notes eleven post-trial steps which any convicted defendant can take; the last six can be repeated until the prisoner exhausts his fertile imagination.<sup>103</sup> The suggested response on the part of the National Advisory Commission is to adopt an essentially civil law approach.<sup>104</sup> Such an approach can be justified not only in terms of its potential reduction of cases submitted to appellate courts, but also because of its potential to readjust the allocation of responsibility for resolving federal constitutional matters between federal and state courts. To the extent that federal issues may be relitigated *ad infinitum* in federal courts, with the potential of overturning state adjudications on a variety of federal constitutional grounds, on many important matters the entire state judicial hierarchy becomes subordinate to the federal judicial system; a federal district court judge can outrank all state appellate judges.

The latter concern is one that may well be striking a sympathetic chord in the Burger Court. In an important 1974 decision,<sup>105</sup> the Court was asked whether the equal protection and due process clauses of the fourteenth amendment required a state to provide an indigent appellant with counsel during discretionary review in the state's highest court and for purposes of application for certiorari to the United States Supreme Court. The Court concluded that counsel need be provided only for the initial plenary review, but not thereafter.<sup>106</sup>

But the Court's comments on the character of third-instance appellate review are informative:

... The critical issue in [the highest state court], as we perceive it, is not whether there has been "a correct adjudication of guilt" in every individual case, but rather whether "the subject matter of the appeal has significant public interest," whether "the cause involves legal principles of major significance to the jurisprudence of the state," or whether the decision

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<sup>103</sup> U.S. NATIONAL ADVISORY COMMISSION ON LAW ENFORCEMENT STANDARDS AND GOALS, COURTS REPORT 113 (1973).

<sup>104</sup> *Id.* §§ 6.1, 6.5-6.8.

<sup>105</sup> *Ross v. Moffitt*, 417 U.S. 600 (1974).

<sup>106</sup> In part, this rests on the premise that the due process clause has not yet been interpreted to require any appeal opportunity for state defendants, a premise recently reaffirmed in *Estelle v. Dorrrough*, 420 U.S. 534 (1975).

below is in probable conflict with a decision of the Supreme Court. The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect, since a decision which appears incorrect may nevertheless fail to satisfy any of the criteria discussed above. Once a defendant's claims of error are organized and presented in a lawyer-like fashion to the Court of Appeals, the justices of the [state supreme court] who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review.<sup>107</sup>

Language of this sort is what one might expect from an English or a French court, and suggests strongly that if state legislatures, or state appellate courts in the exercise of their rule-making power, wish to limit the availability of discretionary review following one plenary appeal, they will receive the imprimatur of the Burger Court in asaying this method of reducing appellate dockets.

### C. SPEEDY TRIAL OF CRIMINAL CASES

One probable reason that trial court dockets fall behind is that many criminal cases remain untried on the dockets while masses of new cases are fed into the courts. One solution prominently urged<sup>108</sup> is that fixed time periods be imposed covering the interval between arrest and formal charge and between formal charge and the commencement of trial. Enforcement of such a requirement might be either through court administrative practices (the position taken by the National Advisory Commission) or through the same kind of dismissal with prejudice that characterizes enforcement of the constitutional right to a speedy trial.<sup>109</sup>

The Warren Court proceeded no further than to confirm that the constitutional right to a speedy trial is a part of fourteenth amendment due process.<sup>110</sup> The Burger Court has refused to convert that right into a constitutional mandate that prosecutions be started<sup>111</sup> or trials commenced<sup>112</sup> within a set period of time. Only if an arrest

<sup>107</sup> 417 U.S. at 615.

<sup>108</sup> AMERICAN BAR ASSOCIATION STANDARDS FOR THE ADMINISTRATION OF JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL §§ 2.1-2.3 (Approved Draft, 1968); U.S. NATIONAL ADVISORY COMMISSION ON LAW ENFORCEMENT STANDARDS AND GOALS, COURTS REPORT § 4.1 (1973); see, in general, Erickson, *The Right to a Speedy Trial: Standards For Its Implementation*, 10 HOUSTON L. REV. 237 (1973).

<sup>109</sup> Cf. ABA STANDARDS RELATING TO SPEEDY TRIAL § 4.1.

<sup>110</sup> *Klopper v. North Carolina*, 386 U.S. 213 (1967).

<sup>111</sup> *United States v. Marion*, 404 U.S. 307 (1971).

<sup>112</sup> *Barker v. Wingo*, 407 U.S. 415 (1972).

for which grounds exist is delayed to the point that a defendant actually is prejudiced through loss of evidence, witnesses, or whatever, may due process be invoked to protect him.<sup>113</sup> After formal charges have been laid, whether or not trial has been delayed too long in the constitutional sense must be determined on the facts of the particular case. The only certainty is that once constitutional boundaries have been transgressed, the prosecution must be dismissed with prejudice.<sup>114</sup>

In *Barker*, the Burger Court rejected any requirement under the Constitution that trial be commenced within a fixed period, as well as a requirement that demand for trial is always a prerequisite to the application of the constitutional speedy trial right. These questions were left to the legislature or the courts in the exercise of their rule-making powers, an invitation which is being accepted more and more by both federal and state authorities. The new Speedy Trial Act of 1974<sup>115</sup> will produce great impact on the federal courts. After July 1, 1976,<sup>116</sup> an indictment must be returned or an information filed within thirty days after arrest or service of summons and arraignment must follow within ten days. Ultimately, trial must commence within sixty days after arraignment if the defendant pleads not guilty.<sup>117</sup> During the first year the statute is in effect,<sup>118</sup> however, the time limit to trial is to be 180 days, for the next fiscal year 120 days, and for the third year 80 days; thus, the trial delay portion does not become fully operative until 1978.

The statute also provides for exclusion of time from the stated periods based on matters such as delay necessary to accomplish various pretrial activities, informal suspension of prosecution conditioned on the defendant's good behavior, and absence or unavailability of the defendant or a witness.<sup>119</sup> A judge may also grant a continuance upon a finding "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial," provided that finding is supported by oral or written reasons for the continuance.<sup>120</sup> General docket congestion, the lack of

<sup>113</sup> *United States v. Marion*, 404 U.S. 307 (1971).

<sup>114</sup> *Strunk v. United States*, 412 U.S. 434 (1973).

<sup>115</sup> Act of Jan. 3, 1975, Pub. L. 93-619, 88 Stat. 2076 (1975), adding to 18 U.S.C. new sections 3161 through 3174.

<sup>116</sup> See 18 U.S.C. § 3161(a)-(b) (1974 U.S. Code Cong. & Ad. News 2407-08).

<sup>117</sup> *Id.* § 3161(b)-(c).

<sup>118</sup> From July 1, 1975, *id.* § 3161(g).

<sup>119</sup> *Id.* § 3161(h).

<sup>120</sup> *Id.* § 3161(h)(8).

diligent preparation or failure to obtain available witnesses on the part of the prosecution is specifically excluded as a ground for a valid continuance.<sup>121</sup>

This summary of the new statute only scratches the surface of its complicated provisions. From the standpoint of developing doctrine, however, it seems clear that this is the approach to the problem the Burger Court indicated it prefers.<sup>122</sup> It is therefore improbable that the Court will find any constitutional basis to strike down the provisions of the federal statute or some of its recent state counterparts.<sup>123</sup>

### III. RESTORATION AND CREATIVE USE OF THE DUE PROCESS STANDARD

#### A. THE SHIFT BACK TO GENERAL STANDARDS

In many of the Warren Court's landmark decisions discussed above, it is evident that the due process clause was simply a convenient, traditional tool used for the purpose of imposing detailed federal standards on state courts and officials. The Warren Court did not appear to make substantial use of the equal protection clause except in those instances in which there was clear racial discrimination in the course of criminal proceedings, or a defendant's poverty was the basis of an effective denial of a functional right.

The Burger Court, in contrast, appears to be much more conscious of the traditional distinction between the two concepts, as well as of their inherent limitations. As the Court summarizes them:

"Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.<sup>124</sup>

It is more often the due process clause which provides the necessary framework for constitutional scrutiny of criminal procedure than the equal protection clause, if the Court's definitions are kept in mind.

This is not to say, of course, that the Burger Court makes no use of the equal protection clause. It struck down the imposition of jail

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<sup>121</sup> *Id.* § 3161(h)(8)(C).

<sup>122</sup> See *Barker v. Wingo*, 407 U.S. 415 (1972).

<sup>123</sup> *E.g.*, *MICH. GEN. CT. R.* 789 (1973).

<sup>124</sup> *Ross v. Moffitt*, 417 U.S. 600, 609 (1974).

sentences in lieu of fines which indigents could not pay, using the equal protection concept.<sup>125</sup> Clear acts of racial discrimination have fallen before the scythe of equal protection.<sup>126</sup> Improper legislative classification violative of the equal protection clause served as a major ground for the declaration that state abortion legislation was unconstitutional.<sup>127</sup> The same basis underlay the avoidance of state legislative restrictions which denied prisoners jailed on preconviction status or misdemeanor convictions the opportunity to vote.<sup>128</sup>

Nevertheless, the present majority appears to be somewhat cautious about over-enthusiastic use of the equal protection clause. A recent illustration is the Court's use of the sixth amendment right to jury trial<sup>129</sup> rather than the equal protection clause to hold unconstitutional a state provision allowing women to serve on juries only by filing a declaration of desire for eligibility.<sup>130</sup> This basis appears somewhat odd at first blush. However, the answer probably lies in the fact that had the Court used the equal protection clause to strike down discriminatory practices based on sex, it would have in effect accomplished the objectives of the equal rights amendment through judicial interpretation of the fourteenth amendment, a step which no doubt it was unwilling to take.

### C. CREATIVE USE OF THE DUE PROCESS STANDARD

In many of the contexts discussed above, the Burger Court has used the due process clause to cut away from the holdings of the Warren Court, most of which also purported to rest on the same clause. On occasion it has also done the same thing where constitutional regulation of the criminal trial is concerned. For example, in the determination of when retrial may be ordered after a mistrial, the Burger Court's use of the due process clause<sup>131</sup> leaves far more

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<sup>125</sup> *Tate v. Short*, 401 U.S. 395 (1971).

<sup>126</sup> E.g., *Alexander v. Louisiana*, 405 U.S. 625 (1972) (jury selection).

<sup>127</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>128</sup> *O'Brien v. Skinner*, 414 U.S. 524 (1974).

<sup>129</sup> Incorporated into fourteenth amendment due process by *Duncan v. Louisiana*, 391 U.S. 145 (1968), and the cases following it.

<sup>130</sup> *Taylor v. Louisiana*, 419 U.S. 522 (1975).

<sup>131</sup> *Illinois v. Sommerville*, 410 U.S. 458 (1973); *United States v. Wilson*, 95 S.Ct. 1013 (1975). See also *Serfass v. United States*, 420 U.S. 377 (1975) (government can appeal dismissal of indictment before trial, even though trial court considers facts outside the indictment); *United States v. Jenkins*, 420 U.S. 358 (1975) (double jeopardy prevents government appeal against dismissal of indictment after bench trial).

latitude for a second prosecution than the decision rendered during the transition from Warren to Burger Court.<sup>132</sup>

Judged as a whole, however, the Burger Court has been much more willing than the Warren Court to use the due process clause to provide some regulation of areas largely left untouched by constitutional regulation. There is no basis to believe that the present Court will retreat from this creative use of the due process clause.

### 1. *A due process exception to the hearsay rule*

In the discussion of *Michigan v. Tucker*,<sup>133</sup> reference was made to the process of balancing the need for probative evidence against any deterrent effect that the exclusion of evidence might work. On three occasions, the Court has used that approach to strike down inherited evidence law doctrines which precluded defendants from access to or presentation of helpful evidence.

In the first case, a defendant charged with homicide learned that a third person had confessed to officers in a way suggesting that he was indeed the killer, and had made similar admissions to private citizens. At trial, the defendant called the third person to the stand, and when the latter denied his confession, sought to impeach that testimony by proof of the earlier confession. The trial court barred the effort on the ground that one vouches for, and therefore cannot impeach, one's own witness. The defense then sought to show that the third party had incriminated himself through the testimony of the persons to whom he had made his admissions. This attempt, too, failed, on the ground that state law required declarations against interest to be contrary to pecuniary, and not penal, interest. The Supreme Court reversed the conviction.<sup>134</sup> The technical basis for its holding was the right of confrontation, which of course is incorporated into due process of law.<sup>135</sup> There were indicia of credibility in the evidence which Chambers sought to adduce, and it denied him due process of law to invoke traditional rules of evidence to frustrate proof of the defendant's case.

A similar result was reached where a secrecy order imposed on juvenile court records and references to the juvenile court probationer status of a key prosecution witness prevented defense efforts to

<sup>132</sup> *United States v. Jorn*, 400 U.S. 470 (1971). †

<sup>133</sup> See text accompanying notes 45-50 and 74-77 *supra*.

<sup>134</sup> *Chambers v. Mississippi*, 410 U.S. 285 (1973).

<sup>135</sup> *Washington v. Texas*, 388 U.S. 14 (1967).

impeach the witness.<sup>136</sup> Although the opinion, interestingly enough, makes no reference to *Chambers*, the Court applied an identical approach to hold that the state's interest in maintaining the rehabilitative goals of its juvenile justice system must give way to the adult defendant's right of confrontation.

The third case of significance is the Watergate tapes case<sup>137</sup> where the President's claim of executive privilege was ruled less important than "full disclosure of all the facts, within the framework of the rules of evidence."<sup>138</sup> Therefore, the presidential claim had to yield to the demands of the Watergate defendants to compulsory process and confrontation of witnesses.

The Burger Court has also indicated its willingness to reconsider the validity even of common-law presumptions if they operate against a criminal defendant.<sup>139</sup>

Thus, one may infer that the due process clause has been used in effect to create a new, general exception to the hearsay rule, which operates in favor of criminal defendants who need apparently credible material for exculpation from or mitigation of the criminal charges against them.

## 2. Revision of mental health doctrine

On a combination of due process and equal protection grounds, the Supreme Court has also opened the entire field of mental health laws to constitutional scrutiny. The most significant decision ruled it

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<sup>136</sup> *Davis v. Alaska*, 415 U.S. 308 (1974).

<sup>137</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>138</sup> *Id.* at 709. The holdings in *Chambers* and *Davis* work only in favor of the defense, while the considerations expressed in *Nixon* cut both ways. That the Court's concern "for developing relevant facts on which a determination of guilt or innocence can be made" can operate for the primary benefit of the prosecution is illustrated by *United States v. Nobles*, 95 S.Ct. 2160 (1975). Defense counsel intended to use the testimony of a private investigator to impeach prosecution eyewitnesses, but resisted a prosecution discovery motion for the investigator's report. As a result, the investigator was not permitted to testify. After rejecting the defense claim that self-incrimination of the defendant would be impaired through production of the report, construing Federal Rule 16 discovery not to preclude a trial court's broad discretion to handle evidentiary matters at trial, and finding nothing in the "work product" rule of *Hickman v. Taylor*, 329 U.S. 495 (1947), to prevent this form of limited discovery, the Court sustained the trial court's handling of the matter as reasonable exercise of discretion: "one cannot invoke the Sixth Amendment [right to counsel] as a justification for presenting what might have been a half-truth." 95 S.Ct. at 2171.

<sup>139</sup> *Barnes v. United States*, 412 U.S. 837 (1973).

unconstitutional to hold an incompetent for an indefinite period prior to trial, with procedural safeguards less than those afforded persons civilly committed, without any provision for treatment or interim review of the commitment.<sup>140</sup> *Jackson* and another case the same Term also placed definite limitations on the duration and circumstances of diagnostic commitments.<sup>141</sup> The Court has also ruled unconstitutional the mental health confinement of a nondangerous person who can live by himself or under the care of others.<sup>142</sup> The details of this growing field of litigation are beyond the scope of this presentation, but it seems quite likely that due process has been extended to a complex of problems badly in need of scrutiny.

The Court has also reaffirmed its earlier holding<sup>143</sup> that the question of mental competency to undergo trial is a federal constitutional issue which cannot be ignored by a trial court.<sup>144</sup>

### 3. Prisoners' rights litigation

Creative use of due process by the Burger Court can also be seen in the rapidly developing protection for probationers, parolees and convicts, classes of persons which benefited only little from Warren Court decisions. Administrative due process must be afforded those undergoing probation or parole revocation proceedings.<sup>145</sup> Some of the same procedural rights are available to prisoners undergoing administrative discipline.<sup>146</sup> Censorship procedures for outgoing and incoming mail also must be severely restricted, in part because the first amendment rights of others are involved.<sup>147</sup> Although media representatives need not be given the freedom to interview notorious inmates of their choice, the Court appears to have conceded that

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<sup>140</sup> *Jackson v. Indiana*, 406 U.S. 715 (1972).

<sup>141</sup> *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1973). See also *Humphry v. Cady*, 405 U.S. 504 (1972).

<sup>142</sup> *O'Connor v. Donaldson*, 95 S.Ct. 2486 (1975). Compare holdings requiring full civil commitment proceedings after acquittal by reason of insanity, e.g., *Wilson v. State*, 287 N.E.2d 875 (Ind. 1972); *People v. McQuillan*, 392 Mich. 511, 211 N.W.2d 569 (1974).

<sup>143</sup> *Pate v. Robinson*, 383 U.S. 375 (1966).

<sup>144</sup> *Drope v. Missouri*, 420 U.S. 162 (1975) (where defense counsel's assertion that his client was not mentally competent was supported by credible evidence).

<sup>145</sup> *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1973).

<sup>146</sup> *Wolff v. McDonnell*, 418 U.S. 539 (1974).

<sup>147</sup> *Procunier v. Martinez*, 416 U.S. 396 (1974).

prisons cannot be closed off from public and media inspection.<sup>148</sup> Most of this new constitutional coverage, it should be noted, has been created under the due process clause.

Some critics of the Burger Court seem to maintain that its majority is intent on moving constitutional criminal law back into the nineteenth century. That it has reordered constitutional priorities is clear. But at the same time, to give the present Court its due, it is willing, however gingerly its statements indicate, to impel the probe of due process into areas hitherto untouched.

#### IV. REALLOCATION OF RESPONSIBILITY FOR REVISION OF THE SYSTEM

It should be apparent from the preceding analysis that the Burger Court takes a different view of (1) the division of responsibility between the judicial and legislative branches, and (2) the allocation of responsibility for revision of the criminal justice system between the states and the federal government.

As to the first, the full implication of statements like those in *Calandra* and *Tucker* for state code and rule drafters remains to be explored. But in other contexts, the freedom of legislatures, state and federal, to explore alternatives seems to be stressed; indeed, it is stressed in *Tucker*. To illustrate, the majority opinion in *Illinois v. Sommerville* comments that "[f]ederal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy."<sup>149</sup> In another setting, the Court has confirmed the freedom of states to experiment with systems to recoup the cost of assigned counsel from once-indigent convicted defendants who subsequently become able to pay in whole or in part.<sup>150</sup> Similar latitude is allowed states in determining the form of hearing required before there can be pretrial detention of arrested persons.<sup>151</sup> Discovery apparently may be granted or withheld, as long as whatever discovery is available is reciprocal in coverage.<sup>152</sup> The flexibility in defining appellate remedies recognized in *Ross v. Moffitt* has already been

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<sup>148</sup> Cf. *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

<sup>149</sup> 410 U.S. at 468.

<sup>150</sup> *Fuller v. Oregon*, 417 U.S. 40 (1974).

<sup>151</sup> *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975).

<sup>152</sup> *Wardius v. Oregon*, 412 U.S. 470 (1973).

described.<sup>153</sup> Although a more than gentle prod has been given in the direction of law reform in areas such as the treatment of the mentally ill and the release, reincarceration and discipline of prisoners, the basic decisions are once more to be those of the legislative branch, subject only to fundamental due process standards, and not de novo judicial reevaluation.

The consequence of this new (or renewed) federalism is that state courts also will have a greater responsibility than during the Warren Court era for the protection of the procedural rights of state prisoners. Some state court judges no doubt will continue to be content to follow only those requirements delineated in state legislation or general court rule, within those specific constitutional controls which they find in federal precedent.

A resurgent phenomenon, however, is the extent to which some state supreme courts, at the urging of defense attorneys, are making creative use of their own state constitutions, or the inherent power to regulate rules of practice and evidence, to preserve at least some of the Warren Court doctrines which have been qualified in recent Terms. To illustrate, the Supreme Court of Hawaii has refused to allow use of a confession not preceded by proper warnings for impeachment,<sup>154</sup> even though *Harris v. New York* and *Oregon v. Hass* find no federal constitutional infringement in the practice. The California Supreme Court has placed a more severe limitation on searches incident to valid custodial arrests than *Robinson* and *Gustafson* mandate as a matter of federal constitutional law,<sup>155</sup> and the Hawaii Supreme Court has also taken a more restrictive view of booking and post-booking searches than *United States v. Edwards* expects.<sup>156</sup> In the exercise of its power to determine what evidence is admissible in state trials, the Michigan Supreme Court has provided for counsel during a custodial photographic identification,<sup>157</sup> even though *United States v. Ash* finds no federal sixth amendment right under such circumstances. The Michigan court has also adopted the dissenters' view in *United States v. Russell* as the Michigan law.<sup>158</sup>

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<sup>153</sup> See text accompanying notes 105-07 *supra*.

<sup>154</sup> *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971).

<sup>155</sup> *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975).

<sup>156</sup> *State v. Kaluna*, 55 Hawaii 361, 520 P.2d 51 (1974).

<sup>157</sup> *People v. Jackson*, 391 Mich. 323, 217 N.W.2d 22 (1974). The *Jackson* rule does not apply to precustodial transactions, *People v. Lee*, 391 Mich. 618, 218 N.W.2d 655 (1974).

<sup>158</sup> *People v. Turner*, 390 Mich. 7, 210 N.W.2d 336 (1973).

No doubt this approach will be increasingly resorted to as defense counsel are reminded of the importance of state constitutional law, as indeed the Burger Court encourages them to do.

Care, however, must be exercised in one respect, which is to make it clear that a state court is interpreting its own constitution or laying down its own local rule of law. If it purports to interpret the Federal Constitution in a manner incompatible with current United States Supreme Court decisions, its action will be upset in the federal courts.<sup>159</sup> In *Hass*, the Burger Court majority disallowed the Oregon Supreme Court's broader construction of the fifth amendment privilege than the interpretation placed on it in *Harris v. New York*: "[O]f course, a state may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."<sup>160</sup>

### V. CONCLUSION

This survey of the present Court's decisions between 1973 and mid-1975 clearly appears to confirm that (1) there will be increasingly less effort to control police power through exclusionary rules of evidence; (2) the exclusionary rules themselves may shrink gradually to little or nothing, particularly if satisfactory alternative remedies are developed (for example, tort claims acts against municipalities with guaranteed minimum recoveries including counsel fees and court costs); (3) legislative bodies will be much freer to experiment with new solutions to law enforcement problems, particularly those of urban areas; (4) no nationwide constitutional strait jacket will be imposed on the states; and (5) rather indefinite warnings will be laid down under the due process concept to force states to reexamine legislation in areas which have not traditionally been touched by constitutional controls. The operative assumptions of the Warren Court have largely been replaced, but the future should still see a constructively creative effort to use constitutional standards to encourage, not dictate, state and federal law reform.

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<sup>159</sup> *Oregon v. Hass*, 420 U.S. 714 (1975).

<sup>160</sup> *Id.*, at 719. Or as the Court in *Hass* comments on language from another Oregon decision, *State v. Florance*, 527 P.2d 1202 (Ore. 1974):

"If we choose we can continue to apply this interpretation. We can do so by interpreting Article 1, § 8, of the Oregon constitutional prohibition of unreasonable searches and seizures as being more restrictive than the Fourth Amendment of the federal constitution. Or we can interpret the Fourth Amendment more restrictively than interpreted by the United States Supreme Court" (footnote omitted). The second sentence of this quoted excerpt is, of course, good law. The last sentence unsupported by any cited authority, is not the law and surely must be an inadvertent error: in any event, we reject it.

417 U.S. at 719 n.4.



## THE WAR-MAKING PROCESS\*

Captain John C. Cruden\*\*

### I. INTRODUCTION

The progressive growth in the power and prestige of the Presidency, especially in the area of foreign relations, has been perhaps the most notable feature of American constitutional development. Beginning with Jefferson's use of the Navy against the Barbary pirates in 1801, debate has raged over the limitations on Presidential authority to commit troops to hostilities without prior congressional authorization. Notwithstanding the constant questioning of what, if any, unilateral war power the President actually possesses, American chief executives have infrequently sought approval from Congress before exerting national force. This steady aggrandizement of power, expanded dramatically by the twentieth century Presidents, became particularly suspect during the war in Southeast Asia.

Heralded as the answer to future Vietnams, the War Powers Resolution of 1973 was introduced amidst the events of Watergate, considerations of presidential impeachment, and in the aftermath of the most unpopular war in the history of the United States. Three years of debate in Congress elicited widely divergent views concerning the wisdom of limiting the President's military prerogatives, and

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a score of conflicting proposals were introduced in the House and Senate. Reconciling their competing approaches toward Presidential powers, the legislators approved a compromise resolution which passed over an angry veto by President Nixon on November 7, 1973.<sup>1</sup>

In substance, the War Powers Act requires that the President both consult with Congress before introducing military forces into actual or potential conflict and report the justification of such action within forty-eight hours of deployment. To allow rapid response to emergency situations, the President is allowed to commit combat troops into hostilities without congressional authorization, but such combat must end within sixty days, with a single thirty-day extension if the President certifies in writing that the extension is necessary for the safety of American combat forces. Even during this ninety-day period, Congress may in accordance with the Act recall all troops by passing a concurrent resolution, not subject to the President's veto, by a simple majority of both Houses.

Does the War Powers Act fulfill its drafters' intent by restoring the war powers allegedly usurped by past Presidents—or is it merely hortatory? Is the Act a rational limitation on the expansive powers of the Presidency, or is it an emotional response to the abuses of a particular President? To answer these questions it will be necessary to examine the constitutional and historical bases for the exercise of war powers, the political environment which contributed to the passage of the Act, and the legislative interpretation of the Act's language.

Following the somewhat abstract section-by-section analysis of the key provisions of the Act, it is necessary to turn to the effect of the Act in practice. Since the passage of the War Powers Act in late 1973, four reports have been rendered by the President to Congress to explain military action. Although each of these reports—all related to the fall of Cambodia and South Vietnam—has stirred considerable controversy, they vividly illustrate the application of the War Powers Act to actual operations. Moreover, these reports provide valuable precedents by which one can test the explanations of certain of the Act's provisions provided in this article.

In the final analysis, the War Powers Act is certainly the most explosive statute of the decade. Every military operation, every U.S.

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<sup>1</sup> Act of November 7, 1973, Pub. L. No. 93-148, 55 Stat. 555. The full text of the resolution is set forth in Appendix A. [Hereinafter referred to as the War Powers Act or the Act.]

treaty, in fact, nearly every aspect of United States national security policy is touched by this critically important document. While it is true that this Act is symptomatic of the schism between Congress and the President engendered by Vietnam, it is equally true that this Act is the first step forward by a legislature seeking a role for itself in the war-making process. To facilitate a positive working relationship between the responsible and coordinate branches of government, the War Powers Act must be thoroughly understood, consistently applied, and thoughtfully criticized. This article does not purport to solve the questions presented by the Act but rather to present the issue for thoughtful deliberation in advance of a crisis situation when the Act must be implemented.

## II. WAR-MAKING POWERS: CONSTITUTIONAL LANGUAGE, FRAMERS' INTENT AND EXECUTIVE PRACTICE

In his message to Congress accompanying the veto of the War Powers Act, former President Nixon warned that the Act was unconstitutional, claiming it would "take away, by a mere legislative act, authority which the President has properly exercised for almost 200 years."<sup>2</sup> Determining the proper allocation of war powers under the Constitution is not an easy task. As Mr. Justice Jackson wryly observed, the constitutional basis for war-making authority "must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."<sup>3</sup> Despite two centuries of scholarly speculation complemented by the plethora of recent articles on Presidential powers, leading historians, political scientists, and constitutional experts continue to spark controversy with the divergent views.<sup>4</sup> Nevertheless, to establish a foundation upon which to judge both the wisdom and legality of the War Powers Act, it is important to first examine the historical arguments set forth in support of both congressional and executive war-making authority.

<sup>2</sup> R. Nixon, Veto of War Powers Resolution (Oct. 24, 1973) in 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS No. 43, at 1285-86.

<sup>3</sup> *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

<sup>4</sup> Wormuth, *The Vietnam War: The President versus the Constitution*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 710 (R. Falk ed. 1969); Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243 (1969); Note, *Congress, the President, and the Power to Commit Troops to Combat*, 81 HARV. L. REV. 1771 (1968); Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 U. RICH. L. REV. 1 (1971); Berger, *Warmaking by the President*, 121 U. PA. L. REV. 29 (1972).

Any analysis of the proper position of war powers in the constitutional framework requires a series of examinations. Initially, the explicit constitutional provisions granting war-making powers must be analyzed. Should the provisions themselves fail to satisfactorily delimit the proper allocation of responsibility, the framers' intent must be examined in an effort to uncover hidden meanings or to clarify ambiguous terms. Finally, the issue must be placed in its proper historical and judicial perspective. It is this three stage approach—constitutional language, framers' intent, and historical perspective—that will be utilized to determine the allocation of war powers under the Constitution.

### A. CONSTITUTIONAL LANGUAGE: "CONGRESS SHALL HAVE POWER . . . TO DECLARE WAR"

Mindful that the failure of the Articles of Confederation stemmed from the absence of a central authority, but fearful of unchecked war-making powers such as those possessed by English Kings, the delegates to the 1787 Constitutional Convention dealt with a broad range of war-related authority in the first article of the new Constitution. Section 8 of that article expressly grants Congress extensive powers in the realm of national defense.<sup>5</sup> In contrast to the war powers of Congress, specifically listed in the first article, the drafters' second article designated the President simply by position as "Commander-In-Chief of the Army and Navy of the United States."<sup>6</sup> Advocates for the congressional exercise of war powers stress the Article I specific grants of authority, particularly the power

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<sup>5</sup> To "provide for the common defense"; "regulate Commerce with foreign Nations"; "define and punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations"; "declare War . . . and make Rules concerning Captures on Land and Water"; "raise and support Armies"; "provide and maintain a Navy"; "make Rules for Government and Regulation of the land and naval forces"; "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions"; "provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the service of the United States"; and to "make all laws which shall be necessary for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8.

<sup>6</sup> U.S. CONST. art. II, § 2. Samuel P. Huntington has pointed out that the Commander-in-Chief clause is ". . . unique in the Constitution in granting authority in the form of an office rather than in the form of a function." S. HUNTINGTON, *THE SOLDIER AND THE STATE* 178 (1957).

"to declare war," and conclude that such language encompasses the broader ability to authorize war. Supporters of Presidential power, on the other hand, would reserve all war-making authority which is not specifically delegated elsewhere in the Constitution to the President.

### B. DRAFTERS' INTENT EXAMINED AND DEFINED

While the language of the Constitution is far from explicit in its delineation of war-making authority between Congress and the President, records of the debates in the Constitutional Convention provide some insight into the framers' intent. In the draft submitted to the Convention on August 6, 1787, the Committee on Detail recommended that Congress be empowered "to *make* war," rather than "to *declare* war."<sup>7</sup> Eleven days later when the provision was debated, several alternative proposals were considered.<sup>8</sup> Combining both congressional and presidential authority, James Madison and Charles Gerry jointly moved ". . . to insert 'declare'; striking out 'make' war; leaving the Executive the Power to repel sudden attacks."<sup>9</sup> Most scholars agree that Rufus King's arguments in support of the Gerry-Madison amendment contributed significantly to its adoption.<sup>10</sup> The Massachusetts delegate urged that the new wording

<sup>7</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION 318-19 (M. Farrand rev. ed. 1937) (emphasis added). [Hereinafter cited as FARRAND, RECORDS.]

<sup>8</sup> Charles Pinckney of South Carolina argued that the entire Congress was "too numerous" to make informed and timely decisions and urged that the war-making power be confined to the Senate alone. Agreeing that the legislature was too cumbersome a body to manage war, Pierce Butler, also of South Carolina, recommended that the power be vested in the President, who ". . . will not make war but when the nation will support it." Butler found little support for his proposition: Elbridge Gerry of Massachusetts stated he ". . . never expected to hear in a republic a motion to empower the Executive alone to declare war" and George Mason of Virginia was ". . . against giving the power of war to the Executive, because [he was] not safely to be trusted with it." Nevertheless, the delegates recognized the need for an Executive to possess sufficient authority to react rapidly in moments of national crisis and the ultimate wording reflects this judgment. 2 FARRAND, RECORDS, *supra* note 7, at 318. For a broader discussion of this debate see, e.g., Reveley, *Constitutional Allocation of the War Powers Between the President and Congress*, 15 VA. J. INT'L L. 73 (1974); Lofgren, *War Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1973); Gilbert, *The President's Power to Make War*, 42 U.M.K.C.L. REV. 157 (1973).

<sup>9</sup> 2 FARRAND, RECORDS *supra* note 7, at 318.

<sup>10</sup> The official *Journal of the Constitution* and the notes of James Madison differ as to these events. Madison's notes indicate the amendment was immediately acceptable and that a tentative vote at that time was seven states to two in favor

was superior to the original phrase "make war," as that "might be understood to 'conduct' war," which he thought was clearly "an Executive function. . . ." <sup>11</sup> and the amendment was adopted by an 8 to 1 vote.

In terms of the 1787 debate and the arguments of Madison, Gerry, and King, only the legislature has the power to formally declare war; once war is declared, however, the President has sole responsibility to "conduct war" although Congress, with its appropriation authority may have considerable effect on any decision. In the event of an attack on the United States, the President need not seek congressional approval to respond with force. Unfortunately, these limits, based on declared wars and sudden attacks, have had little historical importance. Of the more than 150 foreign hostilities involving the United States Armed Forces, only five were preceded by a formal declaration of war and even fewer by an attack on the United States.<sup>12</sup>

While neither the specific language of the Constitution nor the debate at the Federal Convention in 1787 addressed the subject of undeclared wars, writings subsequent to the Convention at least define the issues. When the proposed Constitution was sent to the respective states for ratification, the memory of the traditional power of kings to commit unwilling nations to war made many fearful of an Executive with broad discretionary authority. The anti-Federalists expressed alarm over unfettered Presidential power<sup>13</sup> while Federalist

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of the change. The *Journal* states the Madison-Gerry proposal initially lost by a vote of 4 to 5 and it was only on the second vote that the amendment carried. See Lofgren, *War Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672, 676 n.n.16-19 (1972).

<sup>11</sup> 2 FARRAND, RECORDS *supra* note 7, at 319.

<sup>12</sup> See generally Emerson, *War Powers Legislation*, 74 *W. VA. L. REV.* 53 (1972), Appendix A, as reprinted with supplementary data in *War Powers Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess., at 328 (1973). [Hereinafter cited as Emerson, *War Powers Legislation*.]. The real issue requiring resolution, therefore, is the determination of the branch of government empowered with war making which falls short of a formal declaration of war.

<sup>13</sup> [T]he thoughts of a military officer possessing such powers, as the proposed constitution vests in the president general, are sufficient to excite in the mind of a freeman the most alarming apprehensions. . . . This tyrant . . . can at any time he thinks proper, order him out in the militia to exercise, and to march when and where he pleases.

THE ANTI-FEDERALIST PAPERS, No. 74, at 212-13 (Borden ed. 1965). *Antifederalist Paper No. 74*, signed "Philadelphiasis," is believed to have been authored by Benjamin Workman.

Alexander Hamilton deprecated the extent of such power.<sup>14</sup> Hamilton's advocacy in support of the proposed Constitution stands in marked contrast to his later writings as exponent of executive power.<sup>15</sup> Nevertheless, his early position is important, as it certainly represented the views of Federalist co-author James Madison, and other drafters of the Constitution.

Such leading constitutional scholars as William Van Alstyne,<sup>16</sup> Charles Lofgren,<sup>17</sup> and Raoul Berger<sup>18</sup> have concluded from the 1787 debate and *The Federalist Papers* that the Constitution "... conferred virtually all of the war making powers upon Congress, leaving the President only the power 'to repel sudden attack' on the United States."<sup>19</sup> Disagreeing with this position, Eugene Rostow has criticized this conclusion as an attempt to "... wrap a foreign policy of nearly pacifist isolationism in the priestly mantle of constitutional command."<sup>20</sup> As to the arguments of the other scholars, Rostow asserts they

... dismiss the fact that the men who made the Constitution had quite another view of its imperatives when they became Presidents, Senators, Congressmen, and Secretaries of State. The words and conduct of the

<sup>14</sup> Hamilton wrote in a frequently cited *Federalist Paper* that

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

THE FEDERALIST No. 69, at 417-18 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis added).

<sup>15</sup> Attacking Jefferson's hesitant actions against the Pasha of Tripoli, Hamilton wrote in 1801, "When a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact already at war, any declaration on the part of Congress is nugatory; it is at least unnecessary." 8 THE WORKS OF ALEXANDER HAMILTON 249-50 (H. Lodge ed. 1904).

<sup>16</sup> Van Alstyne, *Congress, The President, and the Power to Declare War*, 121 U. PA. L. REV. 1 (1972).

<sup>17</sup> Lofgren, *War Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 700 (1972).

<sup>18</sup> Berger, *War Making by the President*, 121 U. PA. L. REV. 29 (1972).

<sup>19</sup> *Id.* at 82. But see Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U.L. REV. 628 (1970) where then U.S. Assistant Attorney General Rehnquist argued that the President, as Commander-in-Chief, could initiate combat on his own authority.

<sup>20</sup> Rostow, *Great Cases Make Bad Laws: The War Powers Act*, 50 TEXAS L. REV. 833, 841 (1972).

Founding Fathers in office hardly supports the simplified and unworldly models we are asked to accept as embodiments of the only True Faith.<sup>21</sup>

### C. THE EARLY HISTORY

The dichotomy Rostow points out between the framers' words and their deeds is best demonstrated in the controversy surrounding the first war-related incident in United States history. Only a few years after the 1787 Convention, two of the principal constitutional defenders came to contradictory conclusions regarding the war powers of the President.

When President Washington declared the United States neutral in the war between France and England in early 1793,<sup>22</sup> pro-French congressmen and newspapers objected that this unilateral action went beyond the authority of the Executive. Defending Washington's action in a series of newspaper articles under the pseudonym "Pacificus," Hamilton argued that war making was, per se, an executive function and that Congress was thus limited to only such authority as was specifically delegated to it in the Constitution.<sup>23</sup> At Thomas Jefferson's urging, James Madison challenged Hamilton's views writing as "Helvidius"; he asserted that war making was a legislative function under the Constitution and that any exceptions in favor of the executive must be strictly construed.<sup>24</sup> "The power to declare war," Madison argued "... including the power of judging the causes of war, is fully and exclusively vested in the Legislature, that the executive has no right in any case, to decide the question whether there is, or is not cause for declaring war."<sup>25</sup>

"History," Edwin Corwin stated, "has awarded the palm of victory to 'Pacificus,'" meaning that "[b]y his reading of the 'executive power' clause [Hamilton] gave the President constitutional warrant to go ahead and apply the advantages of his position in a field of power to which they are specially adapted."<sup>26</sup> Accordingly, Washington's position on the European war prevailed, as Congress subsequently enacted the first neutrality law on June 5, 1794, by a

<sup>21</sup> *Id.* at 841.

<sup>22</sup> Proclamation of April 22, 1793 in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 140 (W. Lawrie & M. Clark ed. 1833).

<sup>23</sup> See 4 THE WORKS OF ALEXANDER HAMILTON 437-44 (H. Lodge ed. 1906).

<sup>24</sup> See 6 THE WRITINGS OF JAMES MADISON 138-88 (G. Hunt ed. 1906).

<sup>25</sup> *Id.* at 174 (emphasis added).

<sup>26</sup> E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 217 (3d ed. 1948) [hereinafter cited as CORWIN, THE PRESIDENT].

vote of 13 to 12 in the Senate and 48 to 38 in the House.<sup>27</sup> Madison did, however, raise a crucial question in the Pacificus-Helvidius debate: who decides whether cause for war exists? Although Madison argued that the President could not make this determination, the legislature itself was to delegate such authority only two years later.

In 1795 Congress passed the Militia Act, which provided the President with authority to mobilize state militias and issue appropriate orders ". . . whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe."<sup>28</sup> This legislation, far broader than the power "to repel sudden attack," is the legal and theoretical rationale for Presidential actions in the interest of national security. Discretion allotted to the President to determine when an emergency is "imminent" implies the power to act in advance of such danger to thwart its occurrence. This broader view of Presidential powers was subsequently borne out by two Supreme Court decisions.

Justice Story, speaking for an unanimous Court in *Martin v. Mott*,<sup>29</sup> stated "The authority to decide whether the exigency [requiring the use of militia under the Militia Act of 1795] has arisen belongs exclusively to the President, and his decision is conclusive upon all other persons."<sup>30</sup> In *Luther v. Borden*,<sup>31</sup> the Court went even further and declared itself incapable of examining the correctness of a President's decision as to whether such emergency existed as to require the use of force. "It is said," the Court stated, "that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual."<sup>32</sup>

The 1795 Militia Act, as interpreted by the Supreme Court, is an apparent recognition of the necessity of endowing the President with sufficient power to respond to prospective problems in a timely and efficient fashion. Whatever the Founding Fathers intended, the legislature, as a decision-making body, particularly in times of

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<sup>27</sup> For a discussion of this debate see R. LEOPOLD, *THE GROWTH OF AMERICAN FOREIGN POLICY* 36 (1962).

<sup>28</sup> Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424.

<sup>29</sup> 25 U.S. (12 Wheat.) 19 (1827).

<sup>30</sup> *Id.* at 30.

<sup>31</sup> 48 U.S. (7 How.) 1 (1849).

<sup>32</sup> *Id.* at 44.

national crisis, has significant limitations.<sup>33</sup> It is instructive to note that both Hamilton and Madison rejected the German constitutional example of a strong Diet possessing the broad power of "making war and peace." During an emergency, they warned, "military preparations must be preceded by so many tedious discussions, . . . that before the Diet can settle the arrangements the enemy are already in the field."<sup>34</sup>

In any case, the search for the constitutional bases and delineation of war powers does not end with the numerous debates occurring between the 1787 Federal Convention and the 1795 Militia Act. As Justice Holmes pointed out, the Constitution is to be read "in the light of our whole experience and not merely what was said a hundred years ago."<sup>35</sup> Echoing these words, Professor John Norton Moore in speaking to war powers submitted that ". . . historical evidence as to the framers' intent, however realistic an approximation, is only one source for interpreting a living document such as the Constitution."<sup>36</sup>

#### D. THE PRACTICE OF THE PRESIDENTS

Despite the fact that vague language of the Constitution gives powers to the President that are implied rather than stated, the history of Presidential war making has been that of steady growth. Those Presidents considered to be "strong" or "active" Chief Executives by current historians—Washington, Jefferson, Jackson, Polk, Lincoln, Wilson and the two Roosevelts<sup>37</sup>—are those most closely

<sup>33</sup> John Locke, in his famous chapter, "Of Pterogative," in the *Second Treatise of Government* urged this point, arguing that legislatures are too large, unwieldy and slow to cope with crisis. J. LOCKE, II TWO TREATISES ON CIVIL GOVERNMENT ch. 14 (P. Laslett ed. 1967). Charles Evans Hughes wrote:

The prosecution of war demands in the highest degree the promptness, directness and unity of actions in military operations. This exclusive power to command the army and navy and thus direct and control campaigns exhibits not autocracy but democracy fighting effectively through its chosen instruments and in accordance with the established organic law.

Hughes, *War Powers Under the Constitution*, 85 CENT. L.J. 206, 209 (1917) cited in Goldwater, *The President's Ability to Protect American Freedoms—The War-making Power*, 3 ARIZ. ST. L.J. 301, 315 (1971).

<sup>34</sup> THE FEDERALIST NO. 19, at 131 (C. Rossiter ed. 1961) (A. Hamilton and J. Madison).

<sup>35</sup> *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

<sup>36</sup> *Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess., -- (1971) [hereinafter cited as *1971 War Powers Hearings*].

<sup>37</sup> See H. J. ABRAHAM, *THE JUDICIAL PROCESS* 341-43 (2d. ed. 1968).

associated with the forceful use of war powers. Although a dominant legislature has followed each strong President, precedent for war making by Presidents continued relatively unabated until 1973.

### 1. Nineteenth Century: Pre-Civil War Presidents

Present day scholars who seek to empower Congress with all war-making authority in an effort to prevent future wars overlook the historical fact that, in many instances, the legislature has been more bellicose and less deliberate than the President.<sup>38</sup>

With the exception of the commitment of forces by Presidents Monroe<sup>39</sup> and Polk,<sup>40</sup> the half-century period between Jefferson and

<sup>38</sup> An example of the misfortunes of a strong legislature and a relatively weak President occurred during James Madison's administration. Practicing his philosophy of legislative supremacy, Madison was driven into the unpopular War of 1812 by the War Hawks under Speaker Henry Clay. For a general account of the events leading up to the War of 1812, see Names, *Congress and Military Commitments: An Overview*, CURRENT HISTORY 116 (Aug. 1969). This war with England, ostensibly waged to guarantee shipping rights for neutral countries, was initiated with a jaundiced desire for the vast territories in Canada. The war being unpopular from the outset, several states refused to supply troops, and the young American Army fared poorly in battle. As inept a Commander-in-Chief as he was brilliant in scholarship, Madison emerged successful in only the narrowest sense. Except for Commodore Perry's last minute victory and Andrew Jackson's post-war defeat of the British at New Orleans, the war was marked by a series of reversals for the United States. See generally R. LEOPOLD, *THE GROWTH OF AMERICAN FOREIGN POLICY* 62-64 (1961).

<sup>39</sup> Angered by the atrocities reportedly committed in Florida by the Seminole Indians, President Monroe ordered General Jackson in 1818 to pursue these Indians into Spanish Florida. Based on alleged secret authority given him by the President, Jackson attacked Spanish forts and Indians with equal abandon, and summarily executed two British citizens on Spanish soil. See generally H. AMMON, *JAMES MONROE, THE QUEST FOR NATIONAL IDENTITY* chs. 23-24 (1971) and S. BEMIS, *JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY* chs. 15-19 (1949). This incursion involved the infamous "Rhea Letter" by which Jackson asserted he received authority to invade Florida from President Monroe—the letter was subsequently lost and Monroe denied giving his permission. AMMON, *supra*, at 414-30; BEMIS, *supra*, at 313-16. Without congressional authorization, the invasion of Spanish Florida was an autonomous act of war undertaken by the President. Despite an angry speech by Henry Clay, however, a resolution to condemn the execution of the two Englishmen was defeated by a vote of 90 to 50. By an even larger margin, 112 to 42, a bill designed to prohibit future movement of American troops into foreign territories without congressional permission was defeated. R. LEOPOLD, *THE GROWTH OF AMERICAN FOREIGN POLICY* 97 (1962).

<sup>40</sup> The second of America's formally declared wars, the 1846 Mexican-American War, is an example of William Howard Taft's observation that "... Congress has the power to declare war, but with the army and navy, the President can take

Lincoln was principally dominated by strong legislatures.<sup>41</sup> Presidential war-making authority was dependent, not on constitutional interpretation, but rather on executive inclination. Even during this period, however, there were over sixty reported military hostilities in which there was no declaration of war.<sup>42</sup> While many of these incidents are relatively unimportant, such as the burning of a pirate station in Northwest Cuba or the capturing of a slave ship off Luanda, Africa, they also included several landings of marines in Buenos Aires, Commodore Perry's expedition to Japan,<sup>43</sup> and the unfortunate bombing of Greytown, Nicaragua,<sup>44</sup> and serve as precedent for the exercise of Presidential authority demonstrated by modern Chief Executives. The argument for a President's "inherent authority" to wage war, although mentioned by Hamilton, gained no great support until the time of the most significant crisis in American history—the Civil War.

## 2. *Civil War: Emergence of the "War Power" doctrine.*

One of the dissenters opposed to Polk's action in Mexico was an Illinois Congressman, Abraham Lincoln. "Allow the President to invade a neighboring nation," Lincoln wrote a friend, "whenever he shall deem it necessary to repel an invasion . . . and you allow him to make war at pleasure. Study to see if you can fix any limit

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action such as to involve the country in war and to leave Congress no option but to declare it or recognize its existence." TAFT, *THE PRESIDENCY* 86 (1916). Corwin also refers to the "ability of the President simply by his day-to-day conduct of our foreign relations to create situations from which escape except by the route of war is difficult or impossible." CORWIN, *THE PRESIDENT*, *supra* note 26, at 274. Without congressional authorization, President Polk ordered U.S. troops under General Zachary Taylor to occupy the land between the Nueces and Rio Grande Rivers, disputed territory claimed by Mexico. Taylor was instructed to defend Texas against invasion, but his orders carried the implied authority to invade Mexico, if necessary. *THE WEST POINT ATLAS OF AMERICAN WARS* 13 (V. Esposito ed. 1959). When, as expected, Mexican forces struck, Polk presented the legislature with a *fait accompli*, and Congress dutifully responded by declaring war. LEOPOLD, *supra* note 39, at 97. Justice Grier commented on this incident in the *Prize Cases*, stating: "The battles of Palo Alto and Rasaca de la Palma had been fought before the passage of the Act of Congress of May 13, 1846 [which recognized] a state of war existing by the Act of the Republic of Mexico." 67 U.S. (2 Black) 635 (1862).

<sup>41</sup> See H. J. ABRAHAM, *THE JUDICIAL PROCESS* 341-43 (2d ed. 1968).

<sup>42</sup> Emerson, *War Powers Legislation*, *supra* note 12, at 88-92.

<sup>43</sup> See Emerson, *War Powers Legislation*, *supra* note 12, at 90-91.

<sup>44</sup> See J. B. MOORE, 2 *A DIGEST OF INTERNATIONAL LAW* (1906); J. JAVITS, *WHO MAKES WAR* 104-15 (1972).

of his power in this respect."<sup>45</sup> Despite this concern about unchecked Presidential war making, Lincoln must be designated the principal architect of the expanded commander-in-chief powers for twentieth century Presidents. "The sudden emergence of the 'Commander-in-Chief' clause as one of the most highly charged provisions of the Constitution, occurred almost overnight in consequence of Lincoln's wedding it to the clause which makes it the duty of the President 'to take care that the laws be faithfully executed'." From these two clauses Lincoln proceeded to derive what he termed the "war power" in order to justify the extraordinary measures taken at the outset of the Civil War.<sup>46</sup>

Lincoln's great "eleven week dictatorship" began almost immediately after Fort Sumpter was bombarded on April 12, 1861.<sup>47</sup> Recognizing that a hostile Congress could delay prompt action, Lincoln delayed convening Congress until July 4, providing a three-month period in which he grasped and used the full power of the Presidency. Acting without the prior consent of Congress, either in terms of a formal declaration of war or an enabling statute, Lincoln increased the size of the armed forces; ordered the Secretary of the Treasury to advance money from the Treasury (violating the constitutional prohibition on drawing funds without suitable "appropriations made by law");<sup>48</sup> suspended habeas corpus; ordered summary arrest and confiscated private property; ordered the trial of civilians by military commissions; and on April 19 and April 27, 1861, directed a blockade of Southern ports.<sup>49</sup> Although these domestic actions by Lincoln do not serve as precedent for foreign wars, they are indicative of the historic expansion of executive power during periods of national crisis.

It was the Southern blockade which precipitated one of the few Supreme Court decisions on the extent of the President's war-making powers.<sup>50</sup> During the blockade, naval vessels captured four ships off the coast of the Confederacy and brought them to port in order to be libeled as prizes. The validity of the capture and awards

<sup>45</sup> A. LINCOLN, *COLLECTED WORKS* 451-52 (R. P. Basler ed. 1953).

<sup>46</sup> CORWIN, *THE PRESIDENT*, *supra* note 26, at 277.

<sup>47</sup> C. ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 68 (1951).

<sup>48</sup> U.S. CONST. ART. I, § 9.

<sup>49</sup> See CORWIN, *THE PRESIDENT*, *supra* note 26, at 277-78; Gilbert, *The President's Power to Make War*, 42 U.M.K.C.L. REV. 157, 164-65 (1973).

<sup>50</sup> For a general discussion of the Southern blockade and *Prize Cases*, see C. ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 65-77 (1951).

to the ships' crews was dependent upon whether President Lincoln was constitutionally empowered to initiate a blockade prior to specific authorization of Congress. Upholding Lincoln's action in a 5 to 4 decision,<sup>51</sup> the Court approved Hamilton's earlier theory of defensive war, stating ". . . 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."<sup>52</sup>

Beyond the precise holding of the decision which validated Lincoln's order to blockade Southern ports, the *Prize Cases* contains broad language, frequently quoted by champions of a strong Presidency:

Whether the President, in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection had met with such armed resistance . . . as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decision and acts of the political department to which this power was entrusted.<sup>53</sup>

This language is of twofold importance: first, it indicates that the President rather than Congress may determine the existence of a state of war; second, it reaffirms the principle stated in *Luther v. Borden* that the Court will not inquire into the rationale for the President's decision.<sup>54</sup> This is the root of the current "political question" approach to war-making powers.

The actions of President Lincoln and the Supreme Court during the Civil War, Professor Gilbert wrote, ". . . served vastly to expand Presidential prerogatives and to accumulate a storehouse of precedents for strong executive initiative in military conflicts not only of a domestic nature but also with regard to foreign nations."<sup>55</sup> Although Lincoln's suspension of habeas corpus was invalidated<sup>56</sup>

<sup>51</sup> *Prize Cases*, 67 U.S. (2 Black) 635 (1862).

<sup>52</sup> *Id.* at 668.

<sup>53</sup> *Id.* at 670. Professor Schwartz stated that language in the *Prize Cases* is: ". . . [B]road enough to empower the President to do much more than merely parry a blow already struck against the Nation. Properly construed, in truth, it constitutes juristic justification of the many instances in our history (ranging from Jefferson's dispatch of a naval squadron to the Barbary Coast to the 1882 blockade of Cuba) in which the President has ordered belligerent measures abroad without a state of war having been declared by Congress.

B. SCHWARTZ, *THE REINS OF POWER* 98 (1963).

<sup>54</sup> *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

<sup>55</sup> Gilbert, *The President's Power to Make War*, 42 U.M.K.C.L. REV. 157, 166-67 (1973).

<sup>56</sup> *Ex Parte Merryman*, 17 Fed. Cas. 144 (No. 9,487) (1861).

and the rule of martial law held unconstitutional,<sup>57</sup> writers tend to be sympathetic with Lincoln's use of unprecedented executive authority: he was successful and the nation emerged from a highly volatile period intact.<sup>58</sup> This tacit support of admittedly extra-legal behavior adds credence to John Locke's argument that the executive must have sufficient reserve power "... to act according to discretion for the public good, without the prescription of law and sometimes against it."<sup>59</sup>

Notwithstanding the merits of President Lincoln's wartime actions, a long dormant Congress was anxiously awaiting an opportunity to regain momentum. A reassertion of legislative dominance immediately followed the assassination of Abraham Lincoln;<sup>60</sup> Johnson, Grant, and the remaining nineteenth century Presidents each experienced a hostile Congress actively asserting its powers. It was not until President McKinley, whose term of office extended into the twentieth century, that the stage was set for the modern trio of powerful presidents—Wilson and the two Roosevelts.

### 3. Twentieth Century Presidents

McKinley, who had been a most reluctant participant in the Spanish-American War, acted on the basis of his sole authority as Commander-in-Chief to send an army of 5,000 men and a naval contingent to join an international force organized for the purpose of suppressing the Boxer Rebellion in China during 1900.<sup>61</sup> While Congress was not in session at the time troops were deployed, it did not protest the action upon reconvening.<sup>62</sup> Arthur Schlesinger, Jr. points to this action as marking the beginning of a new era in Presidential war powers. While there had been numerous examples of previous war making by the President without legislative sanction, the intervention in China was the first significant action against a sovereign state.<sup>63</sup>

<sup>57</sup> *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

<sup>58</sup> See, e.g., J. JAVITS, WHO MAKES WAR 116-36 (1973); T. EAGLETON, WAR AND PRESIDENTIAL POWER 35-36 (1974); A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 58-67 (1973).

<sup>59</sup> LOCKE, *supra* note 33, at ch. 14.

<sup>60</sup> CORWIN, THE PRESIDENT, *supra* note 26, at 27-28.

<sup>61</sup> *Id.* at 259-60.

<sup>62</sup> While Congress recognized the existence of a state of war by providing for combat pay, Act of March 2, 1901, ch. 803, 31 Stat. 903, it neither declared war nor formally ratified the President's decision.

<sup>63</sup> A. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 89-90 (1973).

Theodore Roosevelt, the forerunner of powerful twentieth century Presidents, originated the use of explicit, implicit, and nonexistent constitutional powers. Unlike his predecessors, Roosevelt intended to play a major role in moving the United States into the international arena. Somewhat intimidated by his dominant personality, Congress acquiesced in Roosevelt's expansive visions of both United States and Presidential power. "The biggest matters (of my administration)," he stated, "such as the Portsmouth peace, the acquisition of Panama, and sending the fleet around the world, I managed without consultation with anyone; for when a matter is of capital importance, it is well to have it handled by one man only."<sup>64</sup>

The Wilson Presidency further advanced all aspects of the President's power as Commander-in-Chief. Following the raids of Pancho Villa into New Mexico, Wilson ordered a punitive expedition under the command of General John J. Pershing into Mexico;<sup>65</sup> and he later committed forces to North Russia and Siberia following the Bolshevik Revolution in 1917.<sup>66</sup> Congress apparently approved of the first action,<sup>67</sup> but took issue with the latter, introducing two resolutions to compel the withdrawal of U.S. forces.<sup>68</sup>

World War I strengthened all the forces which had for years been gathering in support of undiluted executive power. Even before war was declared, Wilson confronted Congress over the limitations of his office by seeking permission to arm merchant ships carrying goods to Europe. This request was denied by a filibuster of the famed small number of "willful men" led by Senators Robert LaFollette and George Norris.<sup>69</sup> Wilson then decided to rely on his own legal authority, ordering American merchant vessels equipped with guns, although he subsequently admitted that his action was "practically certain" to lead the United States into war.<sup>70</sup> The

<sup>64</sup> ROOSEVELT, LETTERS 1497-98 (E. Morison ed. 1956).

<sup>65</sup> Although the U.S. expedition ultimately grew to 12,000 men, Congress never formally sanctioned the invasion.

<sup>66</sup> Eight thousand American troops joined the Allied expedition against Bolshevik troops which lasted from 1918 to 1920.

<sup>67</sup> A resolution approving the use of armed forces passed the Senate but did not come up for vote in the House. See *Background Information on the Use of United States Armed Forces in Foreign Countries*, quoted in *1971 War Powers Hearings*, *supra* note 36, at 301.

<sup>68</sup> Both resolutions died in committee. *Id.* A watered-down resolution by Senator Hiram Johnson simply requesting information about the Siberian Expedition did pass. S. Res. 12, 66th Cong., 1st Sess. (1919), 58 CONG. REC. 1864 (1919).

<sup>69</sup> See LINK, WILSON THE DIPLOMATIST 84-85 (1963).

<sup>70</sup> 55 CONG. REC. 103 (1917).

advent of the war avoided any constitutional confrontation, and the Congress actively supported the President during the course of hostilities. In fact, by 1919, Wilson exerted "almost absolute authority over Congress."<sup>71</sup>

Following peace at the 1919 Versailles Conference, Congress emerged as the dominant branch of government. No other time in our history demonstrates as convincingly as does the period between World War I and World War II the thesis of the great foreign interpreter of American institutions, Alexis de Tocqueville, that legislatures are singularly unqualified to play a major role in the conduct of foreign relations.<sup>72</sup> The Senate's rejection of the League of Nations Covenant<sup>73</sup> and American participation in the World Court,<sup>74</sup> and Congress' passage of the infamous Neutrality Laws,<sup>75</sup> near enactment of the Ludlow Amendment,<sup>76</sup> and narrow affirmation of the necessity of maintaining the armed forces<sup>77</sup> all reaffirm de Tocqueville's position. Yet during this period of legislative dominance and resurgent isolationism, an unusually conservative Supreme Court broadly interpreted the powers of the President in foreign relations.

Upholding the power of the President to criminally enforce the arms embargo he had proclaimed against Bolivia and Paraguay, eight members of the Supreme Court distinguished the sources of the President's domestic and foreign affairs powers and concluded that

<sup>71</sup> J. JAVITS, *WHO MAKES WAR* 208 (1973). Examples of the broad grants of authority given to Wilson by Congress include the Lever Food and Fuel Control Act, Act of Aug. 10, 1917, ch. 53, 40 Stat. 276; the Selective Service Act, Act of May 18, 1917, ch. 15, 40 Stat. 76; the Espionage Act, Act of June 15, 1917, ch. 30, 40 Stat. 217; and the Trading with the Enemy Act, Act of Oct. 6, 1917, ch. 106, 40 Stat. 411.

<sup>72</sup> A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* ch. 13, at 126-32 (1873).

<sup>73</sup> For a general discussion of defeat of the League of Nations see R. LEOPOLD, *THE GROWTH OF AMERICAN FOREIGN POLICY* 385-401 (1962).

<sup>74</sup> See R. LEOPOLD, *supra* note 73, at 503-04.

<sup>75</sup> Act of Aug. 31, 1935, ch. 837, 49 Stat. 1081 *extended and amended by* Act of Feb. 29, 1936, ch. 106, 49 Stat. 1152; Act of Nov. 4, 1938, ch. 2, 54 Stat. 4, designed more to keep the United States out of war than to guide its conduct while other nations fought. See R. LEOPOLD, *supra* note 73, at 504-09.

<sup>76</sup> Which would have required a national referendum to declare war. See R. D. BURNS and W. A. DIXON, *Foreign Policy and the "Democratic Myth": The Debate on the Ludlow Amendment*, *MID-AMERICA* (Jan. 1965), cited in A. SCHLESINGER, *supra* note 63, at 431 n.59.

<sup>77</sup> Act of August 18, 1941, ch. 362, Pub. L. No. 77-213, extending the Selective Service Act, passed by only one vote, just four months prior to the Japanese attack on Pearl Harbor.

foreign affairs powers were extra-constitutional and that sovereignty itself empowered the President to act.<sup>78</sup> Warning Congress that its role in foreign policy was "significantly limited," the Court, speaking through Justice Sutherland went on to say that "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."<sup>79</sup> Even more pertinent to the current war powers debate is Sutherland's dictum that in international relations Congress must ". . . accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."<sup>80</sup> Although *Curtiss-Wright* has been the subject of a great deal of deserved criticism for its sweeping dicta,<sup>81</sup> it remains the basis upon which the President's role in foreign affairs is defined.

In 1940, when Roosevelt made his controversial exchange of fifty destroyers for the lease of British bases, *Curtiss-Wright* and statutes were cited by Attorney General Jackson as justification for this executive agreement.<sup>82</sup> The agreement was only one of a number of pre-World War II actions undertaken by the President without congressional authorization which put the United States on a collision course with the Axis powers: Greenland was placed under American control; Iceland was taken under U.S. protection; and Dutch Guinea was occupied.<sup>83</sup> Finally, in 1941, with only England standing against Germany, Roosevelt issued his famous "shoot-on-sight" order to the Navy:

[W]hen you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him. The Nazi submarines and raiders are

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<sup>78</sup> *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304 (1936).

<sup>79</sup> *Id.* at 319.

<sup>80</sup> *Id.* at 320.

<sup>81</sup> See, e.g., L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 23-28; Levitan, *The Foreign Relations Power: An Analysis of Mr. Sutherland's Theory*, 55 *YALE L.J.* 467 (1946).

<sup>82</sup> James MacGregor Burns stated this agreement "marked decisively the end of American Neutrality." BURNS, *ROOSEVELT: THE LION AND THE FOX* 441 (1956). See also SCHLESINGER, *supra* note 63, at 107-08. Corwin asserts this act violated at least two neutrality laws. CORWIN, *THE PRESIDENT*, *supra* note 26, at 238-39.

<sup>83</sup> This conclusion is unavoidable, for example, that in the years preceding Pearl Harbor, President Roosevelt and his advisers believed that many of their foreign policies could not have secured the support of a majority of Congress. Important foreign policies were made without prior or subsequent congressional consent.

R. DAHL, *CONGRESS AND FOREIGN POLICY* 178 (1950).

the rattlesnakes of the Atlantic. . . . They are a challenge to our sovereignty.<sup>84</sup>

This order, an overt act of war without any congressional participation, represents Presidential war making at its zenith.

Vindicated by the subsequent Japanese attack, Roosevelt's pre-war actions in the face of an isolationist Congress and conservative Court are frequently cited by proponents of a strong Presidency as a justification for vesting the Executive with discretionary war-making authority. "The grand revival of the presidential prerogative after Pearl Harbor," Arthur Schlesinger, Jr. writes, "must be understood as a direct reaction to what happened when Congress tried to seize the guiding reins of foreign policy in the years 1919 to 1939."<sup>85</sup>

From McKinley to Roosevelt, the precedent for Presidential war making continued, growing in each instance, so that ". . . in each successive crisis the constitutional results of earlier crises reappear cumulatively and in magnified form."<sup>86</sup> Thus it was not surprising that when the next significant emergency occurred, the invasion of South Korea, the President would find it unnecessary to seek congressional approval for his deployment of U.S. troops to this conflict.

On June 24, 1950, the North Korean army struck across the 38th parallel, overpowering the South Korean defenses and border forces. Acting without congressional approval and in advance of the ultimate United Nations request, President Truman moved the nation to war.<sup>87</sup> In his biography, General Douglas MacArthur expressed his concern about the manner in which the nation went to war,<sup>88</sup> but

<sup>84</sup> N.Y. Times, Dec. 9, 1941, at 1, col. 1. Merlo Pusey notes ". . . the fact that the September 11 ["shoot-on-sight"] speech put the nation into the war is widely recognized." M. PUSEY, *THE WAY WE GO TO WAR* 72 (1969).

<sup>85</sup> A. SCHLESINGER, *supra* note 63, at 99.

<sup>86</sup> CORWIN, *THE PRESIDENT*, *supra* note 26, at 262.

<sup>87</sup> For a general account of this period, see TRUMAN, *YEARS OF TRIAL AND HOPE*, VOL. II OF MEMOIRS (1956); KOENIG, *THE TRUMAN ADMINISTRATION* (1956).

<sup>88</sup> I could not help being amazed at the manner in which this great decision was being made. With no submission to Congress, whose duty it is to declare war, and without even consulting the field commander involved, the members of the executive branch of the government agreed to enter the Korean war. All the risks inherent in this decision—including the possibility of Chinese and Russian involvement—applied then just as much as they applied later.

D. MACARTHUR, *REMINISCENCES* 376 (1965). Subsequently relieved by Truman, General MacArthur was probably more piqued that he, rather than Congress, was

Secretary of State Dean Acheson's memoirs bear out the near unanimous congressional support at the war's inception,<sup>89</sup> support reflected in American public opinion.<sup>90</sup>

In response to Truman's request for legal justification for intervention, Acheson prepared a memorandum listing eighty-seven instances in which Presidents had committed American troops abroad on their own initiative, recommending "... that the President should not ask for a resolution of approval, but rest on his constitutional authority as Commander-in-Chief of the armed forces."<sup>91</sup> President Truman accepted Acheson's recommendation, and the Korean conflict became the first military engagement of this century to be initiated and carried out entirely by a President.

The real war powers debate during Truman's administration was triggered, not by Korea, but by the decision in 1951 to send four more divisions to Europe in order to reinforce its threatened defenses.<sup>92</sup> Representative Coudert attacked this commitment of forces to a potentially hostile area and proposed that "... no additional military forces" could be sent abroad "without the prior authorization of the Congress in each instance."<sup>93</sup> Truman responded with the argument derived from the Civil War that "... under the President's constitutional powers as Commander-in-Chief of the Armed Forces, Congressional approval was unnecessary."<sup>94</sup> Robert Taft, the conservative bulwark of the Senate, joined in support of the Coudert

not consulted; nevertheless his criticism points out the lack of formal authorization by Congress.

<sup>89</sup> At eleven o'clock I returned to the White House for a meeting with congressional leaders. . . . The President reported the situation in Korea, reviewed the actions previously taken by the United Nations Security Council and United States Government, and the orders he had issued that morning. A general chorus of approval was interrupted by, I think, Senator Kenneth Wherry questioning the legal authority of the executive to take this action. The President said that he would consider Smith's suggestion and asked me to prepare a recommendation. The meeting ended with Representative Dewey Short stating that Congress was practically unanimous in its appreciation of the President's leadership.

D. ACHESON, *PRESENT AT THE CREATION* 413 (1969) [hereinafter cited as ACHESON].

<sup>90</sup> Eighty percent of the American adult population supported Truman's initial decision according to the Gallup polls. FENTON, *IN YOUR OPINION* 89-90 (1960) cited in Gilbert, *supra* note 55, at 171 n.107.

<sup>91</sup> ACHESON, *supra* note 89, at 414-15. See also 23 DEP'T STATE BULL. NO. 173 (1950).

<sup>92</sup> See generally THE PRESIDENT: ROLES AND POWERS 343-59 (D. Haight and L. Johnston eds. 1965); SCHLESINGER, *supra* note 63, at 137-39.

<sup>93</sup> H.R.J. Res. 9, 82d Cong., 1st Sess. (1951).

<sup>94</sup> See THE PRESIDENT: ROLES AND POWERS, *supra* note 92, at 345-46.

resolution,<sup>95</sup> and was countered by a group of Truman apologists, including Arthur Schlesinger, Jr.<sup>96</sup> and Henry Steele Commager,<sup>97</sup> who would later object with equal fervor to the actions of Presidents Johnson and Nixon in Vietnam.

Truman's unilateral commitment of forces to this Korean "police action" was never directly challenged before the Supreme Court. A divided Court did, however, rule Truman's seizure of the steel mills to be unconstitutional, holding this power was assigned to Congress by the Constitution.<sup>98</sup> The steel seizure case significantly limits the President's domestic authority, but does not affect the Executive's role as Commander-in-Chief. Emphasizing this point, Justice Jackson stated in his concurring opinion:

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander-in-Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. . . .<sup>99</sup>

Congress, having acquiesced to President Truman's commitment of forces to Korea, continued to play a relatively minor role in

<sup>95</sup> The President has no power to agree to send American troops to fight in Europe in a war between the members of the Atlantic Pact and Soviet Russia. Without authority he involved us in the Korean War, without authority he apparently is now attempting to adopt a similar policy in Europe.

<sup>97</sup> 97 CONG. REC. 55-60 (1951). The debate ended inconclusively with a "sense of the Senate" resolution which approved the sending of the divisions but forbade additional ground troops "without further congressional approval." S. Res. 99, 82d Cong., 1st Sess., 97 CONG. REC. 3282 (1951).

<sup>98</sup> Schlesinger wrote in a letter to the *New York Times*:

Senator Taft's statements are demonstrably irresponsible. From the day that President Jefferson ordered Commodore Dale and two-thirds of the American Navy into the Mediterranean to repel the Barbary pirates American Presidents have repeatedly committed American armed forces abroad without prior congressional consultation or approval. . . . Until Senator Taft and his friends succeed in rewriting American history according to their own specifications these facts must stand as obstacles to their efforts to foist off their current political prejudices as eternal American verities!

Arthur Schlesinger, Jr., Letter to the N.Y. Times, January 9, 1951, reported in *THE PRESIDENT'S ROLES AND POWERS*, *supra* note 92, at 353. Schlesinger later recanted this position, although he did not deny its historical accuracy. A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 139 (1973).

<sup>97</sup> Agreeing with Schlesinger, Commager stated that "whatever may be said of the expediency of the Taft-Coudert program, this at least can be said of the principles involved—that they have no support in law or in history." Commager, *Presidential Power: The Issue Analyzed*, N.Y. Times, Jan. 14, 1951, § 6 (magazine), at 11, reported in *THE PRESIDENT'S ROLES AND POWERS*, *supra* note 92, at 354.

<sup>96</sup> *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>99</sup> *Id.* at 645 (Jackson, J., concurring).

similar decisions during the subsequent administrations of Eisenhower and Kennedy. When hostilities appeared to be possible near Formosa in 1955 and the Mideast in 1957, Congress authorized the President to use whatever military measures he deemed necessary.<sup>100</sup> Fourteen thousand troops were sent to Beirut in 1958 to assist Lebanon in preserving its political independence with little congressional dissent.<sup>101</sup> Similarly, when President Kennedy directed the abortive Bay of Pigs operation in 1961, sent troops to Laos in 1961, and ordered the Cuban naval quarantine in 1962, he chose either to not consult Congress or merely inform it of his decision.<sup>102</sup>

By the 1960's, the President's dominant authority in foreign policy matters was generally accepted. In fact, Senator Fulbright argued strongly during this period that

... [W]e have hobbled the President by too niggardly a grant of power . . . . As Commander-in-Chief of the armed forces, the President has full responsibility, which cannot be shared, for military decisions in a world in which the difference between safety and cataclysm can be a matter of hours or even minutes.<sup>103</sup>

Given Senator Fulbright's broad contention, it is appropriate that he was to furnish the cloak of legality for the Vietnam War in 1964—the Gulf of Tonkin Resolution.<sup>104</sup>

The history and result of the Vietnam War being well known, little needs to be said about Vietnam except to note that Congress was consulted, intervention was authorized, and the war initially enjoyed wide public support. The legality of the deployment of U.S. forces to Southeast Asia was not a major issue until the Gulf of Tonkin Resolution was repealed in 1971. At that time, President Nixon set the stage for the eventual passage of the current War Powers Act by stating that his authority to deploy the nation's

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<sup>100</sup> Formosa Resolution, Act of Jan. 29, 1955, ch. 4, 69 Stat. 7; Middle East Resolution, Act of Mar. 9, 1957, Pub. L. No. 85-7, 71 Stat. 5 as amended, Act of Sep. 4, 1961, Pub. L. No. 87-195, 75 Stat. 424.

<sup>101</sup> President Eisenhower did not rely on the Middle East Resolution for his action but asserted his "inherent" constitutional authority. 104 CONG. REC. 13, 903-04 (1958).

<sup>102</sup> See generally A. SCHLESINGER, JR., *A THOUSAND DAYS* (1965).

<sup>103</sup> Fulbright, *American Foreign Policy in the Twentieth Century Under an 18th Century Constitution*, 47 CORNELL L.Q. 47, 50 (1961).

<sup>104</sup> Tonkin Gulf Resolution, Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384, terminated Foreign Military Sales Act of 1971, Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053.

military forces was not dependent on congressional authorization, but was derived from the President's power as Commander-in-Chief.<sup>105</sup>

In his eulogy of James Madison in 1836, John Quincy Adams said, "However startled we may be at the idea that the Executive Chief Magistrate has the power of involving the nation in war, even without consulting Congress, an experience of fifty years has proved that in numberless cases he has and must have exercised the power."<sup>106</sup> This statement is no less valid as we approach the nation's bicentennial than it was when uttered. Strong Presidents and weak Presidents alike have found Congress willing to grant them total war powers authority during times of crisis. Whether such powers are included within the language of the Constitution or the intent of its drafters is doubtful. Congressional inertia or acquiescence has invited autonomous Presidential war-making powers.

Congressional subservience has never existed for an extended period of time, however, and the cyclic shifts of power following the administrations of strong wartime Presidents have greatly influenced the conduct of foreign relations. Hans Morgenthau views United States policy as moving "back and forth between the extremes of an indiscriminate isolationism and an equally indiscriminate internationalism or globalism."<sup>107</sup> In a recent article, one author charted these pendulum-like swings of power, concluding that the United States is currently on the downswing. "The immediate impact of Vietnam on United States foreign policy," he stated, "is already apparent: the Senate's restorative revolt, demoralized armed forces, international economic difficulties, and skeptical allies."<sup>108</sup> Another example should be included in this list: the War Powers Act of 1973.

### III. POLITICAL AND LEGISLATIVE DEVELOPMENT OF THE WAR POWERS ACT

Having analyzed the Constitution's language, the Founding Fathers' intent, and the historical practice of Chief Executives to determine the Constitution's ordering of war powers, one is inclined

<sup>105</sup> N.Y. Times, Jan. 14, 1971, at 4, col. 4.

<sup>106</sup> J.Q. ADAMS, EULOGY ON JAMES MADISON 47 (1836).

<sup>107</sup> H. MORGENTHAU, A NEW FOREIGN POLICY FOR THE UNITED STATES 15 (1969).

<sup>108</sup> Roskin, *From Pearl Harbor to Vietnam: Shifting Generational Paradigms and Foreign Policy*, 89 Pol. Sci. Q. 563, 587 (1974).

to agree with Arthur Schlesinger's conclusion that the issue is ". . . not, save at its outer fringes, primarily constitutional. It [is] primarily political."<sup>109</sup>

Recognizing the political nature of the war powers debate, it is imperative that the events which immediately precipitated the 1973 War Powers Act be examined. If, as many have argued, the Act was only an emotional response to a highly unpopular President, it may have little impact when the unpleasant memories of Watergate and Vietnam have subsided. On the other hand, if the Act was properly conceived by Congress and truly represented the prevailing public view, future Presidents will probably feel constrained to act within its framework.

"In this area," Justice Jackson stated in the steel seizure case, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."<sup>110</sup> These "contemporary imponderables," here a series of extraordinary foreign and domestic events which spurred passage of the Act, will be the subject of the first part of this section. Following an analysis of these events, the legislative development of the War Powers Act will be examined.

#### *A. CHAIN OF EVENTS: 1969 TO 1973*

Beginning in 1969, Congress began to question the President's role in foreign affairs and to seek further participation in war-related decisions. In June 1969, the Senate passed the important but largely symbolic National Commitments Resolution by a vote of 70 to 16. While not legally binding, the resolution expressed the

. . . sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and the legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both houses of Congress specifically providing for such commitment.<sup>111</sup>

By this resolution, the Senate served notice that the exercise of war powers by the President would henceforth be carefully scruti-

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<sup>109</sup> A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 201 (1973).

<sup>110</sup> *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>111</sup> S. Res. 85, 91st Cong., 1st Sess. (1969). See also S. Res. 787, 90th Cong., 1st Sess. (1967).

nized. More importantly, it set the stage for other resolutions concerning the conduct of the Indochina War that would be binding on the President. Accordingly, soon after this measure was passed, Republican Senator John Sherman Cooper of Kentucky and Democratic Senator Frank Church of Idaho introduced an amendment to a defense appropriations bill. This amendment, passed December 15, 1969, specified that no funds could be used by the President to deploy ground troops to Laos or Thailand.<sup>112</sup>

During this same time period, the Senate Subcommittee on United States Security Agreements and Commitments Abroad began to hold hearings under the chairmanship of former Secretary of the Air Force Stuart Symington. Hearings before Senator Symington's subcommittee revealed that the Johnson administration had made secret payments to Filipino, Thai, and Korean troops in Vietnam in order to encourage the appearance of free-world support for American involvement. In addition, evidence adduced before the Committee revealed previously undisclosed CIA participation in Laos.<sup>113</sup> Disclosure of these practices, each autonomously initiated by the President, provided additional impetus to the congressional effort to limit executive prerogative.

Yet, the War Powers Act was not the result of the Symington Committee's disclosures. In fact, the Vietnam war itself did not serve as the immediate cause for the Act, for Congress could not argue that its war-making powers had been usurped as long as the President was acting under explicit legislative authority. Deceptively brief and all-encompassing, the Tonkin Gulf Resolution was legal justification for President Johnson's intervention in Vietnam in 1964.<sup>114</sup> An advance *carte blanche* similar to Eisenhower's Formosa

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<sup>112</sup> Act of Dec. 26, 1969, Pub. L. No. 91-171, § 643, 83 Stat. 469, 487. Similar limitations were also enacted as part of the defense appropriation laws for 1971 and 1972. Act of Jan. 11, 1971, Pub. L. No. 91-668, § 843, 84 Stat. 2020; Act of Dec. 19, 1971, Pub. L. No. 92-204, § 742, 85 Stat. 716.

<sup>113</sup> The Symington Committee hearings were published in twelve volumes and summarized in SEN. COMM. ON U.S. SECURITY AGREEMENTS AND COMMITMENTS ABROAD, SECURITY AGREEMENTS AND COMMITMENTS ABROAD, S. REP., NO. --, 91st Cong., 2d Sess. (1970). See generally M. PUSEY, THE U.S.A. ASTRIDE THE GLOBE (1971); R. PAUL, AMERICAN MILITARY COMMITMENTS ABROAD (1973).

<sup>114</sup> The Gulf of Tonkin Resolution passed 416 to 0 in the House and 88 to 2 in the Senate. The wording of the enactment was sweeping:

The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution and the Charter of the United Nations and in accordance with its

and Mideast Resolutions, the Resolution served as further evidence of congressional deference to the President during times of war.<sup>115</sup> Thus, it was not the Vietnam war itself that triggered the war powers debate, but rather a product of that war, the April 1970 invasion of Cambodia.

### *1. The 1970 Cambodian Invasion: Catalyst for the War Powers Act*

With combined American and Vietnamese task forces already moving across Cambodian borders, President Nixon announced that he had authorized the invasion of that neutral country.<sup>116</sup> A classic military operation emphasizing speed and secrecy with a goal of cutting enemy lines of supply, the Cambodian operation was militarily sound but politically disastrous. Here, as always, the correct military decision should have been tempered by political exigencies. Weary of war and led to believe by President Nixon that American presence in Vietnam was on the downswing, the public reacted with overt hostility, culminating in the tragic incidents at Kent and Jackson State Universities.<sup>117</sup>

In the wake of these events, congressmen began questioning the

obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared as the President determines, to take all necessary steps, including the use of armed forces, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (1964). President Johnson directed this resolution prepared due to what he termed the "Taft Syndrome," referring to former Senator Taft who initially approved Truman's actions in Korea but later came to call them unconstitutional. See notes 94-97 and accompanying text *supra*. When Secretary Rusk testified before the Senate Foreign Relations Committee on this resolution, Senator Fulbright told Rusk it was "the finest Administration proposal to come before his Committee." Interview with former Secretary of State Dean Rusk in Athens, Georgia, November 15, 1974 [hereinafter cited as Rusk Interview].

<sup>115</sup> Senator Cooper, a constant critic of presidential war making, stated:

I do not concur . . . that the Executive has taken from the Congress its powers. The record, if studied, discloses that the Congress, particularly since World War II, has not only ceded to but has supported Executive resolutions requesting Congressional authority to use the armed forces of the United States if necessary in hostilities.

SENATE COMM. ON FOREIGN RELATIONS, WAR POWERS, S. REP. NO. 92-606, 92d Cong., 2d Sess. 30-32 (1972).

<sup>116</sup> R. NIXON, *The Situation in Southeast Asia* (Address to the Nation, April 30, 1970) in 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 596 (1970).

<sup>117</sup> See N.Y. Times, May 6, 1970, at 19, cols. 4-5; NEWSWEEK, May 18, 1970, at 31; TIME, May 18, 1970, at 13.

legality of the President's expansion of the war effort.<sup>118</sup> More importantly, the House began a series of hearings on the proper limits of the President's war-making authority, hearings that ultimately led to the War Powers Act.

The legislative history of the War Powers Act specifically designates the Cambodian invasion as the motivating force behind the initial bills and resolutions concerned with the war powers issue.<sup>119</sup> However, while the Cambodian invasion may have been the specific impetus for the beginning of the war powers hearings, the two-month operation was not, standing alone, momentous enough to sustain three years of congressional debate and produce such a major piece of legislation.<sup>120</sup> Other events occurring after the Cambodian operation maintained the momentum for change and deserve further attention.

## *2. 1971: Repeal of Tonkin Gulf Resolution, Laos Invasion, and Pentagon Papers*

In 1970, President Nixon abandoned the Tonkin Gulf Resolution as the basic legal foundation upon which American participation in Vietnam had been based and Congress repealed the resolution in

<sup>118</sup> E.g., "To many of us the invasion of Cambodia was not only a military and political blunder, but a slap at Congress, which had repeatedly and both formally and informally urged that our military operations be limited to South Vietnam." T. EAGLETON, *WAR AND PRESIDENTIAL POWER* 112 (1974). Senators Cooper and Church renewed their campaign to extend the previous Laos-Thailand troop prohibition to Cambodia. The Cooper-Church Amendment, forbidding the use of funds to maintain troops in Cambodia, passed the Senate by a vote of 58 to 37, but died in the House-Senate conference committee. Later, when U.S. troops had been withdrawn and the Administration had indicated it would not again use American troops in an invasion of Cambodia, Congress did act to bar any further use of American troops or advisors in Cambodia. Act of January 5, 1971, Pub. L. No. 91-652, § 7, 84 Stat. 1942.

<sup>119</sup> See HOUSE COMM. ON FOREIGN AFFAIRS, *WAR POWERS RESOLUTION*, H. REP. NO. 93-287, 92d Cong., 2d Sess. 2346 (1972).

<sup>120</sup> American participation in Cambodia ended June 30, 1970, and the Supplemental Foreign Assistance Authorization Act of 1971, in effect, banned the introduction of either ground troops or advisors into Cambodia:

In line with the expressed intention of the President of the United States, none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisors to or for Cambodian military forces in Cambodia.

Act of Jan. 5, 1971, Pub. L. No. 91-652, § 7(a), 84 Stat. 1942 (Cooper-Church Amendment).

January of 1971.<sup>121</sup> During this same month, a Gallup poll indicated that 73 percent of the American public favored the withdrawal of all U.S. combat forces from South Vietnam by December 31, 1971.<sup>122</sup> Despite public unrest and previous congressional appropriation limitations, the President agreed to the South Vietnamese invasion of Laos on February 8, 1971 after informing a few selected members of Congress. While no American ground troops were directly involved in Laos, United States air support and troop carrying helicopters were an integral part of the invasion. Unlike the reasonably successful Cambodian incursion, Lam Son 719, the Laos operation, was totally unsuccessful, and the ragged retreat of the Vietnamese army from Tchepone placed an even greater burden on the American forces in South Vietnam.<sup>123</sup>

The sanctity of presidential decision making in foreign affairs suffered yet another blow on June 13, 1971. It was on this day that the *New York Times* began publishing *The Pentagon Papers*,<sup>124</sup> a massive top secret history of the early years of United States involvement in Vietnam. For the first time, the step-by-step process by which our national leaders, from Eisenhower to Johnson, had involved the nation in war was revealed. Upon examining the series of decisions based on overly optimistic reports and whirlwind fact-gathering Vietnam visits, Congress was convincingly able to argue that it should have played a far greater role in determining the limits of American participation.<sup>125</sup> As Senator Church stated, "The myth

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<sup>121</sup> Act of January 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053. In *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972), the court of appeals held that Congress did not withdraw its war authorization by repealing the Tonkin Gulf Resolution. The Court cited the extension of the Selective Service Act, the approval of subsequent military appropriations, and the defeat of the McGovern-Hatfield Amendment which proposed to cut off military aid for Indochina as indications that the Congress still intended to support the war effort.

<sup>122</sup> See R. LISTON, *PRESIDENTIAL POWER* 18 (1971).

<sup>123</sup> See generally W. CARSON, *CONSEQUENCES OF FAILURE* 23 (1974).

<sup>124</sup> *THE PENTAGON PAPERS* (N. Sheehan ed. 1971). Although publication of the papers was temporarily enjoined, the Supreme Court held in *New York Times v. United States*, 403 U.S. 713 (1971), that the first amendment right to a free press overrode any subsidiary legal considerations that would block publication by the news media.

<sup>125</sup> *The Pentagon Papers* reveal the considerable Administration dissent during the early years of the Vietnam involvement. For instance, after returning from a tour of Asian countries, then Vice President Johnson wrote a memorandum to President Kennedy that Asian leaders "... do not want American troops involved in Southeast Asia. . . . American combat troop involvement is not only not

that the Chief Executive is the fount of all wisdom in foreign affairs today lies shattered on the shoals of Vietnam."<sup>126</sup>

### 3. *The Mansfield Amendment.*

During the publication of *The Pentagon Papers*, the Senate approved the first of several amendments introduced by Senate Majority Leader Mansfield. This particular measure urged the President "... to terminate at the earliest practicable date all military operations of the United States in Indochina."<sup>127</sup> President Nixon signed a 21.3 billion dollar military procurement bill to which this amendment was attached; however, in doing so, he emphasized that he would ignore the "end the war" rider as "... failing to reflect my judgment about the way in which the war should be brought to a conclusion."<sup>128</sup> The Mansfield Amendment's independence of congressional appropriation power and precatory terms enabled President Nixon to circumvent its intent.<sup>129</sup> Nevertheless this legislation marked the beginning of a congressional anti-war consensus that would surface repeatedly over the following two years.

### 4. 1972: "Peace is at Hand"

Nineteen seventy-two brought an overwhelming political victory to President Nixon and a public ratification of his foreign affairs

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required, it is not desirable." *THE PENTAGON PAPERS*, *supra* note 124, at 128. Later when General Taylor recommended committing troops to Vietnam, he admitted that "The strategic reserve of U.S. forces is presently so weak that we can ill afford any detachment of forces to a peripheral area of the communist block where they will be pinned down for an uncertain duration." *Id.* at 141. Had this information been public, it is possible that intervention would have been delayed or prevented.

<sup>126</sup> Quoted in LISTON, *supra* note 122, at 65.

<sup>127</sup> Act of Nov. 17, 1971, Pub. L. No. 92-156, § 601, 85 Stat. 430. Withdrawal was contingent on the release of American prisoners of war and an accounting for Americans missing in action. *Id.* § 601 (a) (1).

<sup>128</sup> R. Nixon, On Signing the Military Procurement Act of 1971, in 7 *WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS* 153 (1971).

<sup>129</sup> The legal effect of the Mansfield Amendment has never been fully resolved. In *DaCosta v. Nixon*, 55 F.R.D. 145 (E.D.N.Y.), the court held the Amendment was "law," but gave President Nixon very wide discretion. That case held the legislation did not prevent the Army from ordering a serviceman to engage in combat activities in Vietnam. A later decision, *DaCosta v. Laird*, 471 F.2d 1157 (2d Cir. 1973) cast doubt on whether any part of the Mansfield Amendment was binding.

policies and his initiation of peace talks with North Vietnamese representatives in Paris. Although the mining of North Vietnamese ports and harbors that year temporarily stirred anti-war demonstrations,<sup>180</sup> the prospect of peace increased President Nixon's popularity. Shortly before the 1972 presidential elections, National Security Advisor Henry Kissinger emerged from the Paris peace talks to confidently declare "peace is at hand."<sup>181</sup>

Peace, however, was somewhat illusory, and on December 16, 1972, Dr. Kissinger announced the temporary termination of the peace talks, and the bombing of North Vietnam was resumed.<sup>182</sup> Operation Linebacker, the so-called "incentive bombing," was an attempt to drive the North Vietnamese to a negotiated settlement. The large scale bombing effort continued until a few days before the opening of the 93d Congress, and generated a great deal of antagonism in the war-weary Congress. Even presidential supporters were disturbed by the President's inaccessibility before his decision to resume bombing.

#### *5. 1973 Cambodian Bombing: Eagleton Amendment and Holtzman v. Schlesinger*

While the bombing of Hanoi ended before the start of the 93d Congress, the continued bombing of Cambodia after the January 1973 Paris Peace Accords intensified congressional outrage to the point where a confrontation over the war powers issue became inevitable. Inbued with a sense of power and reasonably united, Congress began a two-pronged attack on the bombing of Cambodia: limitation of appropriations and judicial injunction of further bombing.

On May 15, Senator Eagleton introduced an amendment to the House-approved appropriation bill of 1973 that provided for an absolute termination of funds to be expended for combat activity in Cambodia and Laos. After a series of debates, the Congress accepted the "Eagleton Amendment" on June 25, 1973.<sup>183</sup> As expected,

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<sup>180</sup> See R. Nixon, The President's Address to the Nation (May 8, 1972), in 8 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 838 (1972).

<sup>181</sup> H. Kissinger, Vietnam Peace Negotiations (News Conference, Oct. 26, 1972) in 8 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1565 (1972).

<sup>182</sup> See H. Kissinger, Vietnam Peace Negotiations (News Conference, Dec. 16, 1972) in 8 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1764 (1972).

<sup>183</sup> 119 CONG. REC. 5372-74 (S. daily ed. June 26, 1973).

President Nixon vetoed the supplemental appropriations bill of June 27, declaring that ". . . the 'Cambodian rider' to this bill would cripple or destroy the chances for an effective negotiated settlement in Cambodia and the withdrawal of all North Vietnamese troops."<sup>184</sup>

Because the appropriations act to which the "Eagleton Amendment" was attached contained critical funding for vital federal activities,<sup>185</sup> the House failed to override the President's veto. Nevertheless, the hotly contested House vote on the matter indicated that a subsequent "Cambodian rider" might well be favorably received.

Sensing the powerful forces supporting an immediate end to the bombing, President Nixon accepted a compromise agreeing not to veto a resolution barring military operations in Cambodia after August 15, in return for congressional acquiescence to bombing until that date.<sup>186</sup> Thus, while the "Eagleton Amendment" was not itself successful, Congress was able to ultimately prohibit the bombing.<sup>187</sup>

During the period Senator Eagleton was attempting to prohibit further bombing by legislative means, Representative Elizabeth Holtzman was seeking a judicial solution. In a widely-publicized decision, the Federal District Court for the Eastern District of New York permanently enjoined the bombing of Cambodia.<sup>188</sup> The judgment declared that "there is no existing Congressional authority

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<sup>184</sup>R. Nixon, Veto of Second Supplemental Appropriation Bill (June 27, 1973) in 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 861 (1973).

<sup>185</sup>Including issuance of social security checks, see note 133 *supra*.

<sup>186</sup>For a discussion of this compromise suggested by Senator Fulbright, see Eagleton, *The August 15 Compromise and the War Powers of Congress*, 18 St. Louis L. J. 1 (1973).

<sup>187</sup>Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130; Act of July 1, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99. Recently critics have attacked this legislation as encouraging further aggressive actions by Cambodian rebels. Philip C. Habib, Assistant Secretary of State, said in a news conference that just as negotiation efforts ". . . appeared to be approaching a serious state [in Cambodia], they were thwarted by the final bombing halt in August that was legislated by Congress." Mr. Habib argued that once bombing stopped, the insurgents had little incentive to pursue further negotiations. N.Y. Times, Mar. 6, 1975, at 3, col. 1.

<sup>188</sup>*Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973).

to order military forces into combat in Cambodia, and that military activities in Cambodia by American armed forces are unauthorized and unlawful. . . ." <sup>139</sup>

On appeal, the Second Circuit ordered a stay of the lower court's decision pending oral arguments. However, in an unprecedented move, Justice Douglas held a summary hearing while on holiday in Washington state, and vacated the stay, thus demanding a bombing halt.<sup>140</sup> Within seven hours, Justice Marshall, after consulting with other members of the Court by telephone, overturned Ms. Holtzman's brief victory and reinstated the Court of Appeals' order.<sup>141</sup>

This series of unorthodox judicial developments and the congressional success in limiting Cambodian bombing focused the public's attention on the President's use of war powers and set the stage for some form of legislated limitation on the Presidential war-making authority.

Thus, the chain of events from 1969 to 1973 contributed significantly to the already growing disenchantment with the President's unilateral use of his war-making prerogatives. At first, the legislature was not united, and could only muster sufficient support to pass nonbinding "sense of the Senate" resolutions. Then, as the Cambodian and Laotian invasions aroused the public and solidified the anti-war sentiment in Congress, the Cooper-Church Amendments, Mansfield Amendments, and Eagleton Amendment passed. Such legislation, however, only limited the President *after* he had made a commitment of forces and still excluded Congress from the initial decision-making process.

*The Pentagon Papers* demonstrated that in order to be effective, Congress must be in a position to influence war-related decisions from their outset. Major legislation, therefore, was necessary to insure Congress would be properly consulted before future wars like Vietnam developed. From this reasoning emerged the first war

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<sup>139</sup> *Id.* at 553.

<sup>140</sup> *Schlesinger v. Holtzman*, 414 U.S. 1317 (1973). See *TIME*, Aug. 13, 1973, at 3.

<sup>141</sup> *Schlesinger v. Holtzman*, 414 U.S. 1312 (1973). On remand, the Second Circuit reversed the decision of the district court, 484 F.2d 1307 (2d Cir. 1973). The court held that even if the bombing violated the Mansfield Amendment, *supra* note 127, Congress had impliedly authorized the bombing up to August 15. See notes 136-37 and accompanying text *supra*.

powers resolution and three years of congressional hearings and debates.

### B. COMPROMISE AND DEBATE: THE DEVELOPMENT OF THE WAR POWERS ACT

Following the invasion of Cambodia, the House Subcommittee on National Security Policy and Scientific Developments began a series of hearings on proposals to insure, as Abraham Lincoln had stated, that ". . . no one man should hold the power of bringing [war] upon us."<sup>142</sup> The resulting House Resolution was an attempt by the Committee to insure congressional participation in future war-related decisions.<sup>143</sup> No attempt was made in the resolution to define when the President could permissibly act; rather, it sought to introduce new procedures. First, the President was urged to consult with Congress before committing the armed forces to combat. Second, in the event that the President deployed military forces, he was required to "promptly" submit a report to Congress justifying the action. Unanimously reported by the Committee, the joint resolution overwhelmingly passed in the House by a vote of 288 to 39.<sup>144</sup> Characteristically slow, or perhaps looking toward the presentation of its own war powers bills,<sup>145</sup> the Senate failed to act, and the measure died at the end of the 91st Congress.

#### 1. The Ninety-second Congress

Not to be deterred, the House made the issue of war powers the first item on the new agenda of the 92d Congress and passed Representative Zabloncki's (D. Wis.) House Joint Resolution 1 on August 2, 1971.<sup>146</sup> Concurrently, the Senate Committee on Foreign Relations considered proposals to limit the President's war-making authority from Senators Javits, Stennis, Eagleton, Taft, and others.<sup>147</sup>

<sup>142</sup> 2 WRITINGS OF ABRAHAM LINCOLN 52 (Lapsitz ed. 1905).

<sup>143</sup> H.J. Res. 1355, 91st Cong., 2d Sess. (1970).

<sup>144</sup> See HOUSE COMM. ON FOREIGN AFFAIRS, WAR POWERS RESOLUTION, H. REP. NO. 93-287, 92d Cong., 2d Sess. 2346 (1972).

<sup>145</sup> Senator Javits also proposed his first war powers measure in 1970, S. 3964, 91st Cong., 2d Sess. (1970).

<sup>146</sup> H.J. Res. 1, 92d Cong., 1st Sess. (1971). The full text of this resolution is set forth in Appendix B.

<sup>147</sup> For a discussion of the various Senate proposals, see Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?* 6 U. RICH. L. REV. 1 (1971).

These hearings ultimately resulted in Senate Bill 2956, passed on April 13, 1972 by a vote of 68 to 16.<sup>148</sup>

The bill, a modified version of Senator Javits' proposal, was considerably more definitive and restrictive than House Joint Resolution 1. At the heart of the Javits bill were two controversial provisions: a definition of the limits of the President's war-making powers and a time restriction on all hostile action initiated by the President without congressional approval. Presidential authority to commit American forces to hostilities was limited to four situations: (1) to repel an attack upon the United States, take necessary and appropriate retaliatory actions in the event of such an attack, and forestall the direct and imminent threat of such an attack; (2) to repel an attack against U.S. military forces located outside the United States, and to forestall the direct and imminent threat of such an attack; (3) to evacuate endangered citizens of the United States located in foreign countries; and (4) to carry out specific statutory authorization which could not be inferred from any treaty, legislation, or appropriation act.<sup>149</sup>

Another important feature of the Javits bill was a time limitation on a President's use of force. Hostilities initiated by the Chief Executive in accordance with the bill's four enumerated areas of Presidential unilateral authority could

... not be sustained beyond thirty days from the date of their initiation except as provided in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.<sup>150</sup>

Thus the Javits bill placed two important limitations on the President: a condition precedent in the fourfold definition of Presidential war-making authority and a condition subsequent of only thirty days of unapproved military action.

## 2. *Criticism of the Javits Bill*

It was the stricter Javits bill, not the House resolution, which generated numerous critical responses. Former Secretary of State Rusk stated "We should not clutter up our Constitution with detailed

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<sup>148</sup>S. 2696, 92d Cong., 2d Sess. (1972) was introduced by Senator Javits but co-sponsored by Senators Stennis, Eagleton and Spong. The full text of this bill is set forth in Appendix C.

<sup>149</sup>*Id.* § 3.

<sup>150</sup>*Id.* § 5.

directives to the President and to the Congress where we cannot know the future circumstances in which such directives shall be followed."<sup>151</sup> Professor Rostow argued that the bill ". . . would permit a plenipotentiary Congress to dominate the Presidency (and the courts as well) more completely than the House of Commons governs England; that is, it would permit Congress to amend the Constitution without the inconvenience of consulting the people."<sup>152</sup> "In my opinion," Senator Goldwater stated, "this legislation, known as the War Powers Bill, is unrealistic, unwise, and unconstitutional."<sup>153</sup> Professor Schlesinger called the proposal "too expansive as well as too restrictive," and the thirty-day deadline "a hoax," as "most wars are popular in the first 30 days."<sup>154</sup>

Despite the limitations and criticism of the Javits bill, it still represented the only serious attempt of a twentieth century Congress to actually define and delineate the war-making authority of the respective branches. Had such a precise interpretation been included in the Constitution, Presidents might well have been constrained from timely action, but their ultimate decisions would have carried with them the support of a majority of Congress. Indeed, such an interpretation might have avoided the divisiveness engendered by the Vietnam war.<sup>155</sup> This advantage must be weighed against the serious limitations implicit in the Senate bill's narrow definition of

<sup>151</sup> Letter from Dean Rusk to Barry M. Goldwater, May 11, 1971, cited in Goldwater, *The President's Ability to Protect America's Freedoms—The War-making Power*, 3 ARIZ. SR. L.J. 423, 445 n.149 (1971).

<sup>152</sup> Rostow, *Great Cases Make Bad Laws: The War Powers Act*, 50 TEXAS L. REV. 833, 835 (1972).

<sup>153</sup> See *War Powers Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. at 296 (1973) [hereinafter cited as 1973 *War Powers Hearings*].

<sup>154</sup> *Id.* at 172-73 (testimony of Prof. A. Schlesinger, Jr.). Schlesinger stated during the House hearings: "With the President's immense advantages in his control of information, in his ability to define the emergency, in his capacity to rouse the nation, it would take a very stout-hearted Congress indeed to veto his request. . . ." *Id.* at 173.

<sup>155</sup> Prof. Raoul Berger, an advocate of greater congressional participation in foreign affairs, cites W. Averill Harriman and others for the proposition that: ". . . if foreign policy is to be understood, the people must understand it: the Senate is the forum of debate which enlightens public opinion and facilitates a rational decision by the electorate. Such debate serves to expose differences and disunity. (Citations omitted).

Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 57 (1972).

the President's war powers. The fourfold enumeration of the President's authority would not have included, for instance, Roosevelt's pre-World War II preparations, including the Lend-Lease Act;<sup>156</sup> President Johnson's 1964 Congo rescue mission which saved several thousand non-Americans;<sup>157</sup> or President Kennedy's naval quarantine of Cuba.<sup>158</sup> Alexander Hamilton noted some two centuries ago the danger of such limitations on war powers, stating:

These powers ought to exist without limitations, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.<sup>159</sup>

### 3. Failure of the War Powers Resolutions

The differences between the House resolution and the Senate bill resulted from two opposing views. Not wishing to hamstring a President, but desiring a defined position in war-related decisions, the House proposed pre-commitment consultation and post-action reporting. The Senate bill, on the other hand, took an essentially negative approach to executive war powers, limiting such authority in advance of hostilities to four static categories. Summing up the opposing philosophical approaches, Senator Javits stated during the war powers hearings in the House, "I think in the House you let him [the President] go forward unless you stop him and in the Senate we say, 'You do not have the authority to go forward unless we give it to you.'" <sup>160</sup>

In that the House and Senate war powers bills varied both in content and philosophy, the two Houses convened a conference committee to resolve the differences. After considerable delay and only a single meeting of the committee, the proposals died for lack of consensus. "This failure was not unexpected," one of the authors of the Senate bill stated, "The two bills had little common ground."<sup>161</sup>

If history had served as an accurate guide, the movement towards

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<sup>156</sup> 1973 *War Powers Hearings*, *supra* note 153, at 173 (testimony of Prof. A. Schlesinger, Jr.).

<sup>157</sup> *Id.* at 296 (testimony of Sen. B. Goldwater).

<sup>158</sup> See Rostow, *supra* note 152, at 839.

<sup>159</sup> THE FEDERALIST NO. 23, at 133 (C. Rossiter ed. 1961) (A. Hamilton).

<sup>160</sup> 1973 *War Powers Hearings*, *supra* note 153, at 20 (testimony of Sen. J. Javits).

<sup>161</sup> EAGLETON, *supra* note 118, at 142.

war powers legislation would have ended with the failure of the 92d Congress to enact specific restrictions on Presidential power. Each strong wartime President in American history has been followed by a resurgent legislature, and in each cyclic adjustment of power, bills to limit the President's wartime authority have been considered or introduced without success.<sup>162</sup> There was ample reason to believe that this pattern would be repeated in 1973: American forces were nearly out of Vietnam; the Cambodian invasion was long since completed; and President Nixon had just received the largest popular vote in the history of the United States. Nevertheless, the 93d Congress succeeded in bringing the War Powers Act to fruition in 1973, and the cumulative effect of the extraordinary chain of events which occurred between 1969 and 1973 was instrumental in motivating Congress toward limiting the perceived powers of the President.

#### 4. *The Ninety-third Congress*

The renewed "incentive bombing" of North Vietnam which followed Dr. Kissinger's overly optimistic "peace is at hand" speech and the post-peace treaty bombing of Cambodia in 1973 encouraged congressmen to reconsider the twice-rejected war powers proposals. Senators Javits, Eagleton, Stennis and sixty other co-sponsors introduced Senate Bill 440,<sup>163</sup> the same War Powers Act that had previously received a favorable vote in the Senate. In the House, Representative Zabloncki introduced House Joint Resolution 542,<sup>164</sup> a modified proposal based upon both the House and Senate versions. Six days of hearings in the House resulted in an additional thirty-seven bills being submitted, all with one common theme—the limitation of Presidential war-making authority.<sup>165</sup> The sheer magnitude of the number of bills introduced is indicative of the extraordinary interest of the Congress in this subject.

On July 18, 1973, the House passed Joint Resolution 542 by a

<sup>162</sup> For examples of previous congressional attempts to limit a President's war making, see Goldwater, *supra* note 151, at 426-32 and accompanying notes. See also Roskin, *From Pearl Harbor to Vietnam, Shifting Generational Paradigms*, 89 Pol. Sci. Q. 563 (1974) for an excellent discussion of historical cyclic trends.

<sup>163</sup> S. 440, 93d Cong., 1st Sess. (1973).

<sup>164</sup> H.J. Res. 542, 93d Cong., 1st Sess. (1973).

<sup>165</sup> See H. CONF. REP. No. 93-547, 93d Cong., 1st Sess. 2347 (1973) for a breakdown of the various types of proposals and their respective authors. [Hereinafter cited as CONFERENCE REPORT.]

vote of 244 to 170.<sup>166</sup> Two days later the Senate again passed the stricter Javits-Eagleton measure, which contained the fourfold restriction on the President's war-making powers.<sup>167</sup> There existed, however, ample evidence that the authors of the Senate bill were willing to compromise with the House in order to insure the passage of some form of war powers legislation. Accordingly, after five long conference meetings, the respective managers of the House and Senate bills agreed, on October 3, 1973, to a compromise resolution.<sup>168</sup>

### 5. *The Conference Committee's War Powers Act*

The Conference Committee made an heroic attempt to combine the nearly irreconcilable House and Senate products into one piece of legislation. Four key sections emerged from the compromise: a definition of the President's constitutional war-making powers; a pre-force commitment consultation requirement; a post-force commitment reporting requirement; and an overall time limitation on the President's use of force. Detailed analysis of the substance of these sections will consume an entire section of this article;<sup>169</sup> only their derivation need be dealt with here.

The controversial definition of Presidential powers promulgated by Senators Javits and Eagleton was condensed and included in the Act. However, the conference committee's report cast doubt on the definition's legal effect.<sup>170</sup> Consultation and reporting requirements, originally suggested by the House in 1970, were revised and included.<sup>171</sup>

On the issue of a deadline for the termination of hostilities, the conferees adopted a modified version of the Senate's approach. The final Act imposed a sixty-day time limitation on the President's authority to commit troops into foreign hostilities.<sup>172</sup> The sixty-day

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<sup>166</sup> 93d Cong., 1st Sess. (1973). For the vote, see 119 CONG. REC. 6283 (H. daily ed. July 18, 1973).

<sup>167</sup> 119 CONG. REC. 14226 (S. daily ed. July 20, 1973) (S. 440).

<sup>168</sup> For a discussion of the conference committee's actions, see 31 CONG. Q. WEEKLY REP. 2740-43 (1973) and CONFERENCE REPORT, *supra* note 165, at 2363-66.

<sup>169</sup> See Section IV *infra*.

<sup>170</sup> CONFERENCE REPORT, *supra* note 165, at 2364. See also notes 197-200 and accompanying text *infra*.

<sup>171</sup> CONFERENCE REPORT, *supra* note 165, at 2364.

<sup>172</sup> The termination period in H.J. Res. 542 was 120 days and in S. 440, thirty days.

period could be extended an additional thirty days if necessary to permit the safe withdrawal of U.S. forces, but this ninety-day period was not absolute, however, as the Act authorized Congress to demand the withdrawal of committed U.S. forces *at any time* by passage of a concurrent resolution.<sup>173</sup>

Two new "house keeping" sections were added in the conference committee to insure prompt congressional action on presidential requests and to establish certain priority procedures. Other new additions included definitions of important terms and a severability clause in the event any portion of the Act was found unconstitutional.

Thus the central provisions of the ultimate War Powers Act were less restrictive than the stronger Senate version but much more stringent than the original House proposal. Reporting and consultation were required, and the President's actions limited to a maximum of ninety days without congressional approval, but no limitation appeared to restrict Presidential war-making *prior* to his decision to commit troops, save only constitutional restrictions.

The omission of such limitations caused Senator Eagleton, a co-sponsor of the original Senate bill to find the compromise unacceptable. He argued that the authorized ninety-day period, unrestricted by any definition of permissible action, constituted in reality an increase in, rather than a limitation of, Presidential war-making powers. During a Senate debate he argued:

This is no historical moment of circumscribing the President of the United States insofar as warmaking is concerned. This is an historic tragedy. It gives to the President and all of his successors in futuro, a predated 60 day unilateral warmaking authority. All the words here today cannot change what this law does, and what it does is wrong.<sup>174</sup>

His assertion is not without merit. Once the President has committed troops to hostilities neither the courts nor the legislature is likely to recall this decision. Although it is true that the President does remain bound by the limits of the Constitution, this is an

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<sup>173</sup> As will be discussed in Section IV, this controversial provision allows Congress to terminate a commitment of U.S. troops to foreign hostilities by majority vote of a concurrent resolution—an action which would not require Presidential approval. Senate Bill 440, on the other hand, required a bill or joint resolution to require troop withdrawal.

<sup>174</sup> EAGLETON, *supra* note 118, at 219. See also Eagleton, *A Dangerous Law*, N.Y. Times, Dec. 3, 1973, at 39, col. 3.

elastic limitation which has historically encompassed a wide range of presidential actions during a time of war. Indeed, once troops are legally committed to combat, regardless of the source of congressional permission to do so, the President's constitutional designation as Commander-in-Chief is paramount, superseding other related powers of Congress if American lives are endangered.<sup>175</sup>

Senators Stennis, Javits, and other original sponsors of the Senate bill disagreed with Eagleton's analysis at least insofar as they thought the compromise version better than no control over the President, and the War Powers Act passed by a vote of 75 to 20<sup>176</sup> in the Senate and 238 to 138<sup>177</sup> in the House.

As expected, President Nixon vetoed the Act on October 24, 1973 saying "The restrictions which this resolution would impose upon the authority of the President are both unconstitutional and dangerous to the best interests of our Nation."<sup>178</sup> Many observers felt this veto would end the congressional attempt to legislate on war powers, as Congress had been unsuccessful in several previous attempts to override a veto. Even at the height of the unpopular Cambodian bombing, Congress had been unable to muster the necessary two-thirds majority, and the issue of Presidential war-making remained extremely controversial. Once again, however, the impetus for congressional unity and action lay beyond the confines of the war powers debate.

#### 6. *Watergate: Overriding the President's Veto*

It would appear doubtful that President Nixon's actions in Southeast Asia alone would have generated the degree of congressional opposition necessary to insure overriding a Presidential veto of a war powers bill. It was, in reality, the burglary of Democratic campaign headquarters by individuals connected with President

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<sup>175</sup> Professor Alexander Bickel argued with regard to the 1970 invasion of Cambodia that:

The Cambodian actions nobody could have stopped, authorized or not authorized. They were taken as actions in a de facto war by a commander in chief. . . . Once there is a war, the Commander in Chief can move his forces any place he wants to achieve safety and victory.

1973 *War Powers Hearings*, *supra* note 153, at 183.

<sup>176</sup> 119 CONG. REC. 19006 (S. daily ed. Oct. 10, 1973).

<sup>177</sup> 119 CONG. REC. 8963 (H. daily ed. Oct. 12, 1973).

<sup>178</sup> R. NIXON, Veto of War Powers Resolution (Oct. 24, 1973) in 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS No. 43, at 1286 (1973).

Nixon's reelection committee which breathed new life into the War Powers Act's potential for enactment.

Even though a matter of entirely domestic concern, the discovery of the burglary of Democratic headquarters, generically termed the "Watergate affair," colored every aspect of the President's powers. Each new Watergate-related incident added impetus to congressional consideration of methods by which to limit Presidential authority.

President Nixon had consistently refused to provide a specially convened grand jury with tape recordings of his conversations with members of his administration suspected of criminal activity in connection with the burglary of the Watergate offices and other related offenses. Finally, after great public pressure, President Nixon did agree to have Senator Stennis review the tapes and provide a summary to the grand jury. Special Prosecutor Archibald Cox publicly announced, however, that he would not accept the President's compromise and would, instead, continue further court action. When ordered by the President to fire Cox, Attorney General Elliott Richardson resigned instead. Deputy Attorney General William Ruckelshaus, who also refused to fire Cox, resigned in protest. Only after President Nixon appointed a new Acting Attorney General was he able to fire the Special Prosecutor.<sup>178</sup>

These dramatic developments had a tremendous impact on the pending War Powers Act.<sup>180</sup> Congressional anger over the Cox firing was still apparent when the vote to override the Presidential veto of the War Powers Act was taken on November 7. One Senator reported such comments as these from his colleagues: "This is not the time to support Nixon;" "We simply have to slap Nixon down, and this is the vote to do it on;" and "I love the Constitution, but I hate Nixon more."<sup>181</sup> As a result of this high degree of animosity toward the President evidenced by some, and a genuine concern by others over the President's broad war powers, the House voted 284 to 135 in favor of the Act.<sup>182</sup> Thus, by the slim margin of four votes the House overrode the President's veto. On that same day, the

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<sup>178</sup> See R. Nixon, Discharge of Watergate Special Prosecutor in 9 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1271-72 (1973).

<sup>180</sup> For an account of this so-called "Saturday Night Massacre" and its tremendous effect on the pending War Powers Act see EAGLETON, *supra* note 118, at 213-25.

<sup>181</sup> *Id.* at 215-16, 220.

<sup>182</sup> 119 CONG. REC. 9660 (H. daily ed. Nov. 7, 1973).

Senate followed suit, voting passage of the Act by a vote of 75 to 18.<sup>183</sup> This action marked the first time the 93d Congress had been able to override a Presidential veto.

It is evident that a series of extraordinary events, including unprecedented developments on both the domestic and foreign scenes produced the landmark War Powers Act of 1973. Each of the President's war-related decisions from 1969 to 1973 precipitated a corresponding attempt at legislative limitation by a Congress gradually uniting in opposition to the war. Senate end-the-war amendments, congressional repeal of the Tonkin Gulf Resolution, and prohibitions on bombing of Cambodia were indications of a growing consensus in Congress. Finally, at the height of the Watergate affair, the House and Senate were able to achieve compromise and pass the first significant restriction on the autonomous war-making authority of a President.

Unfortunately, the chain of incidents leading to the passage of the War Powers Act seems to indicate that rather than being directed at the *Office* of the Presidency, the restraints contained therein were designed to remedy the abuses of a particular President. The Act, however, was never applied during President Nixon's administration, as he was forced to resign less than a year after its enactment. As a result, it remains for future Presidents to grapple with the wording and underlying intent of this significant and emotionally charged piece of legislation.

#### IV. THE WAR POWERS ACT: LEGISLATIVE ANALYSIS

A product of the conference committee's substantial revision and modification, the War Powers Act emerged in a form different than that desired by either the supporters of the Zabloncki or Javits bills. The result has been called ". . . confused, because in an effort to reconcile their differences, the Senate and House produced a hodge-podge."<sup>184</sup> Nevertheless, the Act was greeted with tremendous enthusiasm, as its supporters insisted that "If any single activity in Congress illustrates the efforts being made to reinstate the symmetry of powers between the branches envisioned by the Constitution, it is the enactment of the war powers resolution."<sup>185</sup>

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<sup>183</sup> 119 CONG. REC. 20098 (S. daily ed. Nov. 7, 1973).

<sup>184</sup> *A Bad War Powers Bill*, THE NEW REPUBLIC, Oct. 27, 1973, at 6.

<sup>185</sup> Hopkins, *Congressional Reform Advances in the Ninety-Third Congress*, 60 A.B.A.J. 47 (1974).

Does the Act really achieve this laudable goal of reinstating symmetry? Or, do its compromised wording and ambiguous requirements obscure the drafters' true intent? More importantly, are portions of the Act likely to both be held unconstitutional and, in John Norton Moore's words, ". . . precipitate a constitutional crisis between Congress and the President when the nation can least afford it?"<sup>186</sup> While answers to these questions may require additional legislative and judicial interpretation, an examination of the important sections of the War Powers Act will help clarify its requirements and point out the possible problems it poses.

Prior to analyzing the precise language of the Act, one must focus upon the competing philosophies underlying the compromise resolution. In the conference committee, the House approach was characterized as the "performance test" and the Senate proposal as the "authority test."<sup>187</sup> Using this terminology, consultation (section 3) and reporting (section 4) requirements were established by the House in order to properly evaluate the President's "performance." The definition of the Chief Executive's constitutional powers as Commander-in-Chief (section 2) and the restriction on the exercise of such authority to sixty days (section 4) are derived from the Senate's efforts to place limitations on the "authority" of the President. Throughout the following analysis of the War Powers Act's provisions, this performance-authority dichotomy should be borne in mind, as it accounts for some of the apparent contradictions in the legislation.

#### A. DEFINITION OF THE PRESIDENT'S WAR POWERS

The unresolved conflict between the Senate and House approaches to the war-making powers of the President is best demonstrated in section 2 of the War Powers Act, entitled "Purpose and Policy." Using the Constitution's "necessary and proper" clause as authority,<sup>188</sup> section 2(c) purports to limit the constitutional powers

<sup>186</sup> 1971 *War Powers Hearings*, *supra* note 36, at 471.

<sup>187</sup> During the Senate debate on the conference committee report Sen. Javits stated:

The House was absolutely adamant against what is called an authority test. . . . The only bill we could get out was one based on a performance test. It is a miracle that we got this bill.

<sup>188</sup> 119 CONG. REC. 18994 (S. daily ed. Oct. 10, 1973).

<sup>189</sup> Article I, § 8 of the Constitution gives Congress the power  
To make all Laws which shall be necessary and proper for carrying into Execution

of the President to commit forces to actual or imminent hostilities to only three situations: (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.<sup>189</sup>

While section 2(c)'s definition is clearly the result of the Senate's demand for some statement of the President's constitutional limitations, it is inexplicably narrower than even the controversial Javits-Eagleton proposal. Conspicuously absent from the original Senate proposal is authority to allow the President to evacuate or protect American citizens abroad. While this omission would appear to be an oversight, Congressman Donald M. Fraser (D. Minn.) stated "We [members of the conference committee] recited the President's powers in the bill and rescuing U.S. citizens is not one of them. Such a provision was included in the Senate bill but dropped in conference."<sup>190</sup>

While not explicitly provided for in the Constitution, few actions of American Presidents have been as generally accepted as limited defensive measures designed to protect American lives abroad.<sup>191</sup> It is difficult to imagine that President Johnson, informed that there were "400 to 500 Americans in the parking lot next to the Ambassador Hotel [in Santo Domingo, Dominican Republic] who

the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

<sup>189</sup> War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555 (1973) [hereinafter all sections cited will be to the War Powers Act unless otherwise indicated].

<sup>190</sup> Fraser, *The Veto is Wrong*, THE NEW REPUBLIC, Nov. 3, 1973, at 9.

<sup>191</sup> In *Durand v. Hollins*, 8 F. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860), the court denied recovery for damages inflicted by a U.S. naval officer protecting citizens and their property in Nicaragua. Presidential authorization for the action was upheld, the court stating:

For the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President.

*Id.* at 112. The right to protection abroad has been said to be one of "privileges and immunities of citizens of the United States." *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872). Professor Lillich has indicated that while there is some scholarly opinion against unilateral intervention by states to protect their own nationals due to Article 2(4) of the United Nations Charter, the "President has and should have the power to protect Americans abroad" subject to strict limitations of "internal chaos." Letter from Richard D. Lillich to Senator J. W. Fulbright, June 10, 1971 noted in 1971 *War Powers Hearings*, *supra* note 36, at 796-97. *Accord*, Friedman, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205 (1969).

were in danger of being liquidated at any moment . . ." would have considered he lacked constitutional power to act promptly in order to protect these U.S. citizens.<sup>192</sup> Yet when asked about this limited definition of the President's powers, Senator Javits replied:

There was a long argument [in the conference committee] about including the concept of rescuing nationals. It was felt that whatever was specified on that score, in order to be conservative in respect to the President's powers, would have to be so hedged and qualified that we were better off just not saying it, in view of the fact that it is a rather rare occurrence, and just leaving that open; and that is what we did.<sup>193</sup>

Senator Javits' oblique statement tends to indicate that the conference committee may well have been more concerned with problems of legislative draftsmanship than with constitutional considerations in its attempts to define the President's war powers.

Section 2(c) also omits the Senate bill's provisions allowing the President to act to forestall an imminent threat of attack. Substituted for this judicially accepted aspect of the President's war-making authority is the extremely restrictive requirement that, before a President may act, there must exist *both* a "national emergency" *and* an "attack upon the United States, its territories, or its armed forces."

The contention has been made that such language would have prohibited President Roosevelt from protecting vital allied shipping by invoking his 1941 North Atlantic policy before Pearl Harbor.<sup>194</sup> Eugene Rostow has warned that restrictions such as these ". . . would have prevented President Truman from taking any action whatsoever [in Korea] before obtaining a Congressional Resolution, despite the risks of delay, since the North Korean attack was not directed against the territory or the armed forces of the United States."<sup>195</sup>

<sup>192</sup> 1971 *War Powers Hearings*, *supra* note 36, at 636 (Testimony of Mr. George Ball, Undersecretary of State during President Johnson's Administration).

<sup>193</sup> 119 CONG. REC. 18995 (S. daily ed. Oct. 10, 1973).

<sup>194</sup> 1973 *War Powers Hearings*, *supra* note 153, at 167-68. Prof. Schlesinger stated:

In short, the war powers bill would have prevented President Roosevelt from protecting the British lifeline against Nazi submarines; and it would not have prevented President Johnson from intensifying the war in Vietnam nor President Nixon from carrying that war into Cambodia or Laos. If all this is so, then the bill will serve neither the purpose for which it was drafted nor the national interest of the United States.

*Id.* at 167-68.

<sup>195</sup> Rostow, *Great Cases Make Bad Laws: The War Powers Act*, 50 TEXAS L. REV. 833, 839 (1972).

Moreover, even humanitarian actions such as the 1964 Congo rescue mission in which the United States military assisted in saving nearly 2,000 non-Americans near Stanleyville cannot be undertaken due to the limitations imposed by the section 2(c) definition.<sup>196</sup>

Apparently recognizing the unrealistic limitations contained in the Act's definition of the President's war-making powers, the conference committee acted in two ways to make this language precatory rather than absolute. First, it placed the definition of the President's powers in the "purpose and policy" portion of the legislation rather than in the main body of the resolution. Principles of legislative interpretation have established that the preamble, or purpose and policy section, does not determine statutory rights and cannot affect or enlarge the scope or effect of the statute.<sup>197</sup> Second, the conference committee's report explicitly declared that "... subsequent sections of the joint resolution are not dependent upon the language of this subsection [2(c), definition of the President's powers] as was the case with a similar provision of the Senate bill."<sup>198</sup>

Although Senator Javits has asserted that section 2(c) remains an operative part of the War Powers Act,<sup>199</sup> it has not been so interpreted. "It is our opinion," the Legal Adviser to the State Department wrote, "that this subsection is at most a declaratory statement of policy. . . . Section 2 does not contain language which requires or

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<sup>196</sup> 1971 *War Powers Hearings*, *supra* note 36, at 103 (testimony of Prof. J. N. Moore); 1973 *War Powers Hearings*, *supra* note 153, at 296 (testimony of Sen. B. Goldwater, R-Ariz.).

<sup>197</sup> See generally, Note, *Legal Effects of Preambles*, 41 *CORNELL L.Q.* 134 (1955); *MATERIALS ON LEGISLATION* 176-86 (H. Read, J. MacDonald, J. Fordham, and W. Pierce eds. 1973).

<sup>198</sup> CONFERENCE REPORT, *supra* note 165, at 2364. Representative Zabloncki, the House author of the War Powers Act, emphasized this conclusion:

The Senate bill defined the President's authority in war making and sought to mandate the circumstances under which he could act. The House resolution did not attempt such a definition or mandate, on the grounds that to do so was constitutionally questionable and from a practical standpoint unwise. . . . The conference version reflects the House position on this issue.

119 *CONG. REC.* 8348-49 (H. daily ed. Oct. 12, 1973).

<sup>199</sup> During the debate between Senators Javits and Eagleton on the effect of the definition, Senator Javits stated "every section of this bill is operative, including the declaration." Later, however, Javits admitted signing the report of the conferees which limits the effect of the definition. Senator Eagleton then responded that "the political effect of section 2(c) is 'nothing.' Noble in concept but worthless in execution." 119 *CONG. REC.* 18995-96 (S. daily ed. Oct. 10, 1973).

prohibits any particular action, which is characteristic of mandatory and binding provisions."<sup>200</sup> Thus, as a result of the position of the definition of the President's war powers in the Act and the specific disclaimer in the conference report, the most controversial portion of the Senate proposal has been rendered ineffective.

### B. CONSULTATION

Underlying the entire war powers issue is the urgent need for full and continuous communication between Congress and the executive branch. Having learned of most of the important war-related decisions of the last decade after they had been made, Congress justifiably sought to ". . . be fully apprised of U.S. troop presence and strategic interest anywhere in the world that could lead to involvement in armed conflict."<sup>201</sup> To overcome past communication deficiencies, section 3 of the War Powers Act requires the President, "in every possible instance," to consult with Congress before committing military forces to areas of existing or "imminent hostilities" and to continue such consultation "until U.S. Armed Forces are no longer engaged in hostilities."<sup>202</sup>

There are two possible interpretations of this consultation provision. Both would have the President comply with the literal requirements of the Act but avoid materially increasing the chance of unnecessarily compromising legitimately secret information. One approach would require the President to consult Congress on every war-related decision, regardless of how collateral or peripheral it might be, but limit disclosure to only selected members of Congress (such as the appropriate committee chairmen). The second interpretation, relying on the "every possible instance" qualification, would insist upon prior consultation by the President with Congress only when he believes a prospective deployment of the Armed Forces could conceivably lead the nation to war.

Although the first approach, that of maximum disclosure to a minimum number of people, appears to conform with the legislative report accompanying the House version of the war powers

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<sup>200</sup> Letter from Department of State to Sen. Thomas Eagleton, Nov. 30, 1973 (copy on file in library of The Judge Advocate General's School, US Army, Charlottesville, Virginia).

<sup>201</sup> 1973 *War Powers Hearings*, *supra* note 153, at 79 (testimony of Rep. D. Facell, D.-Fla.).

<sup>202</sup> Pub. L. No. 93-148, § 3, 87 Stat. 555 (1973).

resolution,<sup>203</sup> such an interpretation fails to be persuasive when analyzed in terms of the ultimate Act. The conference committee purposely modified the House consultation requirement, providing for communication with "the Congress" as opposed to only congressional leadership.<sup>204</sup> Apparently in recognition of the declining role of senior committee chairmen, this change rules out the limited disclosure aspect of the first interpretation.

Moreover, the first interpretation would incorrectly require consultation on every war-related decision. The conference report recognized that executive-legislative discussions before deployment might not always be possible and thus intended a more flexible standard for pre-decision consultation.<sup>205</sup> Forcing the President to meet with Congress on inconsequential military issues would not only create a bureaucratic nightmare, it would also obscure the many important questions which should confront the Congress. Thus, a realistic interpretation of section 3 would require only that Congress be consulted on significant war-related decisions, *i.e.*, decisions in which the prospective involvement of American forces in armed combat could be reasonably anticipated.

Viewed in terms of this suggested interpretation, the deployment of the 6th Fleet to within fifty miles of the Syrian Coast during the 1967 Arab-Israeli War would not have required preliminary consultation had the War Powers Act been in effect. Although war was in progress, there was no direct commitment of American troops, and U.S. participation in the conflict appeared unlikely.<sup>206</sup> The deployment of forces in that instance might be compared with the fact that President Kennedy informed only Senator Fulbright of the impending 1962 Bay of Pigs invasion. As American lives were likely to be endangered in that situation,<sup>207</sup> the entire Congress would

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<sup>203</sup> H. REP. NO. 93-287, 93d Cong., 1st Sess. (1973) (to accompany H.J. Res. 542) [hereinafter cited as HOUSE REPORT].

<sup>204</sup> CONFERENCE REPORT, *supra* note 165, at 2364.

<sup>205</sup> *Id.*

<sup>206</sup> See notes 242-43 and accompanying text *infra*. See also 119 CONG. REC. 8958 (H. daily ed. Oct. 12, 1973) for the view that similar deployment of the 6th Fleet by President Nixon during the 1973 Mideast crisis would not require consultation.

<sup>207</sup> Despite President Kennedy's order that there be no participation by the United States in the invasion, the first frogman on each beach was an American. In addition, four American pilots were killed while flying air support missions. A. SCHLESINGER, JR., A THOUSAND DAYS 272-73, 278 (1965).

have had to have been consulted had the War Powers Act been in effect at the time. The problem, of course, is in determining the degree of "consultation" required. Are telephone calls to the Speaker of the House and President pro tempore of the Senate sufficient? Should the Secretary of State or Defense schedule a formal briefing? Or, must the President himself seek the joint advice of Congress before acting?

The report accompanying the House version of the War Powers Act indicated that the consultation section should be read as requiring the President to personally seek the legislature's "advice and opinions and, in appropriate circumstances, their approval."<sup>208</sup> This version, however, only required that the President confer with certain leaders of Congress. When the wording was changed by the conference committee in order to require Presidential consultation with "the Congress," the conferees must have had in mind a much narrower discussion than that envisioned in the House Report. To interpret the consultation provision in a manner that would require the President to have meaningful discussions with all 535 members of Congress before making important war-related decisions would be both unrealistic and unworkable. Paraphrasing Madison and Hamilton's criticism of the 18th century German Diet, military decisions would have to be preceded by so many tedious discussions that, before the President could act, the enemy would already be in the field.<sup>209</sup>

A workable standard can be derived from past executive-legislative actions. During the entire course of the three-year debate on the various war powers bills, little criticism was directed toward President Kennedy's dealings with Congress during the 1962 Cuban Missile Crisis. After concluding a naval blockade of Cuba was required, the President simply called various members of Congress together and informed them of his decision. Recalling this meeting, Theodore Sorensen wrote that several of the congressional leaders advocated other alternatives:

The President, however, was adamant. He was acting by Executive Order, Presidential Proclamation, and inherent powers, not under any resolution or act of the Congress. He had earlier rejected all suggestions of reconvening Congress or requesting a formal declaration of war, and he had summoned the leaders only when hard evidence and a fixed policy were ready.<sup>210</sup>

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<sup>208</sup> HOUSE REPORT, *supra* note 203, at 2351.

<sup>209</sup> THE FEDERALIST No. 19, *supra* note 14, at 131 (A. Hamilton and J. Madison).

<sup>210</sup> T. SORENSEN, KENNEDY 702 (1965).

While President Kennedy did not accept any of the advice offered by the congressmen briefed, including Senator Fulbright's suggestion that Cuba be invaded, he carefully insured that Congress was informed of his decision prior to the commencement of the naval blockade.

President Kennedy's approach in the Cuban Missile Crisis should serve as the minimum standard for interpreting the War Powers Act's consultation requirement.<sup>211</sup> Whenever possible, considering both time and secrecy requirements, the President should meet with as many members of Congress as possible before making his final decision. While the President need not accept every recommendation offered, he would be wise to encourage the diverse views of those experienced in foreign affairs. Therefore, consultation means more than merely informing Congress, but less than requiring congressional approval.

Because of the likelihood that the consultation section might be interpreted as requiring only that the President meet with Congress before a decision, rather than seeking individual legislators' "advice and consent," Arthur Schlesinger and Alexander Bickel have termed this provision "hortatory."<sup>212</sup> The author does not agree. Any advance notice of decisions moving the nation closer to conflict increases the opportunity for informed individuals to assert contrary opinions or provide new information. Former Secretary of State Dean Rusk, lamenting over the Bay of Pigs tragedy, remarked that if there had been any meaningful consultation with either Congress or the military before launching that CIA-directed invasion, it might have been prevented.<sup>213</sup> If ill-conceived actions such as the Bay of Pigs invasion can be avoided by adequate prior consultation, this one

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<sup>211</sup> But see Comment, *The War Powers Resolution: Statutory Limitation on the Commander-in-Chief*, 11 HARV. J. LEGIS. 181, 194 n.53 (1974) wherein the author argues President Kennedy's briefing was inadequate consultation for purposes of the War Powers Act. For this proposition, the author cites only the Senate Report accompanying the non-binding National Commitments Resolution, S. REP. No. 129, 91st Cong., 1st Sess. 21-22 (1969). That Senate Report, however, does not in any way condemn President Kennedy's consultation with Congress. In fact, the report later recognizes the need for prompt action in the Cuban situation, and appears to support the method by which President Kennedy informed the Congress. *Id.* See also 119 CONG. REC. 14209 (S. daily ed. July 20, 1973) for testimony approving of President Kennedy's actions.

<sup>212</sup> 1973 *War Powers Hearings*, *supra* note 153, at 197.

<sup>213</sup> Rusk Interview, *supra* note 114. See also 119 CONG. REC. 18986 (S. daily ed. Oct. 10, 1973) (remarks of Sen. J. Javits).

requirement imposed on the President might indeed serve as adequate justification for the War Powers Act.

### C. REPORTING REQUIREMENTS

Complementing the consultation requirements of section 3, section 4 of the War Powers Act requires the President to submit a written report justifying his decision to deploy armed forces within forty-eight hours after those forces are committed abroad. While consultation may be difficult if not impossible in an emergency, the post-deployment reporting requirements must always be met. The three enumerated circumstances requiring a report are when U.S. 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.<sup>214</sup>

#### 1. *The Two-Prong 4(a)(1) and 4(a)(2) Test: Imminent Hostilities and Troops Equipped for Combat*

The effectiveness of the reporting requirements depends to a large extent on the interpretation of its various elements. It is critical to understand the differences between a 4(a)(1) operation and the other two reportable categories. Only a 4(a)(1) operation is required to be preceded by consultation between the President and Congress. More importantly, the 4(a)(1) report triggers the sixty-day time limitation whereas 4(a)(2) and 4(a)(3) operations are not similarly limited.<sup>215</sup> In order to better understand the interaction between the first two elements of the reporting requirement, sections 4(a)(1) and 4(a)(2), it would be useful to examine the recent evacuation of American citizens from the island of Cyprus in 1974.

With the war between Greece and Turkey in Cyprus growing

<sup>214</sup> Pub. L. No. 93-148, § 4(a), 87 Stat. 555-56 (emphasis added).

<sup>215</sup> See notes 224-26 and accompanying text *infra*.

more intense, the American ambassador in Nicosia requested that a number of endangered American citizens be evacuated.<sup>216</sup> Sixth Fleet Task Force 61-62 was thus directed to move to an area twenty miles south of Dhekelia, a British base on the southern coast of Cyprus. On July 22, during the time of a temporary cease fire, 384 U.S. citizens and 82 allied nationals were evacuated by Marine helicopters to the USS *Coronado*. The rescue operation commenced at 11:15 a.m. and was completed by 4:30 p.m., during which time no hostilities occurred. Following the successful Cyprus evacuation, Senator Eagleton charged that President Ford had failed to submit a report to Congress concerning the use of U.S. armed forces in Cyprus in accordance with the terms of the War Powers Act.

In order to determine the validity of Senator Eagleton's allegation, it is essential that the reporting requirements of sections 4(a)(1) and 4(a)(2) be analyzed. Combining the War Powers Act's legislative history with the statutory requirements of reporting forces introduced into "imminent hostilities" or into the territory of foreign nations while "equipped for combat," the following two-prong test emerges. First, any deployment of forces into an area where (1) conflict is already in progress or is immediately anticipated *and* where (2) there is a reasonable expectation that American military personnel will be subject to hostile fire must be reported under section 4(a)(1).<sup>217</sup> Furthermore, even if no actual combat occurs, section 4(a)(2) requires that the President file a report if (1) troops are equipped for combat *and* (2) "there is some risk, however small, of the forces being involved in hostilities."<sup>218</sup>

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<sup>216</sup> This account of the Cyprus operation is summarized from Department of State and Defense memoranda dated 23 July and 1 August 1974 on file in the library of The Judge Advocate General's School, US Army, Charlottesville, Virginia.

<sup>217</sup> Section 4(a)(1) was basically taken from H.J. Res. 542 § 3(a)(1), 93d Cong., 1st Sess. (1973). The House Report accompanying that resolution states that the section in question "... includes all commitments of U. S. Armed Forces abroad to situations in which hostilities already have begun and where there is a reasonable expectation that American military personnel will be subject to hostile fire." HOUSE REPORT, *supra* note 203, at 2351-52.

<sup>218</sup> Section 4(a)(2) was taken verbatim from H.J. Res. 542 § 3(a)(2), 93d Cong., 1st Sess. (1973). The House Report explains that section as covering "... the initial commitment of troops in situations in which there is no actual fighting but there is some risk, however small, of the forces being involved in hostilities. A report would be required any time combat military forces were sent to another

Applying the two-prong test to the Cyprus evacuation, it would appear that the President was under no obligation to file a report concerning this operation. U.S. forces were *not* being introduced into hostilities. Instead, they had the limited defensive mission of rescuing endangered American citizens and allied nationals. Moreover, because the British base was some distance from the fighting and a temporary cease fire had been declared, it was most unlikely that American troops would be subject to hostile fire. Finally, even if the six Marines directing the operation carried weapons necessary for self protection, the phrase "equipped for combat" cannot be interpreted in a manner so restrictive as to prevent the evacuating force from possessing the minimum weapons necessary for self-defense.

Indeed, there exists some authority for the proposition that a rescue operation of American citizens need never be reported. During a Senate debate, the principal author of the War Powers Act, Senator Javits, stated:

I think the normal practice which has grown up on this [evacuation and rescue operations] is that it does not involve such a utilization of the forces of the United States as to represent a use of forces appreciably, in hostilities so as to constitute an exercise of the war power or as to constitute a commitment of the Nation to war.<sup>219</sup>

On the basis of Senator Javits' criteria, no evacuation operation, regardless of the magnitude of the rescuing force involved or the level of combat attained would have to be reported to Congress. Therefore, it would appear that when President Johnson sent 400 Marines to the Dominican Republic in 1965 in order to rescue American citizens in Santo Domingo, his actions would not have had to have been the subject of a Presidential report.<sup>220</sup> However, when the President announced shortly thereafter that he was sending an additional 200 men to that country and that another 4,500 would be required to control the communist revolutionaries alleged to be

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nation to alter or preserve the existing political status quo or to make the U.S. presence felt.

HOUSE REPORT, *supra* note 203, at 2352.

<sup>219</sup> 119 CONG. REC. 18995 (S. daily ed. Oct. 10, 1973).

<sup>220</sup> President Johnson announced in a television broadcast on April 30 that U.S. troops had been sent in "when, and only when" he was notified by officials of the Dominican Republic that they were no longer able to guarantee the safety of American citizens. See N.Y. Times, Apr. 29, 1965, at 1, col. 8; *id.*, Apr. 30, at 1, col. 8.

the cause of the trouble there, section 4(a)(2) would have applied and a report would have been required.<sup>221</sup>

## 2. *Military Alerts, Naval Movement in International Waters, and Air Force Overflights*

A number of Presidential actions that might normally be considered an exercise of war powers are not covered by sections 4(a)(1) and 4(a)(2). This is true because a condition precedent to these reporting requirements is that there must be a *present* commitment of forces to a foreign country. Thus, the October 1973 worldwide alert of U.S. military forces triggered by the Arab-Israeli war need not have been reported despite its significance.<sup>222</sup> Similarly, the Pentagon need not report its contingency plans for sending troops into a foreign combat zone. Even the training of troops on American soil, such as occurred in Florida in 1961 in preparation for the Bay of Pigs invasion, need not be reported.<sup>223</sup> However, if the planning or training reaches the point where a commitment of U.S. forces appears likely, the President would be required to consult with Congress in accordance with section 3 of the Act.

The movement of the Navy in international waters, which might otherwise appear to require reporting, appears to have been exempted from the War Powers Act's requirements. At the time the Act was being debated in Congress in 1973, President Nixon moved elements of the 6th Fleet to the eastern Mediterranean to monitor the Arab-Israeli war. There was almost total agreement in Congress that such an action did not fall within the ambit of the Act.<sup>224</sup> It would appear

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<sup>221</sup> President Johnson justified his action as an exercise of the President's power to preserve the security of the hemisphere in accordance with the principles enunciated in the OAS Charter. See *N.Y. Times*, May 31, 1965, at 10, col. 1. Although the President did not seek congressional approval, the OAS subsequently authorized a multinational peace-keeping force.

<sup>222</sup> See note 224 *infra*.

<sup>223</sup> Accord, Comment, *The War Powers Resolution: Statutory Limitation on the Commander-in-Chief*, 11 *HARV. J. LEGIS.* 181 (1975).

<sup>224</sup> See, e.g., 119 *CONG. REC.* 14162, 14210 (S. daily ed. July 20, 1973). Senator Stennis, a co-author of the Senate war powers bill, stated:

... during the recent Mid-East crisis the President used his authority as Commander-in-Chief to order the armed forces to a higher level of alert than that in which they are normally placed. He also ordered extra ships into the Mediterranean . . . . Nothing in this War Powers Resolution would hinder the President from taking these types of steps in the future on his own authority as Commander-in-Chief, and nothing in the resolution would require Congressional approval of such decisions. Moreover, nothing in the Resolution would even require the reporting of most such actions.

that normal Air Force flight missions should be similarly treated. However, air flights over hostile countries, including photo or reconnaissance missions, were never considered in the war powers hearings. It would be reasonable to exempt such flights from the reporting requirements due to their infrequent occurrence and non-combat nature.<sup>226</sup> However, if any of the Navy or the Air Force actions develop to the point that enemy retaliation or subsequent U.S. military involvement is probable, a report must be rendered to Congress.<sup>226</sup>

### 3. 4(a)(3): *Reporting the Substantial Enlargement of U.S. Forces in a Foreign Country*

Implicit in the President's ability to control or monitor the deployment of the armed forces is his power to place priorities on overseas developments. Moreover, as Senator Fulbright stated, "Both experience and logic show that, to the extent the President controls deployment of the armed forces, he also has de facto power of initiating war."<sup>227</sup> Recognizing this, section 4(a)(3) requires that any substantial enlargement of U.S. armed forces in a foreign country be justified by the President. Problems arise in determining

News Release, Senator Stennis (D.-Miss.), November 2, 1973, copy on file in the library of The Judge Advocate General's School, US Army, Charlottesville, Virginia (emphasis added).

<sup>226</sup> U.S. SR-71 reconnaissance aircraft continued aerial surveillance of North and South Vietnam during 1973 and 1974. Although the Administration ultimately admitted the existence of these flights, no report was rendered pursuant to the War Powers Act. See *N.Y. Times*, January 14, 1975, at 1, col. 1; January 15, 1975, at 1, col. 2-3; January 29, 1975, at 3, col. 5.

<sup>226</sup> Senator Javits stated during the Senate debate on the war powers bill:

It was made absolutely clear during the debate last year and again is made clear in the committee report this year that show-of-force deployments—for example, the movement of the 6th Fleet into the eastern Mediterranean during the 1970 Jordanian crisis—are not restricted by the bill unless and until they involve the Armed Forces in hostilities or in situations where imminent involvement in hostilities is clearly indicated by the circumstances. Should these latter conditions pertain, then, of course, "Show of force" would be covered by the bill as that is the entire intention of the bill, which relates to involvement in hostilities.

119 Cong. Rec. 14162 (S. daily ed. July 20, 1973).

<sup>227</sup> See S. REP. NO. 220, 93d Cong., 1st Sess. 37 (1973) (Supplemental views of Sen. W. Fulbright). Senator Fulbright quotes General Wheeler, former Chairman of the Joint Chiefs of Staff, as saying, with regard to the deployment of American forces in Spain in the absence of a security treaty, "The presence of the United States forces in Spain is a far more visible and credible security guarantee than any written document." *Id.*

what is a "substantial" enlargement as well as deciding what is included within the term "Armed Forces."

No strict numerical percentage can be established with regard to what constitutes a "substantial" increase in troop strength. While a 100 percent increase of Marine guards at an embassy in Spain would not merit a report, a ten percent increment of European forces would require justification.<sup>228</sup> Factors other than numerical strength which bear on a decision as to whether or not a report is required include location, nature of the units involved, and the estimated duration of the force commitment. An increase in forces at Guantanamo Bay or in Berlin is more likely to require reporting than a similar increase of troops in Germany.<sup>229</sup> Similarly, the movement of a Nike-Hercules battery is of more importance than that of a normal battalion. The President's decision whether or not to report a troop enlargement should be largely based on the reason for his decision. Sending additional troops for only training or logistical purposes is less likely to require a report, regardless of the numbers involved, than a commitment of even a small number of troops to a location of impending danger. In any case, the decision whether to render a report in such an instance must be analyzed on a case-by-case basis and must rely on the good faith of the President.

Although the submission of a report is required if the "United States Armed Forces" is substantially enlarged, the term "Armed Forces" is never defined, as the committee hearings and conference reports dealt exclusively with quantitative considerations.<sup>230</sup> While the term certainly includes all troop units and advisors, the shipment of increased munitions and armaments tends to raise difficult questions. The Act does not address such items as tanks, jet aircraft, or nuclear weapon stockpiles, an apparent oversight rather than an intentional omission, as the expansion of U.S. nuclear presence anywhere in the world significantly enlarges American military

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<sup>228</sup> See HOUSE REPORT, *supra* note 203, at 2352.

<sup>229</sup> The House Report indicates that while a 1,000 man increase of troops in Europe need not be reported, the same 1,000 men added to the naval base at Guantanamo Bay would have to be justified. *Id.*

<sup>230</sup> Section 8(c) of the War Powers Act states only that the term "introduction of United States Armed Forces" covers:

The assignments 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.

Pub. L. No. 93-148, § 8(a), 87 Stat. 558 (1973).

potential. Nevertheless, because the Act does not speak to the reporting of pure munition, ammunition, or equipment increases, the term "Armed Forces" cannot be stretched to include these war-related items. Thus, an increase in the number of nuclear land mines (Atomic Demolition Munitions) stored in Western Europe for use along Soviet Bloc frontiers in the event of war would not have to be justified, despite its political implications. Similarly, should the United States stockpile armored vehicles in Germany and Iran in anticipation of a new Arab-Israeli war, this action would not have to be reported.

This is not to say, however, that all increases in armaments are exempt from the reporting requirement. Vehicles or machines that require human operators, such as tanks, airplanes, or anti-aircraft systems, must be reported if an increase in their number substantially enlarges the size of a unit. Therefore, a thirty percent increase in the number of A-4 Skyhawk fighter-bombers on Lajes Air Force Base in the Azore Islands would have to be justified. While few airmen would be involved, the increase would be substantial in terms of the type of unit involved.

#### *4. Avoiding the 4(a)(3) Reporting Requirements: Civilian Contracts and Arms Sales*

Because the War Powers Act only applies to action of "United States Armed Forces," its requirements may be circumvented through the use of contractually procured civilian surrogates for American military forces. Recognizing the significance of this loophole, Senator Eagleton proposed that the Senate's version of the war powers resolution be amended to include "Any persons employed by, under contract to, or under the direction of any department or agency of the United States Government . . ." in the term "Armed Forces."<sup>281</sup> Despite Senator Fulbright's support, the amendment was defeated by a large margin and was not included in the ultimate War Powers Act.<sup>282</sup> This gap in the Act's coverage has become extremely important recently, as the Department of Defense has begun to emphasize the use of nonmilitary forces abroad.

In January 1975, a \$76.9 million Defense Department contract was awarded to the Vinnell Corporation to train selected portions

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<sup>281</sup> See 119 CONG. REC. 14187 (S. daily ed. July 20, 1973).

<sup>282</sup> The amendment was defeated by a vote of 94 to 53. *Id.* at 14200.

of the Saudi Arabian Army.<sup>233</sup> This marks the first time civilians have been hired to actually train military combat units, a task formerly reserved for military assistance advisory groups. Over the next three years a 1,000 man Vinnell Corporation contingent will train three newly mechanized battalions of 1,000 men each and a 105 mm howitzer artillery battalion.<sup>234</sup> Ultimately, Vinnell will be training Saudi troops in tactical maneuvers at battalion level.<sup>235</sup>

In Iran, retired Major General Delk M. Oden has assembled a 1,500 man American civilian force to create and train the Iranian equivalent of the United States 1st Cavalry Division (Airmobile)—the Iran Sky Cavalry Brigade.<sup>236</sup> Unlike the Vinnell contract, General Oden's force operates pursuant to an agreement made directly between Iran and the Bell Helicopter Company. The Defense Department did, however, administer Bell's sale of 489 helicopters to Iran in 1973.<sup>237</sup> Moreover, the Pentagon recently awarded Bell two additional contracts totaling \$169 million for the training of Iranians in helicopter flying and supply.<sup>238</sup> Other companies in Iran providing similar services include Northrop, McDonnell Douglas, Hughes Aircraft, Philco Ford, and Westinghouse.<sup>239</sup>

While the Vinnell and Bell Helicopter contracts involve non-combat training, the Air Force's contract with Bird Air in Cambodia clearly required combat support operations. Beginning in October 1974, the Air Force turned over the emergency airlift to Phnom Penh to a small government contracted "civilian" airline—Bird Air.<sup>240</sup> Initially the contract was designed to last nine months at a cost of \$1.9 million and envisioned about ten sorties a day from Thailand to Cambodia.<sup>241</sup> Four months later, when the Khmer Rouge cut off critical supply lines to the Cambodian capital, the

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<sup>233</sup> N.Y. Times, Feb. 9, 1975, at 1, cols. 2-3.

<sup>234</sup> The Washington Post, Feb. 9, 1975, at A1, col. 1.

<sup>235</sup> The Washington Post, Feb. 20, 1975, at A1, col. 7.

<sup>236</sup> The Washington Post, Feb. 12, 1975, at A1, col. 4; *id.* at A10, col. 2. General Oden was formerly the Commanding General of the U. S. Army Aviation Center at Ft. Rucker, Alabama, and is currently the president of Bell Helicopter International.

<sup>237</sup> The Washington Post, Feb. 12, 1975, at A10, col. 2. The helicopter force will ultimately include 202 AH-1J twin engined "Sea Cobra" attack helicopters.

<sup>238</sup> The Washington Post, Feb. 13, 1975, at A32, col. 1.

<sup>239</sup> *Id.*

<sup>240</sup> See The Washington Post, Jan. 25, 1975, at A12, col. 1.

<sup>241</sup> The Washington Post, Feb. 12, 1975, at A1, col. 1.

Department of Defense doubled the number of crews it had under contract. In addition, the Air Force provided an additional seven C-130 aircraft to the commercial airline rent free, bringing the total number of government aircraft to twelve.<sup>242</sup> These civilian aircraft continued to supply the Cambodian capital until just before Phnom Penh fell to the Khmer Rouge insurgents.

While each of these civilian contracts was ostensibly entered into to reduce the U.S. military presence abroad, the Department of Defense is aware of the collateral benefit of avoiding the reporting requirements of the War Powers Act. In each of these instances, had American soldiers been used instead of civilians, the decision would have had to have been reported as at least a section 4(a)(3) substantial enlargement of troops in the area and, perhaps, in the case of Cambodia, as troops equipped for combat.

### *5. Justification for Committing or Expanding the Armed Forces*

Should the actions of the President fall into any of the three enumerated categories in which a report is required, the following information must be submitted in writing to the Speaker of the House and President pro tempore of the Senate within forty-eight hours:

- (A) the circumstances necessitating the introduction of the 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.<sup>243</sup>

Additionally, the President must provide any other information which Congress might request with respect to the specific incident in question.

Requirement (A) has been satisfied in the past as a matter of course, with the exception of such covert CIA operations as occurred in Guatemala in 1954<sup>244</sup> and the Bay of Pigs in 1961. Incidents such as

<sup>242</sup> The Washington Post, Feb. 28, 1975, at A1, col. 2. The Air Force initially provided Bird Air with five rent-free C-130 transport aircraft. Finally, when the resupply became critical, seven more aircraft were loaned without cost.

<sup>243</sup> Pub. L. No. 93-148, § 4(a), 87 Stat. 555-56 (1973).

<sup>244</sup> See R. BARNETT, *INTERVENTION AND REVOLUTION* (1968) and R. SCHENIDER, *COMMUNISM IN GUATEMALA* 311 (1959) for an account of the 1954 CIA operation in Guatemala.

these, however, are not spoken to in section 3 and need not be reported under the War Powers Act.<sup>245</sup>

The requirement of subsection C that the President give an estimate of the scope and duration of hostilities is well considered. The existence of this requirement insures that the President, National Security Council, and the Departments of State and Defense will carefully consider the anticipated degree of U.S. involvement prior to an initial commitment of American forces. The step-by-step build-up in South Vietnam becomes increasingly suspect with the realization that sustained conflict in that area was apparently inevitable from the outset. The Tonkin Gulf Resolution would undoubtedly have been subjected to greater scrutiny by Congress if President Johnson had reported Undersecretary of State Ball's estimate that a minimum of 300,000 troops would be required and that the war would continue for at least five years.<sup>246</sup>

Satisfaction of requirement (B) requiring delineation of "the constitutional and legislative authority" for the commitment of military forces abroad will be the most problematical of the reporting requirements. In the past, Presidents have justified their use of the Armed Forces in foreign countries by one of three methods: legislative authorization, such as the Tonkin Gulf Resolution; treaty authorization, such as OAS or United Nations support for the Dominican Republic operation and Korean action; or the inherent power of the Chief Executive as Commander-in-Chief. Now, however, section 8 of the Act restrictively interprets general legislative or treaty provisions to prevent their use as sufficient authority to act, and section 2(c) purports to limit the President's inherent authority. The following discussion will consider the impact of the War Powers Act on each of these three traditional sources of authority.

#### *a. Legislation*

Section 8(a) of the War Powers Act provides that the President shall not derive any authority to commit forces

from any provision of the law (whether or not in effect before the date of the enactment of this joint resolution), including any provisions contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities

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<sup>245</sup> Covert CIA operations are now covered by other legislation.

<sup>246</sup> See D. HALBERSTAM, *THE BEST AND THE BRIGHTEST* 215 (1973).

or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.<sup>247</sup>

This section was taken almost verbatim from section 3(4)(B) of the Senate's version of the war powers resolution. The Senate Report indicates that this section was inserted to "obviate a repetition of the unfortunate experience of the Congress with the Tonkin Gulf Resolution."<sup>248</sup> This provision also insures that the President cannot justify his use of military force by merely referring to a congressional appropriation authorization.

The critical question is the effect section (8)(a)'s limitation will have on existing "area resolutions," *i.e.*, resolutions that give the President additional authority to act in certain geographical areas. The Senate Report states that its section ". . . holds the validity of three area resolutions currently on the statute books. These are: the Formosa Resolution (H.J. Res. 117 of January 29, 1955); the Middle East Resolution (H.J. Res. 117 of March 9, 1957, as amended); and the Cuban Resolution (S.J. Res. 230 of October 3, 1962)."<sup>249</sup>

The 1955 Formosa Resolution authorized the President "to employ the Armed Forces of the United States as he deem[ed] necessary for the purpose of securing and protecting Formosa and the Pescadores against armed attack. . . ."<sup>250</sup> Additionally, the 1957 Middle East Resolution stated:

The United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East. To this end, if the President determines the necessity thereof, the United States is prepared to use armed force to assist any such nation or group requesting assistance against armed aggression from any country controlled by international communism. . . .<sup>251</sup>

Both of these resolutions appear specific enough to satisfy section 8(a)(1) and give the President extraordinary authority in those geographic areas. Not only do these resolutions fully satisfy the reporting requirement, but they are a substantive grant of power which would even meet the Act's narrow definition in section 2(c) of the President's constitutional war-making powers.

<sup>247</sup> Pub. L. No. 93-148, § 8(a)(1), 87 Stat. 555 (1973).

<sup>248</sup> S. REP. NO. 220, 93d Cong., 1st Sess. 24 (1973).

<sup>249</sup> *Id.* at 24.

<sup>250</sup> Formosa Resolution, 50 U.S.C.A. APP. at 16 (1970).

<sup>251</sup> Middle East Peace and Stability Act, 22 U.S.C. § 1962 (1970).

Notwithstanding the Senate Report, the Cuban Resolution, passed a month prior to the 1962 missile crisis, does not appear to satisfy section 8 (a) (1)'s specificity requirement. While the original resolution expressed the sense of Congress that the President possessed the authority to deal with Cuba "by whatever means may be necessary, including the use of arms," Senator Russell of Georgia successfully opposed this language as too broad a grant of authority.<sup>252</sup> The ultimate resolution is somewhat narrower and does not appear to authorize the President to use force in all circumstances.<sup>253</sup>

The final result of section 8(a) (1)'s legislative requirements is to eliminate all existing statutes as potential bases for Presidential authority with the exception of the Formosa and Middle East Resolutions, and possibly the Cuban Resolution. Moreover, future legislation must contain an unequivocal grant of war-making power to the President before he can utilize such a statute as authority to commit U.S. armed forces into hostilities.

#### *b. Treaties*

There has been continuing controversy over the authority the President possesses by virtue of the nation's collective and bilateral security treaties. While each of these treaties was passed in accordance with the Constitution, there is a common requirement in each agreement that involvement of military forces will be in accordance with each nation's "constitutional processes."<sup>254</sup> Confusion exists whether such language requires additional implementing legislation before the President can act or whether it is "self-executing."

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<sup>252</sup> See Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 U. Rich. L. Rev. 1, 8 n.20 (1971).

<sup>253</sup> The Cuban Resolution authorizes the President to use force if necessary to prevent "the Marxist-Leninist regime in Cuba" from extending its activities by force or the threat of force to any part of the hemisphere. The Resolution also announced the determination of the United States to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States. That clause of the Resolution, however, does not mention the use of arms. Act of Oct. 3, 1962, Pub. L. No. 87-733, 76 Stat. 697.

<sup>254</sup> Typical is the language of the SEATO Treaty which provides in Article I, section 1, that:

Every Party recognizes that aggression by means of armed attack in the treaty area or against any of the Parties . . . would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional process.

Section 8(a)(2), in effect, defines "constitutional processes" for the first time, at least insofar as the term relates to the authority a President derives from treaties.<sup>255</sup> That section forbids any inference of Presidential authority

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.<sup>258</sup>

Thus, Congress has clearly mandated that treaties are not "self-executing" and that the President must seek implementing legislation or an area resolution before citing a treaty as sufficient authority for introducing military forces into the area.

One writer has argued that U.S. participation in joint peace-keeping operations, such as the 1960 U.N. operation in the Congo, would be justified under section 8(b) of the Act.<sup>257</sup> This appears to be an incorrect interpretation. Section 8(b) allows for U.S. participation only "... in the headquarters 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."<sup>258</sup> This language was designed to permit members of the armed forces to take part in certain joint military exercises with allied or friendly organizations or countries.<sup>259</sup> The legislative history indicates that the "high-level military commands" referred to were understood by the drafters "... to be those of NATO, the North American Air Defense Command (NORAD) and the United Nations Command in Korea (UNC)."<sup>260</sup>

### *c. Inherent Authority*

As most existing treaties and statutes do not constitute sufficient authority upon which the President might base the commitment of

<sup>255</sup> See S. REP. No. 220, 93d. Cong., 1st Sess. 25-27 (1973).

<sup>256</sup> Pub. L. No. 93-148, § 8(a)(2), 87 Stat. 558 (1973).

<sup>257</sup> Note, 1973 *War Powers Legislation, Congress Re-Asserts Its War Making Powers*, 3 LOYOLA U.L.Q. 83, 98 (1974).

<sup>258</sup> Pub. L. No. 93-148, § 8(b), 87 Stat. 558 (1973).

<sup>259</sup> During the Senate debate on the war powers conference report, Senator Javits stated that "Section 8(b), derived directly from the Senate bill, makes it clear that the legislation is not intended to disrupt the NATO command structure."

<sup>260</sup> 119 CONG. REC. 18987 (S. daily ed. Oct. 10, 1973); H.R. REP. No. 547, 93d Cong., 1st Sess., at 2366 (1973).

forces abroad, in the future Chief Executives must rely on the Constitution for their war-making powers. This is the only part of the War Powers Act in which section 2(c)'s definition of the President's powers is likely to be relevant. Congress may assert section 2(c) as the correct standard by which the President's actions should be evaluated. Section 2(c), however, is not an operative part of the Act and a President need not justify his actions on the basis of such a restrictive interpretation of the Constitution.<sup>281</sup>

Because the War Powers Act provides no workable constitutional standard for the President's actions, Congress or the courts will have to return to the delineation of war powers between Congress and the Executive discussed in Section II of this article. In the final analysis, however, the resolution of the authority issue will probably not be the result of an in-depth constitutional analysis but rather a political determination by Congress as to whether the President was adequately justified in his actions. If the legislature agrees, the War Powers Act will be forgotten. On the other hand, should the Congress object to the President's use of force, section 5 of the War Powers Act becomes important.

#### D. LIMITATIONS ON THE PRESIDENT

Although the preceding sections on reporting and consultation place additional requirements on the President, they do not materially affect the exercise of his war-making powers. It is section 5, entitled "Congressional Action," which embodies the Senate's intent to limit the President and forcibly insert Congress into every facet of conflict management.

Once it has been established that United States military forces have been deployed and combat is foreseeable, the President is required to render a report in accordance with section 4(a)(1) of the War Powers Act. Within sixty days from the time of such a report (or the causal event which should have required this report), the President must withdraw all U.S. armed forces unless 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.<sup>282</sup>

<sup>281</sup> See notes 197-200 and accompanying text *supra*.

<sup>282</sup> Pub. L. No. 93-148, § 5, 87 Stat. 556 (1973).

The President may extend this sixty-day limitation for one additional thirty-day period by certifying, in writing, to Congress that "unavoidable military necessity respecting the safety of United States Armed Forces" requires the continued use of such armed forces in the course of bringing about a prompt removal of these forces.<sup>263</sup> Notwithstanding this sixty or ninety-day limitation, the Act provides in section 4(c) that Congress may, at any time, direct the removal of all forces. This may be done by concurrent resolution, not subject to the President's veto.

Section 5 has two basic purposes: first, to deny the President unilateral authority to commit U.S. armed forces beyond a maximum of ninety days without congressional approval and second, to grant Congress the power to disengage forces at any time without having to obtain the two-thirds majority necessary to override the President's veto. Both of these provisions constitute substantial challenges to the foreign affairs authority of the President and bring into question the constitutionality of the War Powers Act.

#### *1. Actions Covered by the Sixty-Day Limitation*

The standard used by the War Powers Act to determine both what actions are limited by the sixty-day period and when that period commences is found in section 4(a)(1), *i.e.*, when forces are committed to "situations where imminent involvement in hostilities is clearly indicated." While the commitment of troops "equipped for combat" or the substantial enlargement of U.S. armed forces in a foreign country must also be reported, the sixty-day limitation imposed by section 5 is not applicable to such actions. Thus, it is critical to differentiate between a 4(a)(1) situation where hostilities are "imminent" versus a 4(a)(2) instance where combat is merely a possibility.

In order to decide what type of actions may be limited to sixty days without congressional authorization, it is important to understand the key terms "hostilities" and "imminent." The word "hostilities" was substituted for the original phrase "armed conflict" during the subcommittee drafting process and was considered to be a somewhat broader term, encompassing a situation where there was a clear danger of fighting although none had yet occurred. "Imminent hostilities," the congressional report states, denotes a situation

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<sup>263</sup> *Id.*

in which there is a clear potential for either confrontation or combat.<sup>264</sup>

The standard to be applied, then, is the same test used to determine whether a report is required under section 4(a)(1). Thus, the sixty-day limitation of section 5 applies to any deployment of forces into an area where (1) conflict is already in progress or is reasonably anticipated and where (2) there is a reasonable expectation that American military personnel will be subject to hostile fire.

If this criterion had been applied to the 1958 Lebanon operation, it is apparent that President Eisenhower would have had to report the introduction of the 5,000 Marines to Beirut in accordance with section 4(a)(1). Even though these forces were given orders not to shoot unless fired upon, hostilities had already begun and it was reasonable to assume that American forces would be subjected to hostile fire.<sup>265</sup> Once having made this report, President Eisenhower would have had a maximum of ninety days (including the thirty-day extension period) to convince Congress of the wisdom of intervening in this area.

Unfortunately, all examples are not as clear as the Lebanon operation in which there was substantial and readily apparent danger to U.S. armed forces. In many other instances the line between "imminent hostilities" and possible combat may be both unclear and changing on a day-to-day basis. Moreover, the President may commit forces into a country where there is only a remote possibility of combat and the situation may gradually develop over a period of many years until U.S. forces are actually involved in combat operations. In such a case there must be a determination when U.S. involvement in hostilities begins for purposes of the sixty-day limitation. Several examples will develop this problem.

## 2. *When Does the Sixty-Day Period Begin?*

During the 1973 war powers hearings, several witnesses were asked when the U.S. involvement in the Vietnam war would have had to have been reported as "hostilities," triggering the War Powers Act's sixty-day limitation. Representative Findley and

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<sup>264</sup> HOUSE REPORT, *supra* note 203, at 2351.

<sup>265</sup> See De Conde, *Dwight D. Eisenhower: Reluctant Use of Power*, in POWERS OF THE PRESIDENT IN FOREIGN AFFAIRS 116-18 (1966). See also 1973 War Powers Hearings, *supra* note 153, at 185 (testimony of Prof. A. Bickel).

Professor Bickel replied that President Kennedy's commitment of 15,000 additional advisors to Vietnam in 1962 would have had to have been reported.<sup>266</sup> Senator Eagleton, on the other hand, thought the report of U.S. involvement would have been required sometime in advance of the Tonkin Gulf Resolution in 1964.<sup>267</sup> Finally, Senator Javits would not have required a report until heavy bombing began in March 1965.<sup>268</sup> When presented with the hypothetical possibility of a commitment of 20,000 advisors to Israel in 1973, Senators Javits and Eagleton again disagreed as to whether hostilities would be considered "imminent" in this situation. Senator Eagleton claimed such circumstances were inherently dangerous,<sup>269</sup> while Senator Javits stated "I would not define that as committing us to hostilities or imminent danger of hostilities."<sup>270</sup>

These two examples point out the inherent problems in determining what actions are covered by section 5 and the point at which the sixty-day period commences. One possible solution is to begin the initial period when the President's commitment of forces is likely to result in retaliation by a potentially belligerent nation. On the basis of this test, the critical date in the Vietnam conflict would have been April 2, 1965, when National Security Action Memorandum 328 directed the Marine battalions already deployed to South Vietnam be shifted from a static defensive role to one of combat operations.<sup>271</sup>

Even this test, however, is ambiguous and depends on an estimation of an opposing force's reaction to a potential situation. In fact, it is

<sup>266</sup> 1973 *War Powers Hearings*, *supra* note 153, at 16, 185. Note that advisors are included in section 8(c) of the War Powers Act and would have to be reported if either "equipped for combat" or if the number of armed forces were substantially enlarged. However, neither of these actions would be subject to the sixty-day limitation, so this debate concerns only when section 4(a) (1) would apply to trigger the time limitation.

<sup>267</sup> *Id.* at 73-74.

<sup>268</sup> *Id.* at 16.

<sup>269</sup> *Id.* at 73-74.

<sup>270</sup> *Id.* at 16.

<sup>271</sup> See THE PENTAGON PAPERS, *supra* note 124, at 345. See also B. BRODIE, WAR AND POLITICS 141 n.38 (1973). It is interesting to note that direct American participation in hostilities began as early as 1961. Operation "Farm Gate" allowed U.S. helicopters and aircraft to transport Vietnamese to combat while Operation "Mile Train" authorized pilots training Vietnamese pilots to support ground action with their 250 pound bomb if airborne at the time help was necessary. Interview with Frederick Nolting, former United States Ambassador to Vietnam (1961-63), January 15, 1975.

difficult, if not impossible, to devise a workable definition of "hostilities" that would cover all situations. When asked in the House war powers hearings to define "hostilities," Alexander Bickel replied that:

It is at this point that my urge to codify vanishes. There is no way in which one can define that term other than the good faith understanding of it, and the assumption that in the future Presidents will act in good faith to discharge their duty to execute the law.<sup>272</sup>

The problem, of course, is that Presidents and congressmen are likely to have differing interpretations of what actions are covered by section 5 and, if covered, when the sixty-day period begins. "A President who wished to act," Professor Henkin indicated, "could exploit its [section 5] ambiguities and uncertainties, notably the meaning of 'hostilities,' and when 'imminent involvement' is clearly indicated."<sup>273</sup> However, the converse of this situation is also true, as a hostile Congress might wish to characterize any action by the President as one involving a potentially hostile area, thus making it subject to the sixty-day provision. As Senator Javits stated, "At that stage where the President does report, Congress may very well decide that the report is one covered by section 4(a)(1) of this particular measure, and therefore does trigger the sixty-day period, even though he might not think so."<sup>274</sup> Unfortunately, Senator Javits and the other drafters of the Act did not offer any definitive standards by which the President can determine whether 4(a)(1) is applicable. Thus, the Act's ambiguous language may ultimately contribute uncertainty to the war powers controversy rather than present the viable solution its drafters intended.

### 3. Section 5(b) and (c): Congressional Alternatives to End a War

Regardless of the test used in determining the initial date of "imminent hostilities," the President has a maximum of ninety days (sixty days plus a thirty-day extension for "unavoidable military necessity") in which to persuade Congress that his actions were justified. Should Congress disagree, it may take any of three possible courses of action to overrule the President and require that com-

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<sup>272</sup> 1973 *War Powers Hearings*, *supra* note 153, at 185.

<sup>273</sup> HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 103 (1972).

<sup>274</sup> 119 CONG. REC. 18988 (S. daily ed. Oct. 10, 1973) (testimony of Sen. J. Javits).

mitted U. S. armed forces be withdrawn. First, both Houses may pass a concurrent resolution at any time ordering the immediate withdrawal of U.S. troops engaged in combat. Secondly, Congress need do nothing, and at the expiration of the ninety-day period, the President is required to terminate any use of armed forces. Thirdly, Congress may pass normal legislation, similar to the Mansfield Amendment, calling for an immediate disengagement of all U.S. forces. Each of these options available to Congress merits separate analysis with regard to its constitutionality and practicability.

#### *a. Concurrent Resolution*

The drafters of the War Powers Act, fearing a veto of any legislative action recalling a presidential commitment of U.S. forces abroad, attempted to provide a procedure by which the President could not act on such legislation. Section 5(c) states that:

Notwithstanding section (b) [the 60/90 day limitation], at any time that United States Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.<sup>275</sup>

The significance of a concurrent resolution is that it only requires the majority vote of both houses of Congress to become law, thus circumventing the President's veto power. Even the supporters of the War Powers Act questioned this provision's constitutionality, and a significant number of the House Foreign Affairs Committee registered reservations to this section.<sup>276</sup>

Normally a concurrent resolution has no binding effect: it constitutes an expression of opinion without establishing legal

<sup>275</sup> Pub. L. No. 93-148, § 5(c), 87 Stat. 556-57 (1973). With regard to this provision, Senator Javits stated:

Use of the concurrent resolution device to foreshorten the time period is restricted to the initial 60-day period in section 5(b). It would not apply to any extensions to the 90-day period which Congress may have made by law . . . or to the 90-day period during which the President could certify military necessity respecting the safe removal of forces.

119 Cong. Rec. 18987 (S. daily ed. Oct. 10, 1973). This appears to be an incorrect interpretation. Section 5(c) makes the concurrent resolution independent of the 5(b) sixty-day period and specifically applies it to "any time that United States Forces are engaged in hostilities. . ."

<sup>276</sup> See H.R. REP. No. 93-287, 93d Cong., 1st Sess. 2359 (1973) (Supplemental Views of Representatives Mailliard, Broomfield, Mathias, Guyer, and Vander Jagt); *id.* at 2362 (Minority Views of Representatives Frelinghuysen, Derwinski, Thompson, and Burke).

requirements.<sup>277</sup> If a resolution is passed by both Houses which contains matter determined to be legislative in its character and effect, it must be sent to the President for approval. Any attempt to use a concurrent resolution as a device to prevent presidential participation in the legislative process violates the express constitutional requirement that "Every Bill which shall have passed the House of Representatives and the Senate shall, before it becomes a Law, be presented to the President of the United States."<sup>278</sup> Commenting on the legality of a concurrent resolution in the war powers context, one of the leading constitutional scholars in the nation, Alexander Bickel, stated:

... the Constitution pretty clearly says that anything you do that is to have the force of law has to be approved by both Chambers and submitted to the President for signature.

As I read the Constitution and as I suspect the Supreme Court would look at it, these things are extra-constitutional. They are not what was foreseen.<sup>279</sup>

During the course of the House hearings on the Act, Professor Bickel briefly debated with Arthur Schlesinger on the legality of this provision. An extraordinary historian, Professor Schlesinger nevertheless betrayed a misunderstanding of the law by citing the Reorganization Act of 1949 as sufficient precedent to support a binding concurrent resolution.<sup>280</sup>

<sup>277</sup> For a thorough discussion of the constitutional weight of the concurrent resolution, see Giannane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953) in which the author finds such resolutions unconstitutional. See also 41 OP. ATT'Y GEN. 32 (1955).

<sup>278</sup> U.S. CONST. art. I, § 7. One proponent of the concurrent resolution candidly admitted its questionable constitutionality. Representative Fraser (D.-Minn.) stated during the House debate on the War Powers Act:

I want to say that I think this is a sufficiently arguable position [regarding the unconstitutionality of the concurrent resolution] to put in the bill. Let us assume that the court holds its unconstitutional. We have lost nothing because we always retain the authority to act by law.

119 CONG. REC. 6249 (H. daily ed. July 18, 1973).

<sup>279</sup> 1973 *War Powers Hearings*, *supra* note 153, at 205 (testimony of Prof. A. Bickel). During the House debate Representative Dennis stated:

... the only way in which a concurrent resolution can possibly have the binding force and effect of law, which it does under this measure, in order to terminate the Executive action, is by attaching such a resolution as a condition subsequent to a grant of power. Otherwise you have to legislate by going through the legislative process, and that requires a presentation to the President and an opportunity to exercise the veto power. Under the Constitution there is no other way to do it.

119 CONG. REC. 8951 (H. daily ed. Oct. 12, 1973).

<sup>280</sup> 1973 *War Powers Hearings*, *supra* note 153, at 174, 204-05 (testimony of Prof. A. Schlesinger, Jr.).

Under the Reorganization Act the President was delegated the extraordinary power to implement his own reorganization of the government, without seeking approval by the legislature. However, Congress reserved to either house the power to veto such a reorganization by a simple resolution.<sup>281</sup> Thus, the President was granted authority to make rules and regulations having the force of law, exercising such authority as the delegate of the Congress. As the President had never before possessed the power to undertake such action, Congress was entitled to establish the conditions under which it delegated its own authority.

The War Powers Act is the exact legislative opposite of a statute like the Reorganization Act. There is no delegation of additional power to the President in the Act. To the contrary, section 8 specifically states that nothing in the resolution is to be construed as granting *any* additional authority to the President.<sup>282</sup> Therefore, the President is only exercising the power he already possesses under the Constitution, and the Congress cannot attach any conditions to its use. Accordingly, both Professor Bickel<sup>283</sup> and Senator Eagleton<sup>284</sup> stated that the Reorganization Act afforded no legal precedent for a binding concurrent resolution.

The legislative history accompanying the House war powers resolution also cites the Middle East Resolution, the Gulf of Tonkin Resolution, and the 1941 Lend-Lease Act as authority for a binding concurrent resolution.<sup>285</sup> Overlooked however, was the fact that the Executive specifically agreed to be limited by a concurrent resolution in the Middle East and Gulf of Tonkin area resolutions. In the case of the Lend-Lease Act,<sup>286</sup> President Roosevelt did sign the act; however, he subsequently made it very clear that he did not feel bound by the concurrent resolution procedure. In a letter to then Attorney General Jackson, President Roosevelt wrote:

<sup>281</sup> Act of June 20, 1949, ch. 226, 63 Stat. 203.

<sup>282</sup> Pub. L. No. 93-148, § 8(d) (2), 87 Stat. 558 (1973) provides that:

Nothing in this joint resolution (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.

<sup>283</sup> 1973 *War Powers Hearings*, *supra* note 153, at 205 (testimony of Prof. A. Bickel).

<sup>284</sup> *Id.* at 73 (testimony of Sen. T. Eagleton, D.-Mo.).

<sup>285</sup> See H.R. REP. NO. 93-287, 93d Cong., 1st Sess. 2357-58 (1972). See also 1973 *War Powers Hearings*, *supra* note 153, at 256 (testimony of W. Revley).

<sup>286</sup> Act of March 11, 1941, ch. 11, 55 Stat. 32.

I should like to file with the Attorney General an official memorandum placing me on record in regard to that provision of the Lend Lease Bill which seeks to repeal legislation by concurrent resolution of the two houses of Congress.

Would you try your hand at drafting such a memorandum? I should say in it, of course, that the emergency was so great that I signed the bill in spite of a clearly unconstitutional provision contained in it.<sup>287</sup>

Jackson later prepared such a memorandum which explicitly stated that Roosevelt was not acquiescing to the concurrent resolution and that he had only signed the legislation due to the emergency conditions which existed at that time.<sup>288</sup>

Representative Peter Rodino, Chairman of the House Judiciary Committee, justifies the concurrent resolution ". . . as part of carefully drawn procedures to carry out the purpose of specific legislation."<sup>289</sup> He concludes that "the President can disapprove and veto the specific legislation which provides for such procedures, as was done in the War Powers Resolution, but if the specific legislation becomes law, he is bound by such procedures."<sup>290</sup> By this statement Congressman Rodino seems to imply that regardless of the constitutionality of the concurrent resolution procedure, once imposed on the President it is cured of its legal infirmities and becomes binding. For this extraordinary proposition, Rodino cites Bernard Schwartz's commentary on the Constitution. His conclusion could not be more incorrect or his reliance on Schwartz more misplaced. Professor Schwartz, agreeing with President Roosevelt's position on the Lend-Lease Act's concurrent resolution provision, states:

To repeal a statute is plainly to perform a legislative act, which should be subject to the veto power. The Framers themselves clearly intended that the President's negative could be employed to prevent the repeal of laws. To permit the Congress to effectuate what amounts to veto-proof repeals is to violate such intention.<sup>291</sup>

On the issue of using current resolutions as a technique to disapprove executive actions, Professor Schwartz would allow them

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<sup>287</sup> Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1354 (1953).

<sup>288</sup> *Id.* at 1356.

<sup>289</sup> Rodino, *Congressional Review of Executive Action*, 5 SELTON HALL L. REV. 489, 523 n.168.

<sup>290</sup> *Id.*

<sup>291</sup> B. SCHWARTZ, 2 A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 34 (1963).

only insofar as they are tied to a delegation by Congress of its rule-making power.<sup>292</sup> As the War Powers Act delegates no such power to the President, and is in fact a restraint on his authority, Professor Schwartz would not look favorably on Representative Rodino's broad, sweeping statement.

The separation of powers doctrine demands that the President be an integral part of the legislative process regardless of the subject matter, unless the President agrees to a limitation of his powers or Congress as a part of the legislation delegates additional powers to the President. In the final analysis, therefore, a concurrent resolution would not be binding upon the President. At best, such a resolution would only serve as an expression of congressional unity in the face of some course of action taken by the President. As the Legal Adviser to the State Department has stated, "If the President were authorized by the constitution or by legislation to take certain actions, that authority could not be negated by a concurrent resolution, even though he would doubtless give such an expression great weight in his policy decisions."<sup>293</sup>

#### *b. Ninety Days of Inaction: A Silent Veto*

One of the Act's unique provisions is the fact that even if the Congress cannot agree on the wisdom of the President's action or simply fails to act in the requisite ninety days, all deployed troops must be recalled. Of the thirty-five members of the House Foreign Affairs Committee, eleven dissented on this provision, stating they considered it to be illegal or ill advised.<sup>294</sup> In an Act supposedly based on the need for Congress to reassert itself in the decision-making process, it is difficult to understand how this "silent veto"<sup>295</sup> will assist in the achievement of this goal.

Proponents of this provision contend that the elaborate anti-filibuster provisions of the War Powers Act will insure prompt consideration of any hostility and that the sixty-day limitation acts

<sup>292</sup> *Id.*

<sup>293</sup> 1973 *War Powers Hearings*, *supra* note 153, at 136 (testimony of C. Brower).

<sup>294</sup> See HOUSE REPORT, *supra* note 203, at 2358-63.

<sup>295</sup> But see the statement of Rep. Findley during the House debate on the compromise War Powers Resolution:

I firmly believe myself that inaction by the Congress is a reasonable and traditional way to thwart a Presidential effort to establish public policy as in other fields.

119 CONG. REC. 9851 (H. daily ed. Oct. 12, 1973).

only as an incentive for both Congress and the President to act in a timely fashion.<sup>296</sup> This argument overlooks the fact, however, that the detailed procedures in sections 6 and 7 can be modified or deleted at any stage of consideration by a simple yea or nay vote. This means, Representative Dennis stated, ". . . that the Congress can have this important policy of whether the troops should be pulled out determined on a motion to lay on the table, a motion to postpone, or on a motion to recommit."<sup>297</sup>

Describing this provision as "dangerous and perhaps unconstitutional," five congressmen stated that "Congress ought to exercise its powers in a positive way and not have major consequences ensue from the inaction of the Congress."<sup>298</sup> Similarly, Representatives Buchanan and Whalen agreed "that in order to fulfill its constitutional responsibility Congress must act, whether it be in a positive or negative manner."<sup>299</sup> Congress possesses significant war-related powers in the Constitution which it need only assert in order to exercise its authority; it does not have veto power, particularly in the case of a derogation of the President's constitutional authority as Commander-in-Chief.

If the concurrent resolution, an affirmative action by Congress, is an unconstitutional circumvention of the President's legislative authority, this "silent veto" is a fortiori illegal. Although there does exist some scholarly authority that supports such reservations of power by the legislature,<sup>300</sup> no court or commentator has yet suggested that the President's constitutional powers may be so limited.<sup>301</sup> Congress cannot accomplish by inaction more than can be achieved by the constitutionally established legislative process of affirmative action. Moreover, it is difficult to imagine that a President, amidst

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<sup>296</sup> See 119 CONG. REC. 8949 (H. daily ed. Oct. 12, 1973) (testimony of Rep. Zabloncki).

<sup>297</sup> 119 CONG. REC. 8951 (H. daily ed. Oct. 12, 1973) (testimony of Rep. Dennis).

<sup>298</sup> HOUSE REPORT, *supra* note 203, at 2358 (supplemental views of Reps. Mailliard, Broomfield, Guyer, and Vander Jagt).

<sup>299</sup> *Id.* at 2359 (supplemental views of Reps. Buchanan and Whalen).

<sup>300</sup> See Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962), for arguments favoring the constitutionality of a legislative veto.

<sup>301</sup> The leading work in this area, Giannane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953) would only allow the type of legislative veto found in the Reorganization Acts.

a war he found to be in the interest of national security, would be dissuaded to act by congressional silence, inaction, or disagreement. Just as Woodrow Wilson defied the small number of "willful men" attempting to prevent him from arming American ships before World War I,<sup>302</sup> a President would most likely disregard a taciturn legislature.

*c. Affirmative Legislation to End the War*

Congress may also act to end the deployment of U.S. forces abroad by passing specific legislation to this effect within the first sixty days of conflict or any time thereafter. Examples of legislation of this kind are the repeal of the Gulf of Tonkin Resolution and the 1971 Mansfield Amendments which declared United States "policy" to be the termination, at the earliest practicable date, of American military involvement in Indochina. These two actions, however, were not firm declarations by Congress, and the President was able to avoid their intent. Moreover, congressional resolutions, not specifically tied to appropriation acts, are replete with other significant problems.

Once Congress has authorized the President to commit forces, whether by resolution or by the advance grant of authority contained in the War Powers Act, the President assumes complete control of the conduct of the war. The role of Commander-in-Chief is a specifically enumerated constitutional position which Congress may not abridge. Thus, once the President has been given the authority to commence hostilities, he may not be ordered to withdraw U.S. forces if he considers such a move would endanger these or other troops. Professor Bickel, a supporter of the War Powers Act, qualified his endorsement of the legislation, saying:

I don't think the President can be deprived of his power to respond to an imminent threat of attack (as well as the attack itself); or of his power to respond to attacks and threats against our troops wherever they may be, as well as against our territory; or of the power to continue to see to the safety of our troops once they are engaged, *even if a statutory [60 day] period has expired.*<sup>303</sup>

Assuming the correctness of Professor Bickel's view, the President's powers in combat must then be considered to be paramount, overriding every other grant of authority stated in the Constitution.

<sup>302</sup> See notes 69-70 and accompanying text *supra*.

<sup>303</sup> 117 Cong. Rec. 12390 (S. daily ed. July 28, 1971) (emphasis added).

Thus, a joint congressional resolution ending a war would not be binding so long as the President could show that some U.S. troops might be endangered by the ordered withdrawal. Such action as the joint resolution is hardly necessary, however, as Congress possesses ample authority to end any war by means of the appropriation process.

Military actions require enormous expenditures of money. Thus, any failure by Congress to pass the necessary appropriations effectively ends a war. Congressmen, of course, are reluctant to either leave American troops weaponless or endanger their lives unnecessarily in order to force the President to make a decision. However, the Eagleton amendment calling for an end to the bombing of Cambodia in 1973 indicates the effectiveness of such a use of funds. As a practical matter, Congress may simply designate a future date on which appropriations will be terminated.<sup>304</sup> This allows the President sufficient time in which to conduct a slow and safe withdrawal of committed troops.

In addition to the previously mentioned constitutional difficulties with the sixty-day limitation, there exists a number of very practical reasons for not placing this type of a restraint on the Commander-in-Chief. Such a limitation might well generate pressures on the President to escalate hostilities in order to achieve all objectives within the allotted time. Moreover, negotiations might well be delayed by the opposing force for the sixty or ninety-day period in an attempt to have the U. S. Congress dictate terms to the President. This, too, would prolong hostilities. Finally, such limitations only exacerbate the ever present danger of sacrificing secrecy, decisiveness, and flexibility in favor of lengthy and often unproductive congressional debate. Quiet diplomacy, unimpeded by deadlines, newsmen, or undue pressure is oftentimes the best approach toward attainment of peaceful solutions.

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<sup>304</sup> An example of such a use of the congressional appropriations authority occurred on June 19, 1972, when the Senate voted to cut off funds for recently concluded military base agreements with Portugal and Bahrain unless the agreements were submitted to the Senate as treaties. The Executive had not complied with an earlier Senate resolution asking for submission of the executive agreements as treaties on the ground that they had already been concluded. See 118 CONG. REC. 9533 (S. daily ed. June 19, 1972); Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 3 (1971).

## V. THE WAR POWERS ACT IN PRACTICE: DANANG, PHNOM PENH, SAIGON, AND THE MAYAQUEZ REPORTS

The preceding legislative interpretation of the central provisions of the War Powers Act relied primarily on the voluminous legislative hearings, committee reports, and statements of the drafters' intent. While such an analysis is vital for any judicial interpretation of the Act's often ambiguous provisions, the political ramifications of this legislation cannot be understood without putting the Act in its proper perspective and considering its application to actual military operations. The Act lay dormant for a year and a half after its well-publicized passage in 1973, but within the span of a sixty-day period in April and May of 1975 President Ford was required, or at least inspired, by the War Powers Act to render four reports to Congress concerning U.S. military operations in Southeast Asia. These four reports, and the tragic events which precipitated them, provide a unique opportunity to judge the effect of the War Powers Act in practice.

### *A. THE 1975 OFFENSIVE: SOUTH VIETNAM UNDER ATTACK*

New Year's Day 1975 marked the beginning of a North Vietnamese siege of the capital of Phouc Long Province—Phouc Binh, just 75 miles north of Saigon. This attack was later to be designated as the first move of a new Communist offensive in South Vietnam; an offensive which was to grow and to proceed with remarkable rapidity. Within a week, the North Vietnamese 7th Division, spearheaded by Soviet-built tanks, was able to penetrate the city's outer perimeter. Symptomatic of future problems, the Saigon government was unable to assist the 2,500 troops trapped in the besieged city as both air support and attempts at troop reinforcement were unsuccessful.<sup>305</sup> When, on January 7, the Communists seized full control of Phouc Binh, it was the first time an entire province had been captured since the 1973 Paris Peace Accords.

The attack on Phouc Binh indicated a significant change in the

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<sup>305</sup> Because of heavy anti-aircraft fire, the South Vietnamese Air Force was unable to provide close air support for much of the battle. This, in turn, made it virtually impossible for troop-carrying helicopters to land. See *TIME*, Jan. 20, 1975, at 41.

overall Communist strategy and provided an ominous warning to the Saigon government. Though the city was of seemingly minor strategic importance, the relative ease of Communist victory combined with the mild reaction of the United States to the violation of the Paris Peace Accords signaled new opportunities for the aggressive attacker.<sup>308</sup>

Emboldened by its January victory, Hanoi launched a massive attack in March along an arc ranging from the Central Highland cities of Kontum and Pleiku down 200 miles to Tay Ninh. After overrunning three district capitals in the highland regions, the attacking Communists converged on what had always been their principal target: the strategic capital of Darlac Province—Ban Me Thuot. Caught unprepared by the lightning advance of the North Vietnamese forces which had infiltrated into the area from Laos the previous month, the South Vietnamese 23d Division fell back into a disorganized defense of the city.

The attack on Ban Me Thuot was only one part of a two-pronged Communist advance; the second encompassed a thrust by the Communists into the northern provinces of Military Region I. Despite the presence of some of Saigon's elite marine and airborne units, as well as the ARVN 1st Division, Quang Tri and the former imperial capital of Hue were soon experiencing the heaviest fighting since the 1968 Tet Offensive. When, on March 12, Ban Me Thuot fell, the already deteriorating morale of the northern defenders reached a new low.

President Thieu, under intense pressure since the Phouc Binh defeat, now found himself threatened on two fronts while his remaining forces were thinly spread over the entire length of the nation. Two days after the fall of Ban Me Thuot, Thieu reportedly met with General Pham Van Phu, Military Region II Commander, in Nha Trang to determine the proper course of action. While this meeting, perhaps the most important conference of the entire Vietnam war, was secret, the ultimate decision is well known: President Thieu took the drastic step of ordering a strategic withdrawal from the Central Highlands. While this unexpected withdrawal was being implemented, the President flew to DaNang and ordered General Ngo Quang Truong, the famed I Corps Commander, to abandon what little remained of Quang Tri province

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<sup>308</sup> See N.Y. Times, Jan. 12, 1975, at 1, col. 5.

and reestablish his defensive position around DaNang.<sup>307</sup> Thus, within only a few days, with the bulk of his military force intact, President Thieu had abandoned one-fourth of the country, seven provinces with a population of over 1.7 million people.

Whatever the theoretical merits of the withdrawal may have been, it soon degenerated into a leaderless rout, leaving thousands of frightened civilians in its wake. Caught by surprise,<sup>308</sup> the United States Government watched in anguish as Kontum, Pleiku, and the Darlac provinces in the Central Highlands fell along with Quang Tri in Military Region I. The problem of fleeing refugees, however, presented a new crisis for the Saigon government, a crisis which eventually led to limited United States military participation and the first application of the War Powers Act.

### B. THE DANANG EVACUATION

As a result of the chaotic military evacuation from the north and the fear of Communist reprisals similar to that experienced in Hue during the 1968 Tet offensive, refugees fled in thousands to the coast in hope of being evacuated to the more secure southern ports. By the end of March, DaNang was hopelessly swollen by the influx of an estimated 500,000 refugees.<sup>309</sup> For days the Saigon government endeavored to evacuate the remaining military units and endangered civilians by ship and aircraft. With thousands of civilians still awaiting evacuation, North Vietnamese units began assaulting the port city.

The trapped refugees put the United States Government in a painful quandry: whether or not to intervene militarily and assist or take control of the evacuation effort. Finally, a short time before DaNang was taken by the Communists, President Ford ordered four U.S. military transports to move off the coast of South Vietnam and pick up refugees.

To dispel any accusations of military combat intervention by

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<sup>307</sup> Reportedly General Truong disagreed with President Thieu's withdrawal order and attempted to dissuade him. See *The Washington Post*, April 5, 1975, at A11, col. 4. The surprising order left little time to prepare or plan and many unit commanders were not aware of the retreat order until they read it in the paper! *TIME*, March 31, 1975, at 10.

<sup>308</sup> The United States military establishment was apparently not informed of the evacuation order in advance of its implementation.

<sup>309</sup> *N.Y. Times*, March 29, 1975, at 1, col. 8.

sending the four vessels, the Ford Administration assured Congress and the public that the scope of the operation was limited to humanitarian relief. The ships were to be positioned off the coast thereby out of range of North Vietnamese guns; their only mission was to pick up civilians coming to them. "Our vessels will not enter the combat areas," Ronald Nessen, the President's press secretary stated, "or participate in any hostilities."<sup>310</sup> Because of the limited nature of the operation, the White House determined that the War Powers Act was inapplicable.

In order to decide whether the War Powers Act did apply to the President's commitment of naval vessels off the DaNang coast, three important provisions of the Act must be reviewed: the definition of the President's war powers in section 2(c), the requirement of precommitment consultation in section 3, and the mandatory post-commitment reporting categories in section 4.

Concerning the limits of the President's war powers, there was no criticism of the DaNang evacuation as being beyond the Chief Executive's authority—nor should there have been. Even if the restrictive definition of the President's war powers contained in section 2(c) of the War Powers Act were operable, this humanitarian relief effort could not be reasonably characterized as a war effort so as to be circumscribed by the Act.<sup>311</sup> A more important question is whether President Ford should have consulted with "the Congress" before ordering the four vessels to move into position. If consultation were required, then it would have to be asserted that the situation was one in which the President should have expected imminent involvement in hostilities by his decision. This was hardly the case. The military was specifically ordered to avoid confrontation and, in fact, was never involved in hostilities during the course of the limited evacuation.<sup>312</sup> Therefore, precommitment consultation

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<sup>310</sup> N.Y. Times, March 31, 1975, at 1, col. 6.

<sup>311</sup> *But see* Letters to the Editor, N.Y. Times, April 8, 1975, at 36, col. 3. In his letter, Abraham F. Lowenthal, Assistant Director of the Council on Foreign Relations, criticized the President's allegation that the War Powers Act was inapplicable. His argument was essentially that a failure to report the allegedly humanitarian operation "could disguise something else" or "lead to something wider." Mr. Lowenthal's concerns, although not without some foundation, are entirely unrelated to the requirements of the War Powers Act. The Act is not applicable to every possible military action, and requires a certain threshold of U.S. military involvement which Mr. Lowenthal failed to consider.

<sup>312</sup> Due to the speed of the Communist seizure of DaNang, the rescue operation was somewhat limited. N.Y. Times, April 4, 1975, at 11, col. 6.

was not required under the War Powers Act, although President Ford did notify senior congressional leaders and appropriate committee chairmen in advance of his decision.

If consultation is not mandated, a report may still be required if the operation falls within the three categories of section 4 of the Act. As forces were not being introduced into imminent hostilities, and the 700 marines aboard the ship did not substantially enlarge the existing U.S. forces, only section 4(a)(2) could conceivably apply. As previously discussed, however, section 4(a)(2) applies only when the troops are both "equipped for combat" *and* there is some expectation of hostile fire.<sup>313</sup> In this case, there was little likelihood of the U.S. forces being engaged in combat given their location and mission. On the other hand, the vessels were ultimately sent into a combat zone, and it was reasonable to expect that a vessel might be subject to random enemy fire.

While the author believes that the DaNang evacuation attempt did not require a report, some questions arose regarding section 4(a)(2), and the Administration chose the safe middle ground of denying its applicability while complying with its provisions. Although Mr. Nessen argued, on behalf of the President, that a report was unnecessary, he conceded that President Ford would be ". . . informing members of Congress in keeping with the spirit of the War Powers Act."<sup>314</sup> Accordingly, President Ford's April 4 letter to Congress was couched in such terms as to give the required information without ever admitting the necessity of complying with the War Powers Act. Observe the careful wording:

In accordance with my desire to keep the Congress fully informed of this matter, and taking note of the provision of section 4(a)(2) of the War Powers Resolution, I wish to report to you concerning one aspect of United States participation in the refugee evacuation effort.<sup>315</sup>

Thus, the first report stimulated by the War Powers Act was not in actuality a formal report, but rather a carefully worded letter of

<sup>313</sup> See notes 217-18 and accompanying text *supra*.

<sup>314</sup> N.Y. Times, March 31, 1975, at 14, col. 7.

<sup>315</sup> As to the application of section 4(a)(2), President Ford stated:

Although these forces [the 700 marines] are equipped for combat within the meaning of section 4(a)(2) of Public Law 98-148, their sole mission is to assist in the evacuation including the maintenance of order on board the vessels engaged in that task.

Letter from President Ford to Senator Eastland, April 4, 1975, copy on file in the library of The Judge Advocate General's School, US Army, Charlottesville, Virginia.

information by the President. Unwilling to admit the War Powers Act applied, but seeking to avoid further executive-congressional dissension, President Ford provided the necessary information. While this report is a questionable precedent in any analysis of operation of the War Powers Act, it is an important political concession and historically it set the stage for the next report concerning the evacuation of Phnom Penh.

### C. OPERATION EAGLE PULL: THE CAMBODIAN EVACUATION

On New Year's Day 1975 almost at the same time the North Vietnamese were beginning their attack on Phouc Binh, the Khmer Rouge insurgents launched their final offensive in Cambodia. Their objectives were clear: cut all sea and land routes to Phnom Penh, seize or damage the only airfield, and capture the capital city before the monsoon rains began. By February the Communists had succeeded in interdicting the Mekong River, closing what had been the principal supply route for the government forces. With resupply virtually impossible over land, Phnom Penh became isolated.

At this critical juncture in the five-year Cambodian war effort, the capital became totally dependent on the continuing resupply by commercial U.S. airplanes through the Pochetong Airport ten miles southwest of Phnom Penh.<sup>816</sup> If the flow of critical supplies were cut or seriously disrupted, and stockpiles of food and military supplies depleted, the government's collapse would be inevitable. Therefore, when the Communist forces breached the outer defenses of Phnom Penh in April and came within mortar range of Pochetong airfield, Cambodia's fate was sealed. President Lon Nol soon left the country and the United States evacuated all but the minimum number of individuals necessary to continue the embassy. Finally, when all diplomatic efforts had failed and the situation appeared hopeless, President Ford directed the implementation of operation "Eagle Pull," the evacuation of Phnom Penh.<sup>817</sup>

Aircraft carriers *Okinawa* and *Hancock* had been positioned in

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<sup>816</sup> For an account of Bird Air's activity and its escape from the War Powers Act's reporting requirements, see notes 240-42 and accompanying text *supra*.

<sup>817</sup> Shortly before the evacuation was ordered, Communist gunners fired forty-six shells and rockets into the airport. Shrapnel from one round reportedly downed a DC-3 taking off, killing its American pilot. N.Y. Times, April 12, 1975, at 1, col. 8.

the area since February in anticipation of some type of rescue mission. On the morning of April 11, thirty-six CH-53 helicopters carrying 350 marines and supported by tactical aircraft launched from the carriers began the evacuation. This rescue force, repeatedly landing in a soccer field a few hundred yards from the American Embassy, completed the operation in less than three and one-half hours. A total of 82 U.S. citizens, 150 Cambodians, and 35 third party nationals were flown to the carrier *Okinawa*.

Following the successful completion of the evacuation, President Ford informed Congress of the operation on April 12.

Despite the evacuation of non-Americans from Phnom Penh, there was no congressional criticism that the President had exceeded his war powers. The issue of precommitment consultation, however, was raised by Senator Javits prior to the evacuation. In a letter to Senator John Sparkman, Chairman of the Foreign Relations Committee, Senator Javits questioned the legality of the planned Cambodian evacuation. Referring to the War Powers Act, he stated "I believe that we are now in just such a situation with respect to advance consultation as is mandated by the law." "And," he continued, "I feel that the Senate Foreign Relations Committee should formally request advance consultation under section 3 of the law in light of the possible introduction of U.S. armed forces into Cambodian hostilities for the purpose of effecting an evacuation."<sup>818</sup>

Norwithstanding Senator Javits' status as a principal drafter of the War Powers Act, consultation does not appear to be legally required in this instance, although it may be politically warranted. Consultation is required only when U.S. forces are to be committed into existing or imminent hostilities. In this case, the operation was a limited one with a prescribed, defensive mission. "There is no intention to use force," a State Department statement issued prior to the evacuation declared, "but if necessary it will be applied to protect the lives of the evacuees."<sup>819</sup>

While consultation was not required prior to initiating this operation, the Administration could not escape the War Powers Act's reporting requirement. Unlike the DaNang operation, this rescue operation involved a military contingent which was not only

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<sup>818</sup> Letter from Senator Javits to Senator Sparkman, March 19, 1975, reported in *N.Y. Times*, April 13, 1975, at 19, col. 7.

<sup>819</sup> *N.Y. Times*, April 12, 1975, at 8, col. 4.

prepared for combat, but was in fact subject to hostile fire. The Communist insurgents, only a few miles from Phnom Penh on the eastern bank of the Mekong River, fired several shells at the evacuating force. While no U.S. personnel were injured, one child watching the operation was reportedly killed by the flying shrapnel from the bursting artillery shells and another seriously wounded.<sup>320</sup> Given the level of combat, but the absence of any intent to engage in hostilities, the Cambodian evacuation appears to fall squarely within section 4(a)(2) of the War Powers Act.<sup>321</sup>

The importance of a 4(a)(2) action is that it avoids both the consultation and sixty-day time limitation problem previously discussed.<sup>322</sup> The next U.S. military operation in Indochina, however, presented a situation where it is arguable that United States forces were introduced into hostilities: the evacuation of Saigon.

#### D. OPERATION TALON VISE: THE FALL OF SAIGON

While Operation Eagle Pull was concluding the U.S. presence in Cambodia and that country was preparing itself for a Communist takeover, South Vietnam's government was similarly faltering. Within three weeks after the fall of Ban Me Thuot, the South Vietnamese Army—one of the largest, best equipped forces in the world—lay in shambles. One of the major ARVN units, the 23d Division, was largely annihilated at the battle of Ban Me Thuot and the fleeing government forces opened up the Central Highlands to Communist occupation. Quickly capitalizing on President Thieu's withdrawal order, the North Vietnamese moved across the entire width of South Vietnam to the coast at Tam Key, dividing the nation in two. After a brief, but courageous defense north of Qui Nhon by the ARVN 22d Division, the South Vietnamese defenders

<sup>320</sup> N.Y. Times, April 13, 1975, at 1, col. 6.

<sup>321</sup> President Ford's report is unclear in this regard as he stated:

Although these forces were equipped for combat within the meaning of Section 4(a)(2) of Public Law 93-148, their mission was to effect the evacuation of U.S. Nationals.

This wording, similar to the DaNang report, appears to at once admit and deny the application of section 4(a)(2). In any case, the report itself is far more important than any specific reference to a particular provision of the War Powers Act. USE OF UNITED STATES MILITARY FORCES IN THE EVACUATION OF UNITED STATES CITIZENS AND OTHERS FROM CAMBODIA, H.R. Doc. No. 105, 94th Cong., 1st Sess.—(1975). This document is also reported in the N.Y. Times, April 12, 1975, at 8, col. 2.

<sup>322</sup> See notes 264-65 and accompanying text *supra*.

yielded to the southward Communist drive which engulfed the coastal towns of Tuy Hoa, Nha Trang, and Cam Ranh in rapid succession.

In the north, the situation was even worse. Confusion over the initial withdrawal order and widespread civilian panic led to piecemeal and uncoordinated defense of Hue and DaNang. The ARVN 1st Division, reported to be the finest South Vietnamese division, and an elite marine brigade escaped defeat at Hue only to be destroyed at DaNang. Other units, including the majority of the 2d and 3d Divisions, moved to DaNang before it fell, and were broken there. By the time Phnom Penh fell, the Saigon government had lost more than half of its major combat units, much of its military equipment, two-thirds of its territory, and was outnumbered in its own country. The shattered remnants of the defeated units and the five remaining divisions were hastily organized for the inevitable battle for the prize of Vietnam: Saigon.

In an attempt to begin their attack on Saigon before the government could prepare an effective defense of the city, North Vietnam began massing its troops at the beginning of April for a final attack. To the fifteen divisions already present in South Vietnam, Hanoi added seven of its eight home-based strategic reserve divisions for the final offensive.<sup>323</sup> With these additional forces, an estimated 130,000 North Vietnamese troops began to encircle Saigon, cutting off routes of resupply or escape.

During this tumultuous time period, the Ford Administration was placed in a hopeless dilemma. It could not announce, much less order, a withdrawal of American citizens in Saigon for fear of undermining the government's already teetering morale; yet an estimated 6,000 Americans were still in South Vietnam at the beginning of April; in addition, many more thousands of South Vietnamese were believed to be seriously endangered by a Communist takeover. As Communist forces began to press Saigon from the north at Xuan Loc and the east at Bien Hoa, the Administration was forced to consider previously formulated contingency plans for the final evacuation of U.S. citizens, third-country nationals, and some South Vietnamese from Saigon.

As plans were being considered, it was clear that several of the proposed options would run afoul of the War Powers Act's limita-

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<sup>323</sup> N.Y. Times, April 5, 1975, at 1, col. 6; The Washington Post, April 11, 1975, at A24, col. 1.

tions and other related legislation.<sup>324</sup> President Ford must have believed that as Commander-in-Chief he had inherent constitutional authority to protect all Americans remaining in Saigon but, he decided, in light of the various congressional restrictions, it would be wise to approach Congress. On April 10 the President addressed a joint session of the House and Senate and asked Congress to

... clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes of protecting American lives by ensuring their evacuation, if this should become necessary. I also ask prompt revision of the law to cover those Vietnamese to whom we have a special obligation and whose lives may be endangered, should the worst come to pass.

I hope that this authority will never be used, but if it is needed there will be no time for congressional debate.

Because of the urgency of this situation, I urge the Congress to complete action on all these measures not later than April 19.<sup>325</sup>

In the weeks following President Ford's urgent request for additional evacuation authority, and while Congress debated beyond his April 19 deadline, South Vietnam's already chaotic defenses began

<sup>324</sup> In addition to the War Powers Act, the 1973 Fulbright Amendment to an appropriation act provided that

None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam or off the shores of Cambodia, Laos, North Vietnam and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purpose.

Act of July 1, 1973, Pub. L. 93-50, § 307, 87 Stat. 99. This Act also applied to the subsequent *Mayaguez* operation. In that regard, see A. Lewis, *The Laws Under Which Mr. Ford Took Action*, May 18, 1975, at 2 & 3-5. There Roderick Hill, the President's counsel, discusses the applicability of the law. Mr. Hill cites Senator Frank Church, one of the bill's sponsors, as saying that the bill was not intended to keep the President from using force to rescue American citizens. Accordingly, Hill argued that:

We should not assume that Congress would lightly interfere with the true constitutional war power of the President—and what would be more at the heart of the true power than assuring the free passage of vessels and the safety of American citizens . . . There is a rational argument to show the President did not willy nilly ignore the law or declare it unconstitutional.

<sup>325</sup> The full text of this speech is reported in *The Washington Post*, April 11, 1975, at A17, cols. 1-6. In addition to requesting supplemental evacuation authority, the President also sought \$722 million in military aid and \$250 million in economic and humanitarian aid for South Vietnam. Following this speech, Senator Javits stated in a CBS "Face the Nation" interview that the President already had the constitutional authority to protect American lives in South Vietnam but "No authority whatever" to use troops to rescue non-Americans. *The Washington Post*, April 14, 1975, at A1, col. 1.

to crumble. Xuan Loc, the site of the last effective stand by South Vietnam in the war, was abandoned and the massive Bien Hoa airfield neutralized by incoming artillery fire. Route 15, the last escape route to the sea, was cut by North Vietnamese forces. By the time President Thieu resigned on April 22<sup>326</sup> Saigon was surrounded, isolated and totally dependent, as Phnom Penh had been a few weeks earlier, on the continuing viability of a single airfield—Ton Son Nhut.

On April 28, hours after General Doung Van "Big" Minh assumed control of the government, North Vietnam launched what was to be its last major attack of the war: a coordinated artillery, rocket, and mortar assault on the vital, but vulnerable, Ton Son Nhut airbase. With over a hundred shells raining on the airport runways, the United States was forced to suspend its evacuation effort with about 1,400 Americans stranded in Saigon. Tensions heightened when it was learned that two U.S. Marines had died in the airbase assault while guarding the military attaché's compound.

A few hours after the attack began (Monday evening in Washington), the President was advised of the assault on Ton Son Nhut and the temporary cessation of the evacuation effort. A meeting of the National Security Council was convened, but a final decision was delayed pending further information on the status of the airfield. The next day, when two C-130 aircraft were unable to land, it was clear that Ton Son Nhut was no longer available for an evacuation.<sup>327</sup>

Without either an airport or a secured coastal port the less dangerous military options of evacuating the endangered Americans *en masse* by fixed wing aircraft or ship were impossible. This left only what was referred to as "option four," the dangerous helicopter rescue of all Americans and selected Vietnamese from inside Saigon itself.<sup>328</sup> Accordingly, President Ford ordered on Tuesday evening that operation Talon Vise begin.

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<sup>326</sup> President Thieu resigned after ten years in office, and appointed Vice President Tran Van Huong to replace him. *N.Y. Times*, April 22, 1975, at 1, col. 8. Huong, quickly denounced by the North Vietnamese as Thieu's "puppet," lasted less than a week in office.

<sup>327</sup> The aircraft were unable to land because of heavy Communist shelling, which left all but 5,000 feet of runway unusable. In addition, thousands of Vietnamese gathered on the runways. *The Washington Post*, April 30, 1975, at A12, cols. 1-4.

<sup>328</sup> The other options were a commercial airlift, military airlift, or naval evacuation from Vung Tau. The latter option would have required establishing a

At 1:04 a.m. EDT on Wednesday, a force of seventy Marine helicopters began the perilous airlift from two selected pick-up zones in Saigon. What was estimated in advance to have been a nine to twelve-hour operation for 2-3,000 people ultimately lasted twenty hours as a total of 7,000 Americans and Vietnamese were evacuated by 630 individual helicopter sorties. The evacuating force was subject to enemy small arms fire and the rioting South Vietnamese continually threatened the mission. Marines exchanged fire with their attackers, and tactical aircraft silenced a suspected North Vietnamese anti-aircraft position.<sup>329</sup> Following a hazardous rescue of the remaining marines from the top of the U.S. Embassy, the evacuation force departed Saigon at 7:46 p.m. EDT to join the assembled armada waiting in the South China Sea.

Although the operation was entirely successful, the President faced a special problem when he attempted to comply with the War Powers Act to report and justify a combat rescue mission which included the extraction of 5,500 South Vietnamese from Saigon. Prior to the operation, the Administration had at least tacitly admitted it lacked the constitutional power to rescue South Vietnamese citizens and requested supplemental authority.<sup>330</sup> Yet, when the circumstances demanded immediate action, Congress had not yet acted to lift the limitations imposed upon the Executive's power to act in Southeast Asia.

In spite of President Ford's urgent request for additional authority not later than April 19, Congress found it difficult to accede. Congressional resentment over its too rapid passage of the Gulf of Tonkin Resolution surfaced, as well as dissension over both the pace of evacuation and the number of South Vietnamese to be rescued.

Finally, after long and heated debates, the Senate and House passed separate bills on April 23 and 24 to give the President additional

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secure corridor from Saigon to the South Vietnamese coast and required at least one U.S. division to secure the beachhead. See *N.Y. Times*, April 17, 1975, at 1, col. 5.

<sup>329</sup> It was reported by both *The Washington Post* and *Los Angeles Times* that the evacuating force had conducted heavy undisclosed bombing raids. This story, denied by the White House and the Pentagon before publication was untrue and both papers subsequently retracted it. See generally Charles Seib, *Was the Bombing Story True*, *The Washington Post*, June 16, 1975, at A22, col. 5.

<sup>330</sup> "There is no question whatever." Secretary of State Kissinger stated following President Ford's request for additional evacuation authority, "that we have no legal authority to remove South Vietnamese unless it is in connection with some American evacuation and there is space available." *The Washington Post*, April 12, 1975, at A1, col. 4.

evacuation authority.<sup>331</sup> On April 25 the House-Senate conferees met and agreed on a compromise evacuation bill which was inundated with references to the War Powers Act.<sup>332</sup> In brief, the bill lifted the restrictions and permitted the President to evacuate all Americans and those Vietnamese who were dependents of U.S. citizens, related to U.S. citizens, or those "to whose lives a direct and imminent threat exists." Notwithstanding this narrow and carefully worded additional power, however, the bill stipulated that the use of U.S. forces must cease after sixty days—in accordance with section 5 of the War Powers Act—absent additional congressional approval.

The Senate quickly passed the conference bill by a vote of 46-17 but, on April 28 when the President ordered the evacuation to begin, the House had not yet acted. Not until May 1 did the House consider the evacuation bill, and then rejected it by a vote of 246 to 162. Supporters of the War Powers Act, including Senator Javits, Senator Eagleton, and Representative Zabloncki, unsuccessfully campaigned for the bill's passage, in a belated effort to establish some form of precedent for joint congressional-executive decision making.<sup>333</sup> Absent such legislation, the President was forced to rely on his ever-controversial authority as Commander-in-Chief. In his report on the Saigon evacuation, President Ford simply stated: "The operation was ordered and conducted pursuant to the President's constitutional executive power and his authority as Commander-in-Chief of U.S. Armed Forces."<sup>334</sup>

<sup>331</sup> Two Democratic liberals, Donald M. Fraser and Robert N. Giaino were instrumental in encouraging the House to pass the evacuation authority. At one stage in the fourteen hours of turbulent debate, Giaino caustically remarked:

We are great in this Congress when it comes to lowering taxes or voting greater deficits or voting for many good social programs, but when we get a tough nut like this one before us, we tend to obfuscate and get lost in extraneous and literally non-germane areas.

To Fraser, the question revolved around whether Congress was prepared to act in the war-making process:

Under the War Powers Act, we tried to limit the President by asking him to come to us if he wanted to use force anywhere in the world. I do not like to see us abdicate that responsibility. I do not like to see us say: "Well, we cannot work it out, so we hand to back to you and you use your Constitutional Authority."

N.Y. Times, April 25, 1975, at 6, col. 8. Given the ultimate failure of the bill, both Fraser and Giaino's statements were unusually prophetic.

<sup>332</sup> The text of this bill is reported in *The Washington Post*, April 26, 1975, at A5, cols. 1-4.

<sup>333</sup> N.Y. Times, May 2, 1975, at 1, col. 8.

<sup>334</sup> Letter from President Ford to Senator Eastland, April 30, 1975, copy on file in the library of The Judge Advocate General's School, US Army, Charlottesville, Virginia.

Whether the President actually possesses the inherent constitutional authority to evacuate endangered third-party nationals while simultaneously rescuing American citizens remains an unsettled question. Of far more importance is Congress' inability to respond to the President's request for authority in a timely fashion. The President's forthright request presented a unique opportunity for Congress to proscribe by law the use of force for the Vietnamese evacuation and participate fully in the decision-making process. Unfortunately, in Senator Eagleton's words, "Congress fumbled the ball,"<sup>385</sup> and the President had no alternative but to go forward without enabling legislation.

As the Talon Vise operation lasted less than a day, there was no reason for President Ford to decide whether the evacuation should be considered a 4(a)(1) or 4(a)(2) operation under the War Powers Act and he simply referred to section 4 in his April 30 report to Congress. If the operation had continued, however, Congress could arguably have characterized the action as a 4(a)(1) action in spite of its limited mission because the rescuing force was in fact introduced into a combat situation and the marines and their supporting aircraft did fire on enemy attackers. A better example of a 4(a)(1) operation occurred just two weeks later when U.S. combat forces returned to Southeast Asia and were involved in hostilities. This time, however, their mission was not evacuating embassy personnel and third-party nationals, but a full-fledged combat operation aimed at rescuing thirty-nine captured American seamen.

#### E. THE MAYAQUEZ RESCUE AND THE CONSULTATION DEBATE

On Monday, May 12, the S.S. *Mayaguez*, a rusting thirty-one year old freighter carrying containers from Hong Kong to Thailand, was fired upon, stopped, boarded and seized by a Cambodian naval patrol. At the time of the *Mayaguez's* capture, the vessel was sixty miles off the coast of mainland Cambodia in the vicinity of a tiny rock islet, Poulo Wai, in the Gulf of Siam.<sup>386</sup> The following morning, the

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<sup>385</sup> Thomas F. Eagleton, *Congress' Inaction on War*, N.Y. Times, May 6, 1975, at 39, col. 2.

<sup>386</sup> The uninhabited Wai Islands are claimed by Thailand, South Vietnam, and Cambodia. Unbeknown to the *Mayaguez's* captain, the Cambodians in the previous ten days had fired upon other ships and fishing boats in the same general area without explanation. TIME, May 26, 1975, at 10.

Cambodians ordered the *Mayaguez's* crew to proceed to Koh Tang Island, a small crescent-shaped island about thirty miles south of the Cambodian port of Kompong Som (also known as Sihanoukville).

The *Mayaguez's* initial "mayday" broadcast at the time of her seizure was soon brought to the attention of the President and he convened an urgent meeting of the National Security Council. At this meeting the State Department was ordered to exhaust every possible diplomatic channel to urge Cambodia's xenophobic new Khmer Rouge government to return the vessel and her crew. State Department attempts to have the People's Republic of China, Prince Sihanouk, or the United Nations intervene failed.

At the same time diplomatic efforts began, the Pentagon began to conduct maritime reconnaissance and to assemble a rescue force. When the *Mayaguez* was seized, the 7th Fleet was otherwise committed. It had just evacuated thousands of Vietnamese refugees and was carrying them to other locations. To fill this void, about 1,000 marines from the 3d Marine Division based in Okinawa were airlifted to Thailand. In addition, the Navy destroyer escort U.S.S. *Harold E. Holt*, the aircraft carrier *Coral Sea*, and the guided missile destroyer *Henry B. Wilson* were ordered into the area together with the supply ship *Vasa*. Finally, three Navy P3 Orion anti-submarine reconnaissance planes located at the U.S. Air Force Base at U Tapao, Thailand, were ordered to find and maintain aerial surveillance of the captured vessel.

The location of the *Mayaguez* and her crew was initially unclear. Based on the ship's last broadcast, it was thought that the freighter had been taken to Kompong Som. On Monday reconnaissance aircraft drew small arms fire as they located the *Mayaguez* at Tang Island. Tuesday morning the President ordered F-4 Phantoms, A-7 Corsair light attack planes and F-111 fighter bombers from Thailand to interdict any movement from or to Tang Island.

It was subsequently discovered that early Wednesday morning Cambodian time, the ship's crew had been taken to the mainland by a Thai fishing boat escorted by Cambodian gunboats. Newspaper accounts reported that U.S. jets fired warning shots, gassed the boats, and when the ships still proceeded, attacked, sinking five boats and damaging two others. The eighth gunboat, which contained the American seamen, was allowed to continue because a pilot reported seeing eight or nine men with "Caucasian faces" on deck. With American jets still circling overhead, the crew landed at Kompong Som and were taken inland. After a series of delays, during which

contact was lost with what the military only suspected might be the *Mayaguez's* crew, the Thai vessel secretly moved the Americans to Rong Island, about fifty miles north of Koh Tang.

While the captured Americans began to negotiate for their release from Rong Island, the President convened his fourth, and final Security Council meeting during the *Mayaguez* affair. General David C. Jones, acting Chairman of the Joint Chiefs of Staff, presented five military options. The President chose the option calling for a marine landing force on Tang Island (where it was thought that at least part of the ship's crew was still located) and protective air strikes against nearby military targets capable of endangering the operation. The operation was ordered to begin Thursday morning (Cambodian time), and congressional leaders were briefed on the situation and the proposed course of action.

The operation began as eight helicopters carrying 210 marines from the U Tapao Air Base in Thailand attempted to land on Tang Island.<sup>337</sup> Welcomed by a surprisingly large defensive force, three U.S. helicopters were immediately shot down and two others damaged.<sup>338</sup>

While U.S. warplanes strafed the Cambodian positions, the U.S.S. *Holt* moved along side the *Mayaguez* and a boarding party found that the crew had disappeared. Several hours later, the freighter's crew was released from Rong Island and picked up by the U.S. destroyer *Robert L. Wilson*. At about the same time the crew was discovered, tactical aircraft from the carrier *Coral Sea* began their attack on Cambodian mainland military targets. The main runway at Ream airport was bombed destroying several Cambodian aircraft and in a second raid about an hour later, U.S. jets bombed and destroyed marshalling yards and POL facility located in Kompong Som's military complex.

As soon as both the *Mayaguez* and her crew were safe, the next task became the extraction of the marines. Heavy hostile fire, however, prevented helicopters from landing for even the wounded marines. To support the extraction, a C-130 from Thailand dropped

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<sup>337</sup> Actually, a force of eleven helicopters was involved in the operation. Three others landed a platoon of marines and six bomb demolition experts on the U.S.S. *Holt* to assist in the recovery of the possibly moved or booby trapped vessel.

<sup>338</sup> One helicopter crash landed on the beach, another about one hundred feet from shore, and the third further out at sea. Only thirteen of the twenty-six men aboard the third helicopter were saved.

a 15,000 pound bomb—America's largest—and *Coral Sea* tactical aircraft joined U.S. destroyers in laying down suppressive fire.<sup>339</sup> Only then were the marines able to be extracted by helicopter, the last group departing at 9:10 p.m. Cambodian time.

Despite the heavy casualties,<sup>340</sup> the operation was considered a success by both the public and the Congress. With the bitter memory of the fall of Phnom Penh and Saigon so fresh in the Administration's mind, the operation boosted the sagging morale of the nation. Thus, the President confidently reported to Congress on May 15 concerning the operation. In this instance, there was little question that a report was required and that it should be characterized as a 4(a)(1) action. Not only did the President commit U.S. forces into a situation where their involvement in hostilities was anticipated, but U.S. aircraft were directed to strike prearranged targets in Cambodia. Such actions can of course be justified in terms of preventing reinforcement or support from mainland sources. They nonetheless indicate a high level of U.S. combat involvement. President Ford, aware of the War Powers Act reporting categories, specifically referred to section 4(a)(1) in his May 15 report to Congress.<sup>341</sup>

A 4(a)(1) report has two important collateral effects: it triggers the sixty-day limitation of section 5 and normally requires precommitment consultation. In this case, it was the consultation requirement which generated the subsequent controversy. In the two hours before the rescue of the *Mayaguez* began, the White House notified twenty-two congressional leaders of the impending

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<sup>339</sup> This part of the attack drew the heaviest congressional criticism as several legislators argued the mainland attacks, which occurred after the *Mayaguez's* crew was known to be safe, were unnecessary acts of retaliation. This allegation overlooks the fact that at the time of these airstrikes the marines on Tang Island were still pinned down by enemy fire and were unable to even medevac their wounded comrades. Mainland Cambodia continued to pose a threat to the evacuating force so long as the marines remained on the ground and subject to hostile fire. Cf. *The Washington Post*, May 17, 1975, at A1, col. 6.

<sup>340</sup> The Pentagon reported on May 21 that fifteen servicemen had been killed in the operation—eleven marines, two airmen, and two sailors—with three others missing in action on Tang Island. Thirteen of the dead were killed in the third helicopter which crashed during the initial landing attempt. Another fifty servicemen were wounded in the operation. *The Washington Post*, May 21, 1975, at A17, cols. 1-6.

<sup>341</sup> The President's May 15 letter to Congress is reported in *The Washington Post*, May 16, 1975, at A17, col. 1.

operation. In a later briefing, White House Press Secretary Ron Nessen claimed that this constituted "consultation" as it had produced "a strong consensus of support and no objections."<sup>842</sup> Responding to Nessen's characterization of the briefing as adequate consultation, several congressional leaders angrily disagreed.

Senate Majority Leader Mike Mansfield issued a statement that, while praising the evacuation, asserted:

I was not briefed either yesterday afternoon or this morning. Nor was I consulted before the fact; I was notified after the fact about what the administration had already decided to do. I did not give my approval or disapproval because the decision had already been made in both cases.<sup>843</sup>

Senator Hugh Scott also denied that there had been consultation in any meaningful sense, stating that he had merely been advised of the President's intentions.<sup>844</sup> On the other hand, Senator Frank Church, a frequent critic of unrestrained Presidential war powers and a sponsor of the War Powers Act, believed that the Act had been complied with. Said Church: "I really don't know what more a President can do in a situation that requires fast action."<sup>845</sup>

Other, more vocal critics of the President's war powers actually criticized President Ford for what they deemed inadequate consultation. Senator Eagleton proposed an amendment to the War Powers Act that would require the President to "seek the advice and counsel of Congress" before deciding to use the armed forces in hostilities abroad.<sup>846</sup> Senator Javits, in testimony before the House International Affairs Committee, stated:

To a disturbing extent, consultations with the Congress prior to the Mayaguez incident resembled the old, discredited practice of informing selected members of Congress a few hours in advance of the implementation of decisions already taken within the executive branch.<sup>847</sup>

This controversy over the consultation requirement will continue

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<sup>842</sup> The Washington Post, May 15, 1975, at A1, col. 7. See also Joseph Kraft, *Mayaguez Post-Mortem*, *id.*, May 22, 1975, at A31, col. 1.

<sup>843</sup> The Washington Post, May 15, 1975, at A1, col. 7.

<sup>844</sup> *Id.*

<sup>845</sup> TIME, May 26, 1975, at 17.

<sup>846</sup> The Washington Post, May 27, 1975, at A17, col. 3.

<sup>847</sup> Reported in The Washington Post, June 19, 1975, at A18, col. 6. Senator Javits said that the legal requirement of precommitment consultation should be conducted with the committees having legislative jurisdiction:

I believe that it is incumbent upon the President to send his designated representative or representatives to appear before the Senate Foreign Relations Committee and the

as long as the President must act in a timely fashion in a rapidly changing situation and the Congress presses for an opportunity to insert itself in the decision-making process. In each case, the President is likely to argue that serious time constraints prevented him from conducting a real consultation with Congress while interested legislators will argue that he should have made time. The *Mayaguez* operation is a perfect example of the dilemma posed by the War Powers Act. The entire crisis lasted only three days and required instantaneous decisions to protect the crew and the rescue force. Because the ship was anchored at Tang Island, and at least part of the crew was thought to be with it, the opportunity for rescue had to be seized before the crew was taken beyond the reach of U.S. amphibious forces.

While President Ford's consultation with Congress was brief, leaving little opportunity for criticism, he provided congressmen with sufficient information to understand and evaluate his decision.<sup>348</sup> In this regard President Ford's approach bears a marked similarity to the briefing President Kennedy gave congressional leaders before the Cuban quarantine in 1961.<sup>349</sup> This, of course, does not exonerate the present Administration, but it points out the President's perceived need for timely, cohesive action unencumbered by unproductive debate. In situations demanding rapid action, such as the Cuban

House International Affairs Committee, in full and timely manner, to consult in the full sense of that term.

This interpretation is, as previously discussed, at odds with both the specific language of the Act and its legislative history. While the original House version of the War Powers Act spoke of selected consultation, this was changed in the conference committee of which Senator Javits was a member, to require full consultation with "the" Congress. See notes 204-05 and accompanying text *supra*. In fact, Senator Javits' recommendation is far more reasonable than the Act's somewhat unrealistic requirement, and reflects a growing awareness by the Senate that the War Powers Act must be carefully applied to have any continuing viability.

<sup>348</sup> Alton Frye, a senior fellow of the Council on Foreign Relations, contends that President Ford had in fact begun consulting with Congress before he ordered the evacuation operation to commence, thus setting the stage to "trigger congressional deliberation" if the military operation had been prolonged. *TIME*, June 9, 1975, at 22. This view has merit since section 3 of the War Powers Act not only requires precommitment consultation, but continuing meetings with the Congress so long as U.S. forces are engaged in hostilities. Thus if the initial consultation is by necessity brief and incomplete, subsequent congressional-executive meetings will be required for longer operations.

<sup>349</sup> See notes 210-11 and accompanying text *supra*.

crisis or *Mayaguez* operation, Congress must expect the President to allot the majority of his time to planning rather than briefing. Congress, on the other hand, must make every effort to keep informed, prodding the President at every step for additional information. An informed Congress, willing to rely on the President in an emergency but constantly offering its views as viable alternatives, will be a positive instrument in the war-making process.

## VI. CONCLUSION

Today, as we stand in the wake of the fall of South Vietnam and Cambodia, the debate over the limits of the President's war-making authority continues. This controversy, beginning in 1787 with the birth of the Constitution, is an ever-present source of confusion and concern. While the Constitution empowers the Congress "to declare war," it also designates the President as "Commander-in-Chief" of the Armed Forces. Numerous scholars, including Alexander Hamilton and James Madison, have attempted unsuccessfully to delineate the respective war-making powers of the legislative and executive branches. Now, for the first time, a legislative standard exists which purports to resolve, or at least clarify, the 200 year-old debate—the 1973 War Powers Act.

Conceived in the controversy surrounding the 1970 invasion of Cambodia, the War Powers Act appears to be the result of political rather than constitutional considerations. Congress, enraged by the actions of President Nixon at home and abroad, embarrassed by its own inertia, and buoyed by public unrest, viewed the war powers issue as a means by which to bridle the power of an unpopular President. Despite this impetus, however, passage of the Act failed in two successive legislatures, and it became law only when the House and Senate agreed to submerge their nearly irreconcilable approaches in a compromise resolution.

Consultation and reporting, the House contributions to the Act, are the most beneficial parts of the statute and its redeeming features. The reassertion of Congress into the decision-making process is desirable; the tragic events of the Vietnam war serve as constant reminders of the need for maximum participation by all informed sources before a decision which would lead the nation to war is made. Nonetheless, as the discussion of the four reports rendered during 1975 has indicated, controversy must be expected to continue. In particular, Congress and the President will continue to do battle

over the degree of consultation required before committing forces into combat.

The Senate's contribution to the Act, the definition of the President's constitutional war-making powers and the sixty-day time limitation on his commitment of forces, stem from that body's desire to limit the President's authority in advance of a critical situation. Such an approach disregards Alexander Hamilton's warning that the war powers "ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."<sup>350</sup> In an attempt to regain lost power, the Senate joined with the House to legislate in an area that is both unpredictable and dangerous.

The definition of the President's constitutional war-making authority is not contained in an operative section of the Act and is much too restrictive to serve as even a legislative guideline. Despite real questions regarding the President's constitutional authority during the fall of Southeast Asia, the Act's definition was largely ignored. Moreover, the requirement that the President withdraw forces from foreign hostilities within sixty or ninety days, or upon the passage of a concurrent resolution, is likely to be found unconstitutional if it is ever tested by a challenge to vital national interests. Such a judicial confrontation, however, would only exacerbate the existing legislative-executive schism during a time when national unity could be the key to the nation's security.

Perhaps, in the final analysis, we are expecting too much of a single document. The War Powers Act cannot wipe away the two centuries of executive-legislative struggle over foreign policy leadership in a single document. Instead, the Act's positive contributions should be emphasized, its ambiguous wording tightened, and its questionable provisions removed.

This nation, as it enters more tumultuous times, is best served by a War Powers Act which both respects the President's powers and guarantees a place for the nation's elected representatives.

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<sup>350</sup> THE FEDERALIST NO. 2 (A. Hamilton).

APPENDIX A  
WAR POWERS RESOLUTION

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

SHORT TITLE

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

PURPOSE AND POLICY

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

(b) Under article I, Section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also 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 which United States Armed Forces are introduced —

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

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

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

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

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

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

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

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

## CONGRESSIONAL ACTION

Sec. 5. (a) Each report submitted pursuant to section 4 (a) (1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee

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

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

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

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

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

in such section, unless such House shall otherwise determine by the yeas and nays.

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

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

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed on 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 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 therefore 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 such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute

specific statutory authorization within the meaning of this joint resolution.

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

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

(d) Nothing in this joint resolution—

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

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

#### SEPARABILITY CLAUSE

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

#### EFFECTIVE DATE

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

*Resolved*, That the said joint resolution pass, two-thirds of the Senators present having voted in the affirmative.

## APPENDIX B

## HOUSE JOINT RESOLUTION 1

JOINT RESOLUTION Concerning the war powers of the Congress and the President

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, ( ) That the Congress reaffirms its powers under the Constitution to declare war. The Congress recognizes that the President in certain extraordinary and emergency circumstances has the authority to defend the United States and its citizens without specific prior authorization by the Congress.*

Sec. 2. It is the sense of Congress that the President should seek appropriate consultation with the Congress before involving the Armed Forces of the United States in armed conflict and should continue such consultation periodically during such armed conflict.

Sec. 3. In any case in which the President without specific prior authorization by the Congress—

- (1) commits United States military forces to armed conflict;
- (2) commits military forces equipped for combat to the territory, airspace, or waters of a foreign nation, except for deployments which relate solely to supply, repair, or training of United States forces, or for humanitarian or other peaceful purposes; or
- (3) substantially enlarges military forces already located in a foreign nation;

the President shall submit promptly to the Speaker of the House of Representatives and to the President of the Senate a report, in writing, setting forth—

- (A) the circumstances necessitating his action;
- (B) the constitutional, legislative, and treaty provisions under the authority of which he took such action, together with his reasons for not seeking specific prior congressional authorization;
- (C) the estimated scope of activities; and
- (D) such other information as the President may deem useful to the Congress 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.

Sec. 4. Nothing in this joint resolution is intended to alter the constitutional authority of the Congress or the President, or the provisions of existing treaties.

Passed the House of Representatives August 2, 1971.

Attest:

## APPENDIX C

## FOREWORD

## SENATE BILL 2956

A BILL To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

## SHORT TITLE

Section 1. This Act may be cited as the "War Powers Act of 1971."

## PURPOSE AND POLICY

Sec. 2. It is the purpose of the Act 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 *initiation of hostilities* involving the Armed Forces of the United States, and to the continuation of such hostilities. Under Article I, section 8, 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 this Constitution in the Government of the United States, or in any department or officer thereof.*" At the same time, the Act is *not intended to encroach upon the recognized powers of the President, as Commander-in-Chief, to conduct hostilities authorized by the Congress, to respond to attacks or the imminent threat of attacks upon the United States, including its territories and possessions, to respond to attacks or the imminent threat of attacks against the Armed Forces of the United States, and, under proper circumstances, to rescue endangered citizens of the United States located in foreign countries.*

## EMERGENCY USE OF THE ARMED FORCES

Sec. 3. *In the absence of a declaration of war by the Congress, the Armed Forces of the United States shall be introduced in hostilities,*

*or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—*

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

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

(c) to protect while evacuating citizens of the United States, as rapidly as possible, from any country in which such citizens, there with the express or tacit consent of the government of such country, are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control: *Provided*, That the President shall make every effort to terminate such a threat without using the Armed Forces of the United States: *And provided further*, That the President shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States; or

(d) pursuant to specific statutory authorization, but authority to use the Armed Forces of the United States in hostilities shall not be inferred from any Treaty or provision of law, including any provision contained in any appropriation act, unless such Treaty or provision specifically authorizes the use of such Armed Forces in hostilities and exempts the use of such Armed Forces from compliance with the provisions of this Act. *Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such forces are engaged, or there exists an imminent threat that such forces will become engaged, in military hostilities. No Treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the use of the Armed Forces of the United States in hostilities, within the meaning of this section.*

### REPORTS

Sec. 4. The use of the Armed Forces of the United States in hostilities pursuant to section 3 of this Act shall be reported promptly in writing by the President to the Speaker of the House of Representatives and the President of the Senate, together with a full account of the circumstances under which such hostilities were initiated, the estimated scope of such hostilities and the consistency of such hostilities with the provisions of section 3. Whenever Armed Forces of the United States are engaged in hostilities outside of the United States, its territories and possessions, the President shall, so long as such forces continue to be engaged in such hostilities, report to the Congress periodically on the status of such hostilities as well as the scope and expected duration of such hostilities, but in no event shall he report to the Congress less often than every six months.

### THIRTY-DAY AUTHORIZATION PERIOD

Sec. 5. Hostilities commenced pursuant to section 3 of this Act shall not be sustained beyond thirty days from the date of their initiation except as provided in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.

### TERMINATION WITHIN THIRTY-DAY PERIOD

Sec. 6. Hostilities commenced pursuant to section 3 of this Act may be terminated prior to the thirty-day period specified in section 5 by statute or joint resolution of Congress.

### CONGRESSIONAL PRIORITY PROVISIONS

Sec. 7. (a) Any bill or resolution, authorizing the continuation of hostilities under subsection (a), (b), (c) of section 3 of this Act, or the termination of hostilities under section 6 of this Act shall, if sponsored or co-sponsored by one-third of the Members of the House of Congress in which it is introduced, be considered reported to the floor of such House no later than one day following its introduction unless the Members of such House otherwise determine by yeas and nays; any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported to the floor of the House referring it to committee within one day after it is so referred, unless the Members of the House

referring it to committee shall otherwise determine by yeas and nays.

(b) Any bill or resolution reported to the floor pursuant to subsection (a) shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after it has been reported, unless such House shall otherwise determine by yeas and nays.

#### EFFECTIVE DATE

Sec. 8. This Act shall take effect on the date of its enactment but shall not apply to hostilities in which the Armed Forces of the United States are involved on the effective date of this Act.



# USING CANADA'S PROCUREMENT EXPERIENCE TO STREAMLINE U.S. GOVERNMENT PURCHASING PRACTICES\*

Captain John T. Kuelbs\*\*

## I. INTRODUCTION

Studying Canada's process of purchasing supplies and equipment for governmental use illuminates useful contrasts with the American government's procurement system. At its most practical level, such a comparison acquaints government contract lawyers in both the public and private sectors with the differing rules and policies applicable to the purchasing practices of the Canadian and United States governments. In addition to providing those commercial lawyers who negotiate transactions across the U.S.-Canadian border with practical legal information, an analysis of this nature encourages procurement attorneys to look beyond traditional procedures to answer questions raised in their own government contracting systems. Finally, insights revealed by reference to foreign methods can provide alternatives to perceived inadequacies within the United States system.

Section II of this study highlights the present functions and scope of the Canadian Department of Supply and Services (DSS) to provide an understanding of the agency responsible for Canadian government purchasing. Section III then examines the statutory basis of the Canadian government's purchasing policy in depth, and traces subsequent interpretations of the statute through official statements, debates and committee hearings in the House of Commons. An analysis of the steps in the process of contract formation

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\*This article is an adaptation of a thesis presented to The Judge Advocate General's School, US Army, Charlottesville, Virginia, while the author was a member of the Twenty-second Judge Advocate Officer Advanced Class. The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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which tend to favor domestic firms and encourage other governmental objectives is provided in succeeding sections. Section VI isolates certain areas within the United States Department of Defense procurement system and recommends improvements in the American system based on information derived from the study of analogous Canadian procurement procedures.

## II. PURCHASING AND SUPPLY RESPONSIBILITIES OF THE SUPPLY ADMINISTRATOR, DEPARTMENT OF SUPPLY AND SERVICES

Three years after the Glassco Commission recommended the creation of an agency to centralize purchasing and supply operations for the entire Canadian Government,<sup>1</sup> centralization of these functions began on an experimental basis. First, the government reassessed the supply procedures of the federal departments and then it increased the powers of the purchasing and supply center, in the process closing some departmental supply stores and pooling their stocks in a central purchasing and supply agency. The Department of Defence Production<sup>2</sup> was designated the core of this new agency.

In 1969, apparently recognizing the effectiveness of the central supply agency's work during the experimental period, the government began providing for the consolidation of operations. The Government Organization Act<sup>3</sup> created the Department of Supply and Services (DSS),<sup>4</sup> headed by a Minister of Supply and Services who also served as Receiver General for Canada. After an organizational and break-in period, the Department experienced three years of extensive operational growth and produced significant tax savings<sup>5</sup> despite reduced employee strength.

The Department of Supply and Services is the purchasing and accounting arm of the government. It provides major common

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<sup>1</sup> THE ROYAL COMMISSION ON GOVERNMENT ORGANIZATION (GLASSCO COMMISSION) REPORT (1962) [hereinafter cited as GLASSCO REPORT].

<sup>2</sup> Established by the Defence Production Act of 1951, CAN. REV. STAT. c. 62 (1952), as purchasing agent for the Canadian Department of National Defence.

<sup>3</sup> Government Organization Act of 1969, c. 28 (Can.) [hereinafter cited as Government Organization Act].

<sup>4</sup> *Id.* at § 42.

<sup>5</sup> Address by Honorable Jean-Pierre Goyer, Minister of Supply and Services and Receiver General for Canada, to the Montreal Chapter of the Purchasing Management Association of Canada, Montreal, Quebec, May 15, 1973 at 8 [hereinafter cited as Goyer Address].

services in the areas of procurement, warehousing, printing and distribution, accounting, payment and audit, and management advisory services.<sup>6</sup> In simple terms, it buys for the government, pays the bills, and balances the books to promote effective and efficient management at minimum cost.

The Canadian Government, through the Department of Supply and Services, is Canada's largest consumer of services and materials with a shopping list of more than one billion dollars annually.<sup>7</sup> Through the Receiver General, it is also the largest accounting and payment organization in all of Canada: it alone issues more than twenty-six billion dollars each year in socio-economic and other payments.<sup>8</sup> Thus the Department is instrumental in assisting the circulation of Canada's tax dollars, stimulating the economy and contributing greatly to the maintenance of the life style of all Canadians.<sup>9</sup>

The Department of Supply and Services is organized into two major administrative sectors, each under the direction of a Deputy Minister. Responsibility for purchasing material for government use rests with the Supply Administration, and for the purposes of this study of purchasing policy any in-depth examination of the Department will be limited to that sector.

Internally, the Supply Administration divides procurement responsibilities among three categorical elements. The first, the Science and Engineering Procurement Service, engages primarily in the purchase of complex technical items, such as aircraft, ships and electronic equipment, including computers.<sup>10</sup> This service is responsible for implementing the government policy of contracting research and development requirements to the private sector.<sup>11</sup> The Science and Engineering Procurement Service also includes the Canadian Commercial Corporation which assists Canadian industry in selling to

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<sup>6</sup> *Id.* at 4.

<sup>7</sup> [1971-1972] DEPARTMENT OF SUPPLY AND SERVICES ANNUAL REPORT 7.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Services and Supply Program Notes on the Estimates of the Department of Supply and Services for the Fiscal Year 1973-74*. Presented to the Miscellaneous Estimates Committee of the House of Commons by the Honorable Jean-Pierre Goyer, P.C., M.P., Minister of Supply and Services and Receiver General for Canada, March 1973, at 13.

<sup>11</sup> *Id.*

foreign governments. This Service is headed by an Assistant Deputy Minister.

A second element is the Commercial Supply Service which is principally involved with procuring commercial commodities—vehicles, drugs, certain office equipment, furniture and the like.<sup>12</sup> This service group also includes the Printing Service which controls both in-house print production as well as that which is contracted out.<sup>13</sup> Warehousing, distribution, maintenance and repair;<sup>14</sup> traffic management; freight cost auditing for government contracts;<sup>15</sup> and travel and accommodation arrangements for public servants are all provided by this Service under the direction of the Assistant Deputy Minister, Commercial Supply.

The third element is the Corporate Management Service which primarily concerns itself with "central planning, policy formulation, supply systems development, research and supply audit" for the entire Supply Administration.<sup>16</sup> This element also bears responsibility for developing specifications and standards, judging quality and procuring data processing services,<sup>17</sup> as well as providing certain contractual advisory services.<sup>18</sup> The Assistant Deputy Minister, Corporate Management who heads this Service supervises more than administrative planning support, however. As Minister Goyer noted when detailing the responsibilities of the Corporate Management Service,

Customer and supplier relations also come under this service, and a great deal of importance is placed on maintaining our good relations with industry as we formulate our purchasing policies.<sup>19</sup>

Under the terms of the Government Organization Act of 1969, the Supply Administration must acquire and furnish goods and services to federal departments and agencies.<sup>20</sup> In order to purchase, warehouse, distribute, maintain and dispose of such goods, the Supply Administration must organize and manage the provision of required material and services and, "in cooperation with Crown Corporations,

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<sup>12</sup> *Id.* at 14.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 15.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Government Organization Act, *supra* note 3, at § 44(3).

acquire goods and services from Canadian suppliers for foreign governments, direct Printing Operations and the Canadian Arsenals, and assist with the disposal of Crown assets."<sup>21</sup>

An example of such a Crown Corporation is the Canadian Commercial Corporation (CCC), actually a functioning part of the Department of Supply and Services. Government contracting officers within the CCC act as both buyer and seller for the government. For example, as contractor-sellers on behalf of the Canadian military, they act in their capacity as CCC employees; and as buyers (*i.e.*, buying from foreign governments) they serve as DSS officers. For example, if the United States Department of Defense desires to purchase Canadian made Alpakas, the Department is not allowed to purchase directly from Canadian industry, but must purchase through the CCC. This procedure assures the buyer a fair price from Canadian industry at the same time it helps promote Canadian industry.<sup>22</sup>

Methods of buying the wide variety of goods and services needed by the Canadian Government naturally vary with the type of commodities involved. For the procurement of usual items, the Department (DSS) invites interested Canadian suppliers to submit tenders, but when special or very technical items are needed and the number of potential suppliers is limited, it is not always possible or feasible to obtain competitive bids. In such situations, purchasing specialists analyze the quotation and often must negotiate the contracts.<sup>23</sup> These purchasing specialists have broad experience in such diverse fields as communications, scientific instruments, aircraft construction and shipbuilding. Their competence is essential to the proper negotiation and administration of technical contracts.<sup>24</sup>

Since the first of April 1973, the Supply Administration has been required to operate on a financially self-sufficient basis: it must self-finance or show a profit on the supplies or services it provides to other governmental departments.<sup>25</sup> The Treasury Board and DSS have combined to study the Department's entire scale of prices but in the meantime, the Department continues to operate on a

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<sup>21</sup> Goyer Address, *supra* note 5, at 5-6.

<sup>22</sup> Interview with Mr. N. J. Clarke, Director of the Washington Office of the Department of Supply and Services at the Canadian Embassy, Washington, D. C., October 19, 1973 [hereinafter cited as Clarke Interview].

<sup>23</sup> Goyer Address, *supra* note 5, at 6.

<sup>24</sup> [1971-1972] DEPARTMENT OF SUPPLY AND SERVICES ANNUAL REPORT 8.

<sup>25</sup> Goyer Address, *supra* note 5, at 7.

self-sustaining basis by charging customer departments and agencies sufficiently high rates for their purchases of supplies and services.<sup>26</sup> Financial dependence on revenues from other departments and agencies has apparently spurred efficiency within DSS. For example, the volume of business handled by contract increased from \$901 million in 1969 to over \$1.2 billion in 1972-73, a thirty-two percent increase in volume at the same time the section's staff decreased by nine percent.<sup>27</sup>

The Department of Supply and Services has found that in certain areas centralization promotes efficiency while in other areas decentralization has proved more economical. The Department has experienced advantages by centralizing "management" whereas decentralization along economic and geographic lines has generally resulted in more efficient purchasing.<sup>28</sup> Several examples provided by the Department's centralized and decentralized policies will give added insight into the operation of DSS. Consolidation and centralization of material management have saved considerable sums of money for the Canadian Government and ultimately the Canadian taxpayer. During the 1973 fiscal year, \$2.65 million were saved by integration of the government's travel and transportation network,<sup>29</sup> and another eight million dollars were saved for other departments in 1971-72 by the identification of new suppliers, close negotiation of prices, and bulk purchasing.<sup>30</sup>

Centralized support services for the procurement branches of the Supply Administration's central office are provided by the Contract Services Branch. During the 1973 fiscal year the Branch received an average of 2,600 orders per month from customer departments.<sup>31</sup> Additionally, this centralized operation assembled and updated information on the financial, technical and production capacity of approximately eleven thousand supply sources, and entered those suppliers' names on eighteen thousand product lists according to their possibilities.<sup>32</sup> The Contract Services Branch also averaged one thousand invitations to tender and three thousand contracts per

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 8.

<sup>28</sup> Goyer Address, *supra* note 5, at 9.

<sup>29</sup> [1971-1972] DEPARTMENT OF SUPPLY AND SERVICES ANNUAL REPORT 8.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 13.

<sup>32</sup> *Id.*

month during fiscal year 1973 with a resultant increase in production of about thirteen percent.<sup>83</sup>

The Traffic Management Branch arranges transportation for the Canadian Commercial Corporation on behalf of both foreign governments and Canadian agencies.<sup>84</sup> During FY 73, transportation arrangements were made for 2,652 shipments within Canada and for 1,562 shipments abroad, resulting in a savings of \$123,000 on in-country, and sixty-two thousand dollars on foreign shipments.<sup>85</sup> The Central Freight Service section of the Traffic Management Branch provides freight audit and management services in order to economically purchase transport services and to insure the effective distribution of material. During 1973 twenty-six departments utilized the Central Freight Service and by auditing 144,152 invoices, the Central Service made savings of ninety-five thousand dollars possible.<sup>86</sup>

The Department of Supply and Services also reviews government practices of supplying office equipment and furniture. For example, prior to purchasing typewriters for client departments and agencies, DSS compiled a comparative statistical survey of several typewriter suppliers, establishing the purchase price, typewriter ribbon costs, and maintenance costs of different machines over an estimated life span of five to ten years.<sup>87</sup> From this study, the Department obtained enough cost estimates to make an intelligent determination of which company could best provide the government's needs at the lowest overall cost. That is, a lower priced model might, at the end of its useful life, prove to have been more expensive and less efficient because of higher maintenance costs or more rapidly declining resale value. The Canadian Minister of Supply and Services acknowledged that such long term data could not have been compiled if the purchase of typewriters for the government "had not been centralized in Ottawa and if the purchase had continued on a piece-meal basis throughout the country by buyers of varying calibre."<sup>88</sup>

Regional or decentralized purchasing, on the other hand, has proven in certain instances to be the most efficient means of serving

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 12.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (fiscal year).

<sup>87</sup> Goyer Address, *supra* note 5, at 10.

<sup>88</sup> *Id.* at 11.

local governmental needs<sup>39</sup> while at the same time providing better service to the customer department. DSS permits this regional purchasing procedure in situations where the purchase does not exceed \$2,500, subject to certain exceptions.<sup>40</sup>

Before concluding this brief explanation of the agency responsible for Canadian government purchasing and supply functions, it should be mentioned that the Canadian Government recently made the Supply Administration responsible for implementing its "make or buy" programs in the research and development fields.<sup>41</sup> According to Mr. Goyer,

This [responsibility] is an indication that the government is relying on its central supply and services agency to work harder in the future towards the successful application of its social and economic policies.<sup>42</sup>

The Canadian government's decision to transfer a higher percentage of its research work to private industry is a good example of the government's "make or buy" policy. The key point again is the efficiency provided by the position of the Supply Administration in its centralized role of allocating research and development work to the private sector. Centralized management in this area prevents the overlap and therefore the wasted effort which often occurs when procurement systems allow individual departments to enter "R&D" contracts.

### III. INTERPRETING THE STATUTORY BASIS OF THE CANADIAN GOVERNMENT'S PURCHASING POLICY

Before discussing the development of Canada's present purchasing policy, it would be well to define the difference between a government's purchasing policies and its spending policies. The term purchasing policy more appropriately describes those expenditures where a buyer's discretion can be exercised. In other words, a purchasing policy would reflect purchases made in markets having varying prices. A government's spending policy, on the other hand, is limited to purchases in the lowest cost markets.

The Canadian Government, as a matter of purchasing policy, has

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<sup>39</sup> *Id.*

<sup>40</sup> For example, office equipment, furniture, vehicles. Goyer Address, *supra* note 5, at 11.

<sup>41</sup> *Id.* at 14.

<sup>42</sup> *Id.*

long favored domestic firms and their domestic labor. Such a policy has been historically and legally justified by statutes and regulations and reflected in policy statements of Canadian leaders. The Organization for Economic Cooperation and Development (OECD) reported in a 1966 comparative study of government purchasing in Europe, North America and Japan, that although Canada customarily grants some preference to goods of Canadian origin, no hard and fast rule regarding the amount of such preference had been set, and no formal legislation or guidance had been issued.<sup>43</sup> The OECD further noted that the Canadian Government would pay a premium of up to ten percent for end-products possessing higher Canadian content, the premium calculated on the basis of price differentials of foreign over domestic content in the tenders being considered.<sup>44</sup> Federal purchases exceeding fifteen thousand dollars undergo review by the Treasury Board which gives a priority of about ten percent (it may go as high as twelve percent) to Canadian products.

The Canadian Government followed a Canadian content rule as early as 1921:

On 23 July 1921 an order-in-council (No. P.C. 2648) directed all departments of the Canadian Government to make purchase of goods of Canadian manufacture only, for departmental and other requirements, except in cases where such action would result in the purchase of articles or goods of so inferior a quality as to make this action undesirable.<sup>45</sup>

Apart from this preference, the OECD report indicates that the Canadian Government is not restricted by any existing act or regulation.<sup>46</sup> This statement is erroneous in view of the Defence Production Act, 1951<sup>47</sup> and the Fair Wages Policy Regulations<sup>48</sup> which give the Canadian Government the authority to give preference to Canadian industry and Canadian labor.

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<sup>43</sup> ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GOVERNMENT PURCHASING IN EUROPE, NORTH AMERICA AND JAPAN: REGULATIONS AND PROCEDURES 23 (1966) [hereinafter cited as GOVERNMENT PURCHASING]. This observation is erroneous, see notes 47-72 and accompanying text *infra*.

<sup>44</sup> *Id.*

<sup>45</sup> BRETON, DISCRIMINATORY GOVERNMENT POLICIES IN FEDERAL COUNTRIES 9 (1967).

<sup>46</sup> GOVERNMENT PURCHASING, *supra* note 43, at 23.

<sup>47</sup> Defence Production Act of 1951, CAN. REV. STAT. c. 62 (1952) [hereinafter cited as Defence Production Act].

<sup>48</sup> [1955] STAT. O. & R. (Statutory Orders and Regulations) 1251-1258 (Can.).

## A. THE DEFENCE PRODUCTION ACT

The purchasing method established by the Defence Production Act was the forerunner of the present purchasing system and laid the groundwork for much of the Canadian government's present purchasing policy. That Act created the Department of Defence Production, presided over by a Minister<sup>49</sup> authorized "to buy or otherwise acquire defence supplies and construct defence projects required by the Department of National Defence."<sup>50</sup> The Minister of Defence Production is also to take steps to mobilize, conserve and coordinate all economic and industrial facilities relating to defense supplies and defense projects.<sup>51</sup> Specifically, section 11 of the Defence Production Act states that:

The Minister shall examine into, organize, mobilize and conserve the resources of Canada contributory to, and the sources of supply of, defence supplies and the agencies and facilities available for the supply of the same and for the construction of defence projects and shall explore, estimate and provide for the fulfilment of the needs, present and prospective, of the Government and the community in respect thereto and generally shall take steps to mobilize, conserve and coordinate all economic and industrial facilities in respect of defence supplies and defence projects and the supply or construction thereof.<sup>52</sup>

The Act therefore obligates the Minister of Defence Production to monitor the producing ability of Canadian industry, Canadian defense requirements, and the contribution that the defense establishment makes toward strengthening the economy as a whole.<sup>53</sup> Section 15 of the Act gives the Minister authority to buy or make defense supplies; make foreign military sales; construct defense projects; arrange for performance of professional or commercial services; make loans; and guarantee repayment of loans made to contractors so that contracts entered into under the Defence Production Act may be carried out.<sup>54</sup>

Defense establishments throughout the world favor strong domestic defense supply bases to eliminate total dependence upon foreign countries. This means, when practicable, defense purchasers should

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<sup>49</sup> Defence Production Act, *supra* note 47, at § 3(1).

<sup>50</sup> *Id.* § 9(2).

<sup>51</sup> *Id.* § 11.

<sup>52</sup> *Id.*

<sup>53</sup> 2 GLASSCO REPORT, *supra* note 1, at 131.

<sup>54</sup> Defence Production Act, *supra* note 47, at § 15(a), (b), (c), (d) and (f).

buy from domestic sources and the Canadian Department of Defence Production takes no exception to this general rule of defense purchasing. That Department's policy was well stated in the House of Commons by the Honorable C. M. Drury, Minister of Defence Production when he stated that he was responsible, under provisions of the Defence Production Act, "for ensuring that the necessary production capacity and materials are available to support the Canadian defence production program."<sup>55</sup> The Minister explained that because of this obligation, his subordinate departmental officers always looked to domestic firms for defense supplies and additionally that they examined defense needs to determine what contribution could be made toward developing new Canadian skills and facilities.<sup>56</sup> Minister Drury specifically stated that:

It is a provision of the general conditions that are applicable to departmental contracts that to the *full extent to which they are procurable, consistent with proper economy and the expeditious carrying out of the contract, Canadian labour, parts and materials shall be used* in the work. Therefore, the department buys from Canadian firms if practicable and only turns to other sources of supply when procurement from the Canadian sources is deemed to be uneconomical or impractical. For example, the complexity of certain weapons systems is such that production in Canada for our limited requirements often involves prohibitive costs.

In addition, it is the government's policy that in the absence of strategic reasons, a premium will be paid for a product with high Canadian content. This premium is calculated at 10 per cent of the difference in foreign content. In the case of coal, a premium of up to 20 per cent can be paid.<sup>57</sup>

The purchasing policy for defense supplies found in 1964 is still relevant today; however, this policy is not presently restricted to defense purchases. Under Department of Supply and Services contracts,

[t]he Contractor shall use Canadian labor and material in carrying out the work, to the full extent to which they are procureable, consistent with proper economy and the expeditious carrying out of the work.<sup>58</sup>

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<sup>55</sup> 6 PARL. DEBATES (Hansard ed.) 6115 (1964).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (emphasis added).

<sup>58</sup> Department of Supply and Services Forms 1026B and 1026A, 7530-21-029-3919 (7-70). General Contract Conditions for supplies under cost reimbursement and firm price contracts, Conditions 18 and 20 [hereinafter cited as General Conditions].

Statements by the Glassco Commission on purchasing policy under the Defence Production Act of 1951 also conform to Minister Drury's policy statement, as do the general provisions of current Canadian contract forms. The Glassco Commission reported that:

Suppliers are invariably required to use Canadian labor and materials to the fullest extent possible. Preference is frequently given not only to Canadian suppliers, but especially to Canadian suppliers who offer higher proportions of Canadian content.<sup>59</sup>

The Department of Defence Production shared the duty of promoting and monitoring the Canadian defense industry with the Department of Industry, which was created in 1963.<sup>60</sup> The creation of the new department did not, however, abolish the responsibility of the Department of Defence Production to promote Canada's defense industry since the same Minister presided over both departments. When explaining the function of Department of Defence Production officers, Minister Drury stated "we have a function which is closely related to the main object of the Department of Industry, to expand and develop the Canadian manufacturing industry. . . ."<sup>61</sup>

#### B. GOVERNMENT ORGANIZATION ACT OF 1969

In 1969 the Government Organization Act created the Department of Supply and Services to centralize purchasing and supply operations for the entire federal government.<sup>62</sup> As mentioned earlier, the Department of Defence Production served as the core of this new agency and therefore the Defence Production Act is now implemented by the Minister of Supply and Services.<sup>63</sup> Section 11 of the Defence Production Act which protects domestic firms in the procurement of defense commodities was maintained intact, and DSS now apparently holds the same authority for developing Canadian defense industries as was formerly held by the Department of Defence Production. In this light, the Department of Supply and Services apparently applies the same purchasing policy when buying

<sup>59</sup> 2 GLASSCO REPORT, *supra* note 1, at 131.

<sup>60</sup> *Minutes of Proceedings and Evidence of the Special Committee on Defence of the House of Commons* 281 (1963) [hereinafter cited as *Minutes of Special Committee*].

<sup>61</sup> *Id.* at 840.

<sup>62</sup> See note 4 *supra*.

<sup>63</sup> See note 2 *supra*.

for the entire Canadian federal government as the Department of Defence Production formerly applied in the procurement of defense commodities. As noted earlier, this current purchasing policy is revealed by the general conditions found in today's Department of Supply and Services contract forms.<sup>64</sup>

The Honorable James Richardson, then Minister of Supply and Services, defined the government's purchasing policy in a 1969 speech to the House of Commons as follows:

The policy of the department with regard to the purchase of Canadian products is, as reflected in the general conditions that are applicable to departmental contracts, that to the full extent to which they are procureable, consistent with proper economy and the expeditious carrying out of the contract, Canadian labour, parts and materials shall be used. Therefore, the department buys from Canadian firms if practicable and only turns to other sources of supply when procurement from the Canadian sources is deemed to be uneconomical or impracticable.

In addition, it is the government's policy that a modest premium will be paid for a product with higher Canadian content. This premium is calculated at up to 10% of the difference of foreign content.<sup>65</sup>

The official policy statements and the contract language concerning Canadian government purchasing have thus remained virtually identical over the past dozen years. While this policy was formerly applicable only to the purchase of defense commodities, the establishment of DSS and centralized purchasing has expanded that policy to the entire spectrum of federal purchases.<sup>66</sup>

The earlier statements relied on the Defence Production Act for their legal authority, but some question remains whether DSS has extended that protectionist policy without legal authority—at least with regard to Canadian labor. The general conditions of current DSS contracts contain a provision requiring the maximum

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<sup>64</sup> DSS Forms 1026B and 1026A, *supra* note 58.

<sup>65</sup> 4 PARL. DEBATES (Hansard ed.) 9978 (1969).

<sup>66</sup> See *Supplementary Data on the Services and Supply Programs of the Department of Supply and Services 1973-1974 Estimates*, at 3:

The first five contracts out of a possible 90 or more have been awarded to Canadian and U.S. suppliers for equipment to effect the modernization and mechanization of mail processing facilities in the Toronto area. It is expected that over the next three years, contracts in the amount of \$58 million will be awarded to complete Toronto installations. Better than 70% Canadian content will be achieved in the current contracts. As the program develops, contractors in Canada, Japan, USA and Europe may be involved, but maximum Canadian content will be a requirement for all contractors.

utilization of Canadian labor,<sup>67</sup> a clause justified by the Defence Production Act but not specifically justified under the terms of the Government Organization Act. The statutory basis for the protection of Canadian labor rests not upon either of these Acts, but on the government's Fair Wages Policy.<sup>68</sup>

### C. THE FAIR WAGES POLICY

The Fair Wages Policy has existed in its current form since December 1954.<sup>69</sup> The regulations establish two schedules ("A" and "B") which dictate the wage standards and work conditions which must be adhered to by parties contracting with the Canadian Government. Schedule "A" is used with construction contracts and Schedule "B" with purchase contracts. Both schedules provide that:

All workmen employed upon the work comprehended in and to be executed pursuant to the said contract shall be residents of Canada, unless the Minister is of the opinion that Canadian labour is not available or that other special circumstances exist which render it contrary to the public interest to enforce this provision.<sup>70</sup>

The effect of this provision on government purchasing depends upon the scope of purchases covered by Schedule "B". That schedule, in effect, states that the conditions which it sets forth are to be adhered to by all departments which initiate government contracts for the manufacture and supply "of fittings for public buildings, harness, saddlery, clothing, and *other outfit* for the military and naval forces. . . ." <sup>71</sup> The emphasized words "other outfit" are the key to the above quoted language. Those words might be interpreted broadly to include almost anything the government desires to purchase or so restrictively as to read them out of the statute for all practical purposes.

The Fair Wages Policy directs that the contracting departments insert conditions of the appropriate schedule in all applicable contracts.<sup>72</sup> The departments must also provide monthly input concerning newly-entered contracts to the Department of Labour which

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<sup>67</sup> General Conditions, *supra* note 58, Condition number 20.

<sup>68</sup> [1955] STAT. O. & R. 1251-1258 (Can.).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1255, 1257.

<sup>71</sup> *Id.* at 1252 (emphasis added).

<sup>72</sup> *Id.* at 1255, 1257.

monitors wage schedules, investigates complaints, and spot checks contractors.<sup>73</sup>

The schedules direct that subcontractors are to be bound to conditions of the main contract and consider the prime contractor responsible for his subcontractors' adherence.<sup>74</sup> Current DSS supply contracts contain identical directions:

Unless otherwise agreed to by the Minister in any assignment or subletting, the Contractor agrees to bind each assigned or subcontractor by the terms of the general conditions, the supplemental general conditions, if any, the labour conditions . . . as far as applicable to the work.<sup>75</sup>

Schedule "B" can, practically speaking, only be enforced if complaints are made. These complaints typically are made to DSS by interested parties such as labor unions and the complaints are then transferred directly to the Department of Labor for investigation and, if necessary, resolution. Most violations apparently concern wage rates and overtime work provisions of the policy.<sup>76</sup>

#### D. SUMMARY

The Defence Production Act imposed responsibility upon the Minister of Defence Production to insure the development of a viable Canadian defense base. This goal was furthered by statutorily authorizing the Canadian Government to prefer Canadian industry when awarding contracts. While the Defence Production Act protected and developed Canadian industry, the Fair Wages Policy Regulations granted the Canadian Government authority to favor domestic labor.

These preferences, first practiced within the Department of Defence Production, have been extended to the present centralized purchasing operations for the entire Canadian Government. This purchasing policy exists largely because the Department of Defence Production was made the core of the Department of Supply and Services, created by the Government Organization Act of 1969. Official policy as reflected in statements by government officials and contract form language utilized since the creation of this centralized

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<sup>73</sup> Clarke Interview, *supra* note 22.

<sup>74</sup> [1955] STAT. O. & R. 1254, 1256 (Can.).

<sup>75</sup> General Conditions, *supra* note 58, Condition number 3(2).

<sup>76</sup> Clarke Interview, *supra* note 22.

purchasing agency evince the preference for Canadian industry and labor that continues to be exercised in governmental purchases.

It is most important to note that Canada therefore exercises a purchasing policy as opposed to a spending policy: the Canadian Government is not restricted to purchases in lowest cost markets. It can instead develop and protect Canadian industry and labor by using discretion in determining the source for a particular purchase.

#### IV. THE CANADIAN PROCUREMENT PROCESS— STEPS TOWARDS PROTECTING DOMESTIC INDUSTRY

Government decision-making authorities can protect domestic industry by utilizing various methods of contract formation. This section discusses some of the more obvious steps the Canadian Government uses to serve the purpose of assisting national industry.

##### *A. DETERMINING NEEDS BY SPECIFICATIONS*

As the purchasing agent for the Canadian Government, the Department of Supply and Services procures for and at the request of other governmental departments and agencies. For example, the following procurement procedure is utilized at post, camp or station level in the Canadian military. The military Judge Advocate has no role, whatever, in the procurement process. Instead, a contracting officer either located at the installation or responsible for the purchase orders within the region of the installation forwards appropriate purchase orders to the Assistant Deputy Minister for Materiel. The Assistant Deputy Minister for Materiel, a civilian responsible to the Deputy Minister for Defence, reviews and then forwards the purchase order to the Department of Supply and Services.<sup>77</sup>

The user department or agency describes the item to be procured either generally, specifically, or by brand name. Both specific and brand name descriptions may serve as limiting specifications by including unessential characteristics to restrict purchases to a certain source or sources of supply. This is particularly true in the procurement of specialized items such as special purpose gear for the military where the consuming (customer) departments or agencies write their own specifications. For standardized items, uniform specifications

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<sup>77</sup> Interview with Brigadier General James M. Simpson, JAG, Canadian Department of National Defence, at The Judge Advocate General's School, Charlottesville, Virginia, November 8, 1973.

are written by the Department of Supply and Services,<sup>78</sup> and purchase orders for such products must be made in accordance with those specifications.

Brand name or detailed specifications are often used in military purchasing, limiting the number of potential suppliers. To expedite the contracting process while advancing the governmental objective of maintaining a viable domestic supply base, the Canadian Government expended over three quarters of a million dollars to implement a system of "advance qualification."<sup>79</sup> This system, developed in 1961 and 1962, serves to establish a pool of "qualified sources of supply sufficiently in advance of requests from the Department of National Defence in order to insure the maximum participation of Canadian firms in defence procurement. . . ."<sup>80</sup> Consequently, Canada has taken steps to insure that the limiting effect of brand name or detailed specification procurement does not stifle Canadian industry from participating in the supply of defense materiel.

Another method of assuring high Canadian content is the requirement that certain equipment be of Canadian design. A good example of this is the government's insistence on domestically designed ships. Although it might seem more economical to utilize designs of vessels tested and proved reliable by other countries, in 1965 Minister of National Defence Hellyer stated that the cost of Canadian design was insignificant (3%) and that it did serve to "give us some additional flexibility in that we are able to introduce Canadian concepts, improvements, and adapt Canadian equipment."<sup>81</sup> Thus, the designing, at least impliedly, amounts to drawing specifications for domestic components, thereby directing that purchases be made from Canadian sources.

### B. CANADIAN PROCUREMENT PROCEDURE

The Government Organization Act of 1969 authorizes the Minister of Supply and Services to enter into government contracts in compliance with "regulations as may be made by the Governor in

<sup>78</sup> Government Organization Act, *supra* note 3, at § 44(2)(c).

<sup>79</sup> See note 80 *infra* and 1962 DEPARTMENT OF DEFENCE PRODUCTION ANNUAL REPORT 33 (1963).

<sup>80</sup> 1961 DEPARTMENT OF DEFENCE PRODUCTION ANNUAL REPORT 30-31 (1962).

<sup>81</sup> *Minutes of Proceedings and Evidence of the Special Committee on Defence of the House of Commons* 1076 (1965).

Council or the Treasury Board in that behalf."<sup>82</sup> The regulations most often used by the Department of Supply and Services officers when awarding procurement contracts under authority delegated by the Minister are the Government Contracts Regulations,<sup>83</sup> based on section 39 of the Financial Administration Act.<sup>84</sup>

Upon receipt of a purchase order from a consumer department, the Department of Supply and Service procurement branch must utilize certain procedures set forth in the Government Contracts Regulations to choose an appropriate supplier. The Government Contracts Regulations set out three procedures which may be used to select the supplier: (1) public discretionary tender; (2) selective discretionary tender; and (3) sole source contract.<sup>85</sup> The Government Contracts Regulations define a public discretionary tender as one "invited by public advertisement in the public press"; and a selective discretionary tender as one "from a representative list or representative lists of suppliers."<sup>86</sup> The regulations also differentiate three types of contracts: construction, purchase, and service,<sup>87</sup> with separate tender requirements for each type. For example, subject to certain exceptions, tenders for construction contracts usually must be invited by advertisement in the public press.<sup>88</sup> For purchase and/or service contracts, tenders may be invited either by "public advertisement" or from a representative list of suppliers. The following discussion will primarily involve the choice between selective tender, public tender, and negotiation as that choice pertains to purchase contracts.

The Government Contracts Regulations stipulate the tendering requirements for purchase contracts are as follows:

Before any purchase contract is entered into, the contracting authority shall invite tenders therefor except where

- (a) the need is one of pressing emergency in which delay would be injurious to the public interest;
- (b) there is only one available source of supply;

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<sup>82</sup> Government Organization Act, *supra* note 3, at § 50(1).

<sup>83</sup> GOVERNMENT CONTRACTS REGULATIONS (Canada), most recent version established by Order in Council P.C. 1964-1467, September 23, 1964, SOR/64-390, Canada Gazette, Part II, Volume 98, Number 19, October 14, 1964, at § 3 [hereinafter cited as GOVERNMENT CONTRACTS REGULATIONS].

<sup>84</sup> Financial Administration Act, CAN. REV. STAT. c. 116 (1970).

<sup>85</sup> GOVERNMENT PURCHASING, *supra* note 43, at 19.

<sup>86</sup> GOVERNMENT CONTRACTS REGULATIONS, *supra* note 83, at § 2.

<sup>87</sup> *Id.* § 7(1).

<sup>88</sup> *Id.* § 2.

(c) the estimated expenditure involved does not exceed fifteen thousand dollars and it appears to the contracting authority, in view of the nature of the purchase, that it is not advisable to invite tenders; or

(d) the contract is one of a class of contracts designated by the Treasury Board as a class in respect of which the invitation of tenders is not required.<sup>89</sup>

Although the Department's policy is to purchase at firm prices through competitive tendering<sup>90</sup> it is obvious that in at least two situations such a policy is either impractical or impossible. These specific situations are where there are (1) inadequate sources of supply, or (2) lack of definite specifications.<sup>91</sup>

Negotiation of a contract permits control over production location whereas purchasing at the lowest price through competitive bidding offers no such assurance. The selective tendering system can also insure production within a given area, but only if a sufficient number of bidders is produced within that area, and then only if area firms are asked to bid. The Department of Supply and Services considers at least two bidders necessary for a competitive situation to exist.<sup>92</sup> The Glassco Commission reported that the Department of Defence Production shied away from negotiating contracts wherever possible for fear of charges of favoritism.<sup>93</sup> Restrictive use of negotiation appears proper, for resort to this technique is necessary only where the type of product requires negotiation,<sup>94</sup> when the selective tendering system fails for lack of Canadian bidders, or when some special objective is being pursued.<sup>95</sup>

### C. THE SELECTIVE TENDERING PROCESS AND SOURCE LISTS

The invited tendering system obviously protects domestic industry more than the open competitive tendering system, for by inviting

<sup>89</sup> *Id.* § 10.

<sup>90</sup> *Id.* § 11.

<sup>91</sup> *E.g.*, in research and development contracts.

<sup>92</sup> GOVERNMENT CONTRACTS REGULATIONS, *supra* note 83, at § 11.

<sup>93</sup> 2 GLASSCO REPORT, *supra* note 1, at 124-25.

<sup>94</sup> For example, where the contract requires items with high Canadian contents, as in the requirements for "fifty CUH-IN helicopters with Canadian-provided, twin engine power plants. . ." cited in [1971-1972] DEPARTMENT OF SUPPLY AND SERVICES ANNUAL REPORT 10.

<sup>95</sup> *E.g.*, regional development. *Minutes of Proceedings and Evidence of the Special Committee on Defence of the House of Commons* 917-18 (1964).

only domestic firms to tender, the government may exclude all foreign bidders. The selective tendering process could be competitive, however, if sufficient numbers of bidders compete for a contract. In the U.S. defense market, according to official Canadian publications, rigorous competition exists, largely as a result of the large number of participating bidders.<sup>96</sup> In Canada, the relatively smaller number of bidders makes the selective tender of government contracts a less competitive process. Of course, the possibility exists that should the number of bidders become small enough, selective tendering process could merge into limited, if not sole source procurement.

The method of composing the source lists which name the firms invited to bid on certain contracts seems to provide another means of affording protection to Canadian industry. Although foreign firms may be listed at their own request, there is no assurance that those firms will be invited to tender as frequently as domestic firms. Minister Drury stated the Department of Defence Production's policy in these words:

These lists are in no way restrictive. It is departmental policy to place on these lists the names of all Canadian suppliers who have indicated a desire to be listed . . . (and) have submitted evidence of ability to fulfill contracts.<sup>97</sup>

This policy is apparently limited to "Canadian" suppliers, however, and at least one writer has reported that

. . . being on the list did not really mean that one could bid for a contract. Sometimes a firm was simply not asked to bid. On other occasions, the product specifications or, more often, the factor and production process requirements were such that it appeared as if only certain pre-selected suppliers could bid. Such cases are extremely difficult to document; but witnesses . . . assured us that such practices, though perhaps not common, did in fact exist.<sup>98</sup>

The same writer further noted that contrary to Minister Drury's statement, the potentially restrictive nature of source lists is not necessarily limited to foreign suppliers:

There is a case, not much more documented, which was brought up in the Canadian House of Commons and is consequently reported in

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<sup>96</sup> DEPARTMENT OF DEFENCE PRODUCTION, PRODUCTION SHARING HANDBOOK 15 (3d ed. 1964).

<sup>97</sup> *Minutes of Special Committee*, *supra* note 60, at 259.

<sup>98</sup> BRETON, DISCRIMINATORY GOVERNMENT POLICIES IN FEDERAL COUNTRIES 12 (1967).

Hansard. It relates to the cancellation of tender calls by the Department of Defence Production (which in terms of purchases is a large department) after the defeat of the Progressive Conservative Party on April 8, 1963. A question was asked in the House by a member of the opposition as to whether it was true that all tender calls had been canceled. After interventions of all kinds of front benchers on the government side, and a few assists from the Speaker of the House, the question went unanswered. Although one cannot be sure that the requests for tender were in fact canceled, Hansard clearly gives the impression that they were.<sup>99</sup>

To be listed, a supplier must first complete a form listing the products sold by his firm and if additional information is required, government inspectors investigate the firm's ability to fulfill contracts. It should be mentioned that no information was obtainable concerning the extent of such investigations or whether foreign firms were ever further evaluated. United States enterprises have no difficulty in this regard, since under terms of the Canada-United States Defense Production Sharing Agreement, each country acknowledges the validity of the other's evaluation report.<sup>100</sup>

#### D. BID INVITATIONS AND BID EVALUATIONS

Whenever a government implements a purchasing policy, it is customary that unequal treatment be given to suppliers even though costs for a given item may be the same. We have seen that foreign firms can be listed on Canada's procurement source lists. However, the selection of the firms invited to bid is often based upon a system of priorities. Thus, priority is given to domestic firms even though their bids may be higher than a foreign competitor's. If a foreign supplier is allowed to bid on a contract, his price must fall below the price of a domestic supplier by more than a certain margin or he will not get the order. Alternately, the supplier may simply not be allowed to bid.<sup>101</sup> Both these methods are widely used by the federal government in Canada.<sup>102</sup> This preference for Canadian contractors was evidenced in the House of Commons Debates during the First Session of the Twenty-sixth Parliament on 21 June 1963, when the Minister of Defence Production was asked to comment on the following question:

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<sup>99</sup> *Id.*

<sup>100</sup> PRODUCTION SHARING HANDBOOK, *supra* note 96, at 15.

<sup>101</sup> DISCRIMINATORY GOVERNMENT POLICIES IN FEDERAL COUNTRIES, *supra* note 96, at 8.

<sup>102</sup> *Id.*

In the light of reports that Canadian defence contractors may face a reduction in the preference granted in orders placed by his [the Minister's] department, would the Minister advise the House whether there has been a change in that if Canada gets larger defense orders from the United States he must reduce the preference granted to Canadian contractors?

The Honorable C. M. Drury, Minister of Defence Production, replied:

I am not sure Mr. Speaker, that I quite understand the full import of that question. There is no question that there will be any reduction in the preference now granted to Canadian contractors.<sup>103</sup>

Naturally, the number of firms selected to participate in a given bid will determine the intensity of competition for that bid. Obviously, by limiting the number of firms invited to bid on a contract the government may protect domestic suppliers. The Deputy Minister of Defence Production has confirmed that this practice is utilized; "foreign producers *are not* invited when there are *adequate Canadian sources*."<sup>104</sup> Exactly what constitutes "adequate Canadian sources" is not clear, but it could be no more than the number needed to create a competitive situation: two bidders.<sup>105</sup>

After the invitations to bid are dispatched and bids are received on a given contract, the responses are evaluated to determine which bidder will be awarded the contract. Usually the bids are evaluated and the award made on the basis of the best competitive price. When this is the case, the ten percent Canadian content preference rule is applied,<sup>106</sup> even in situations which involve only bids from Canadian firms. In such instances, the rule is used to adjust the ranking of Canadian bids. An unresolved question is the manner in which "domestic content" is determined,<sup>107</sup> but the Department of Supply and Services apparently depends on industry's representations.<sup>108</sup> In any event, the unsuccessful bidders are allowed to know the name and price of the winning tenderer<sup>109</sup> and from such information,

<sup>103</sup> *Id.*

<sup>104</sup> *Minutes of Special Committee, supra* note 95, at 918.

<sup>105</sup> See text accompanying note 92 *supra*.

<sup>106</sup> 6 PARL. DEBATES (Hansard ed.) 6115 (1964).

<sup>107</sup> Nothing in the Contracts Regulations or policy statements indicates how this determination is made. See GOVERNMENT PURCHASING, *supra* note 43, at 23.

<sup>108</sup> *Id.* "There is no hard and fast rule regarding the amount of such preference and no legislation or guidance of a formal character dealing with this matter has been issued."

<sup>109</sup> *Id.* at 22.

losing bidders can roughly calculate the amount of foreign content claimed by the winner.

In other situations, the winning bid may be selected on the basis of nonprice factors. Some of the other considerations governing the choice of the winning bid are financial responsibility of the contractor, competence, adequacy of plant and equipment, convenience of location for government inspection, and delivery time.<sup>110</sup> In the case of contracts under fifteen thousand dollars, the procurement officers may make awards according to which offer best suits them.<sup>111</sup>

Treasury Board authority is required for certain contracts in excess of fifteen thousand dollars and for all contracts exceeding fifty thousand dollars.<sup>112</sup> In these larger dollar contracts, the decision of whether or not a preference should be granted to goods of Canadian origin<sup>113</sup> is made by the Treasury Board.

Foreign purchase of certain goods produced by industries whose maintenance is considered necessary to the national defense is prohibited.<sup>114</sup> Where there may be a question of whether foreign bids should be excluded, the Treasury Board considers not only the above mentioned factors<sup>115</sup> but also "the budget situation, the state of the economy, and Canada's foreign trade position."<sup>116</sup> These prohibitions seem unnecessary because the Department of Supply and Services needs the prior approval of the Treasury Board for all purchases exceeding fifty thousand dollars. The Treasury Board could simply refuse to approve such purchases on the basis that the products did not contain sufficient Canadian content.

### E. THE SOCIO-ECONOMIC FORCES

Historically, the Defence Production Act of 1951 and the Fair Wages Policy Regulations legally authorized Canadian contracting officers to give preference to Canadian industry and labor. Today this authority is practically applied by giving preference to domestic firms in the tendering process and by applying the ten percent

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<sup>110</sup> *Id.*

<sup>111</sup> GOVERNMENT CONTRACTS REGULATIONS, *supra* note 83, at § 10(c).

<sup>112</sup> *Id.* § 11.

<sup>113</sup> GOVERNMENT PURCHASING, *supra* note 43, at 23.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 22.

<sup>116</sup> *Id.* at 23.

premium on Canadian content. The Treasury Board may, however, reverse the regular application of these laws if circumstances dictate. The Government Contracts Regulations define the authority of the Treasury Board in this matter as follows: "Except as provided in these Regulations, no contract shall be entered into without the approval of the Treasury Board."<sup>117</sup> Where "the amount payable under the contract does not exceed fifteen thousand dollars; or the amount payable under the contract exceeds fifteen thousand dollars, but does not exceed fifty thousand dollars and not less than two tenders have been obtained and the lowest tender accepted,"<sup>118</sup> the DSS may make contracts without Treasury Board approval, but all contracts in excess of fifty thousand dollars require approval of the Board. So whenever two bidders are being considered in an award between fifteen and fifty thousand dollars, the lower bidder must be given the award or an automatic review will be conducted by the Treasury Board.<sup>119</sup>

The exact considerations used by the Treasury Board to approve or disapprove a contract recommendation by the Department of Supply and Services are not known, however, recent policy statements indicate that Canadian content, nationality of the supplier and Canadian regional development policies are relevant.<sup>120</sup>

## V. OBSERVATIONS ON CANADIAN PURCHASING POLICY

In previous sections, this article has described the functions and policy of the Canadian central purchasing agency, the Department of Supply and Services, and shown the evolution of that Department's purchasing policy through legislative enactments and administrative practices. The most frequently mentioned principle of this purchasing policy is the preference for domestically produced goods, a preference for which Canada is willing to pay prices in excess of the lowest competitive bid. Despite the fact that only the

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<sup>117</sup> GOVERNMENT CONTRACTS REGULATIONS, *supra* note 83, at § 6.

<sup>118</sup> *Id.*, § 11.

<sup>119</sup> *Id.*

<sup>120</sup> *Supplementary Data on the Services and Supply Programs of the Department of Supply and Services 1973-74 Estimates, Part "B" (Supply Program)* at 3 and Notes for an address by the Honorable Jean-Pierre Goyer, Minister of Supply and Services to the Annual Conference of the Purchasing Management Association of Canada, Halifax, Canada, June 4, 1973, at 4.

objectives of protecting Canadian labor and of maintaining a viable national defense industry have been afforded legal sanction by an Act of Parliament or an Order in Council, the practice of protecting labor and defense industries has evolved into a practice of favoring and promoting all Canadian industry. Domestic industry, in general, has been favored by the system of selective invitation for tender of bids, by a policy of preference for Canadian content and by a policy of additional protection for certain industries.

In addition to promoting high employment, maintaining a viable defense industry and encouraging industrialization, Canadian purchasing policy influences regional development and technological advancement. The following excerpts from a recent speech by the Minister of Supply and Services, the Honorable Jean-Pierre Goyer, reflect immediate concern regarding the objectives of Canadian government purchasing:

It is no longer possible for industry to work in isolation. Nor is it possible for government to develop programs to assist industry without first developing an overall strategy—a strategy that will define major goals and working methods for the benefit of the whole community. Together business and government must ensure permanence in their economic activities. And here Government must take an active role in planning and organizing economic goals.

... [T]he government must actively support the private sector by maintaining a climate favorable to industrial and commercial development and by providing industry with enlightened information on national and international economic trends.

In this way government can help industry maintain its dynamism and competitive role in world markets. Canadian economy is largely based on international trade, and in light of our regional development programs and our strong tradition of free enterprise, it is evident that a coordinated effort can only be achieved through a dynamic national industrial strategy.

The government wants to be the "associate" of business or industry. We should consider the Japanese experience, which has shown a close link between the planning and coordinating of government policies with those of the industrial, commercial and financial sectors—their results speak for themselves.<sup>121</sup>

These excerpts are quoted at length because they provide a clear statement of the Canadian government's intense concern with pro-

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<sup>121</sup> Notes for an address by the Honorable Jean-Pierre Goyer, Minister of Supply and Services to the Annual Conference of the Purchasing Management Association of Canada, Halifax, Canada, June 4, 1973, at 2-9.

moting industrialization, regional development, technological advancement and an overall "national industrial strategy" for "the benefit of the whole community."

The performance of Canada's purchasing policy in terms of these objectives is beyond the scope of this article. Many Canadian procurement experts are impressed with the fact that the purchasing policy should be limited to the objective of economy.<sup>122</sup> However, it is both speculative and highly questionable whether more practical and less expensive methods could be implemented to achieve the other objectives of the Canadian Government.

## VI. OBSERVATIONS AND RECOMMENDATIONS

Study of the Canadian procurement system has revealed that it operates under a set of simple uniform regulations; that it achieves certain national objectives in its purchasing policy; that it apparently operates efficiently to the satisfaction of both the consumer departments and the taxpayers; and that the procurement procedures offer a good deal of flexibility to the contracting officers.

In this section, several areas within the United States military procurement system will be analyzed in light of Canadian procedures to determine whether incorporation of Canadian methods could promote increased efficiency in our own system. Specifically, the need for uniform regulations, and the need to provide contracting officers with more flexibility in the selection of the method of procurement will be examined. Finally, current legislation, both proposed and recently enacted, which would affect certain of the problem areas will be noted and recommendations will be made where appropriate.

### A. THE NEED FOR UNIFORM REGULATIONS

Canada has issued one short, uncomplicated set of Government Contracts Regulations. These Regulations impose few restrictions on government contracting officers and at the same time are easily understood by industrial representatives. The uniformity and simplicity of such regulations should reduce the frequency of contract disputes.<sup>123</sup> Additionally, the relatively fewer restrictions on both

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<sup>122</sup> One official termed these other objectives "pollutants" to the pure procurement system.

<sup>123</sup> [1971-1972] DEPARTMENT OF SUPPLY AND SERVICES ANNUAL REPORT 13-14.

industry and government hold overall contract costs below those experienced under a regulatory scheme which provides a mass of restrictive detail.

In 1953 the United States Secretary of Defense was directed to issue uniform procurement regulations to be applicable to all military departments.<sup>124</sup> This directive resulted in the Armed Services Procurement Regulation (ASPR) which

. . . contain[s] policies and procedures relating to the procurement of supplies and services and [is] designed to achieve maximum uniformity throughout the Department of Defense. Hence, implementation of this subchapter by and within the Military Departments, . . . shall be only in accordance with (section) 1.108.<sup>125</sup>

Section 1.108 rambles for eleven paragraphs explaining when departmental procurement instructions may be issued and when the Armed Services Procurement Regulation may be implemented. As a result, ASPR has not achieved the desired consistency of procurement policy and procedure. The Armed Services Procurement Regulation has been implemented by each department with the effect of weakening the uniformity which the drafters intended. Not only has this "implementation" process involved a restatement of ASPR, but such a massive effort within each military department has naturally given rise to many variations in language. With such a mass of words, it was inevitable that significant numbers of conflicts would arise.

These voluminous regulations have sometimes resulted in hobbling military procurement officers at the same time they complicate industry's approach to contracting with the various military departments. Industry is faced with a number of different regulations with which it must comply. This situation requires constant review and updating within corporate legal departments, not to mention modifications of operating procedures. Much of the expense inherent in such an environment is ultimately paid by the taxpayer through increased government contract costs. The complicated, restrictive nature of the regulations also results in longer periods of negotiation and contract performance. Again, these additional expenses must be reflected in higher government contract prices.

The confusion created by multiple regulations applies only to those firms contracting with more than one department. The problem

<sup>124</sup> 5 U.S.C. § 301 (1964); 10 U.S.C. §§ 2202, 2301-2314 (1964).

<sup>125</sup> 32 C.F.R. § 1.104 (1973).

becomes even more acute when a firm contracts with several departments at a time, a frequent occurrence with small businesses which subcontract with a number of prime contractors each of whom holds a contract with a different military department. Such small subcontractors are even further disadvantaged because they operate on too small a scale to hire experts in procurement regulatory law.

The above observations are supported by recent testimony before the Senate Government Ad Hoc Subcommittee on Federal Procurement<sup>126</sup> considering Senate Bill 2510,<sup>127</sup> which would legislatively establish an Office of Federal Procurement Policy within the executive branch.<sup>128</sup> A spokesman for the Small Business Administration stated that his agency favored the bill's objective of establishing a coordinated government procurement policy noting that while some agency procurement regulations are similar, "the differences are sufficient to create confusion and misunderstanding for small businessmen. Creation of a single policy body would contribute substantially to reducing such perplexity."<sup>129</sup>

House Bill 9059,<sup>130</sup> dated 28 June 1973, also proposed to establish an Office of Federal Procurement Policy "to provide overall leadership and direction for the development of procurement policies, regulations, procedures, and forms for executive agencies in implementation of procurement statutes."<sup>131</sup> "Executive agencies" as defined in the bill includes military departments.<sup>132</sup>

Testifying before the House Government Operations Subcommittee on Legislation and Military Operations, Professor John Cibinic, Jr.,<sup>133</sup> endorsed creation of an Office of Federal Procurement Policy as outlined in H.R. 9059:

Many substantial cost savings could be realized from having the same regulations and contract clauses. It would also reduce the bewilderment of contractors and their attorneys who deal with several Government

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<sup>126</sup> FED. CONT. REP. NO. 504, November 5, 1973, at A-11 to A-14.

<sup>127</sup> S. 2510, 93d Cong., 1st Sess. (1973).

<sup>128</sup> H.R. 9059, 93d Cong., 1st Sess. (1973), has similar objectives.

<sup>129</sup> Marshall J. Parker, Associate Administrator for Procurement and Management, Small Business Administration *in* FED. CONT. REP. NO. 504, November 5, 1973, at 12.

<sup>130</sup> H.R. 9059, 93 Cong., 1st Sess. (1973).

<sup>131</sup> *Id.* at § 2(b).

<sup>132</sup> *Id.* at § 3(1).

<sup>133</sup> Director, Government Contracts Program, George Washington University National Law Center.

agencies and must, therefore, cope with a literal maze of regulations and contract clauses.<sup>154</sup>

The confusion created in the administrative area is not limited to the implementing regulations of the three departments (Army, Navy and Air Force). Confusion is furthered by the differences in procurement procedure at lower levels, differences created by the further implementation of the regulations by lower level directives. These directives are not public documents and, therefore, are not available for the contractor's use. Again, the differences created by conflicting contracting policies and the array of regulatory material complicate the contractor's entry into defense contracts and frequently increase his costs of attempting to comply with changing requirements. His increased costs are reflected in the higher cost of defense procurement.

The cost of defense procurement cannot only be measured in terms of dollars paid to industry for products delivered. Although tax money allocated for defense procurement is not considered to cover the cost of government man-hours expended in the administration of defense contracts, nevertheless, the increased labor by Defense Department personnel as a result of the subimplementations of ASPR does mean the expenditure of additional tax dollars. Comparing the mass of restrictive regulations under which the contracting officer must work with those of industry buyers, Mr. E. F. Leatham, as Assistant to the President, Raytheon Manufacturing Company, stated:

Of the sum of procurement regulations, theoretically, each of you, as procurement officers, is probably obligated to work under two-thirds of them, when you leave off those of the other services which you are not in. . . . You have many instances, of large or small importance, where the procurement instructions of a particular office are giving an interpretation or are actually negating the effects of some of the policy statements in the Armed Services Procurement Regulations [*sic*] . . . .

Our buyers are free to use their ingenuity to negotiate the very best deal, under the circumstances, for what materials and parts our product needs to have to make it.<sup>155</sup>

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<sup>154</sup> FED. CONT. REP. No. 489, July 16, 1973, at A-10.

<sup>155</sup> Address by Mr. Ernest F. Leatham, Assistant to the President, Raytheon Manufacturing Company, Waltham, Massachusetts, January 24, 1957 quoted in INDUSTRIAL COLLEGE OF THE ARMED FORCES, PUBLICATION No. 157-101, at 5-6.

This observation was made in 1957. That the need for uniform, simple regulations has not only existed, but been recognized for well over fifteen years, reflects poorly on the present system.

Obviously, such extensive restrictions exist to maintain honesty in the ranks of military contracting officers as well as within industry. The question is whether the protection of the process' integrity provided by complicated and differing regulations is worth the increased administrative costs. Perhaps Mr. Leathem provided the answer by noting:

I would say that probably you are dealing with no more than two-tenths of 1 percent, at most, of people in industry who are dishonest. Most of the punitive regulations are put out to protect the Government against somebody who is doing a particular thing wrong. . . . For a company of any reputation or with any desire to stay in Government business, it would be the most foolish thing in the world to try to pull a fast one on the Government. In my company Government business is 75 percent of all our business. You are our best customer. You don't pull fast ones on your best customers. It just isn't done. I mean, it would be just cutting our throat. Yet we are all harrassed, you on the administrative side of these regulations, and we in complying and performing them, by this necessity to meet all these things which are designed to catch the crook. I say that, even if you don't catch all the crooks, the cost of not catching them is so infinitely less than the cost of operating under this system that the public is best served by not having them.<sup>136</sup>

Statements such as this strongly suggest that the Armed Services Procurement Regulation provides protection enough without the added confusion of individual military department regulations.

The question of how to quickly and efficiently transform the existing complicated, incongruous regulatory system into a simple and uniform one is not easily answered. The fact is that the problem has long existed and has long been recognized. Something should be done soon. In July 1973, Professor Cibinic believed that the passage of H.R. 9059<sup>137</sup> was needed as soon as reasonably possible. He stated, "we need it and we need it now."<sup>138</sup> Professor Cibinic strongly supported a similar Senate Bill (S. 2510) and in November 1973 noted that since his support of H.R. 9059 in July, "I have become even more convinced that the Congress should move quickly and decisively in establishing an Office of Federal Procurement

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<sup>136</sup> *Id.* at 16.

<sup>137</sup> Which would establish an Office of Federal Procurement Policy.

<sup>138</sup> *FED. CONT. REP.*, *supra* note 134, at A-10.

Policy." He further stated that "we have waited too long already."<sup>139</sup>

H.R. 9059 directs that the Administrator of the Office of Federal Procurement Policy establish "a system of Government-wide coordinated, and to the extent feasible, uniform procurement regulations."<sup>140</sup> Section 9 of the bill speaks of its effect on existing regulations in these terms:

Procurement policies, regulations, procedures or forms in effect as of the date of this Act shall continue in effect, as modified from time to time, until superseded by policies, regulations, procedures, or forms promulgated by the Administrator.<sup>141</sup>

After the submission of the thesis on which this article is based, the House and Senate finally resolved the differences in their respective bills (H.R. 9059 and S. 2510) to establish an Office of Federal Procurement Policy (OFPP). The final version was adopted by the House on August 14, 1974, by the Senate on August 19, 1974 and approved on August 30, 1974.

The "Office of Federal Procurement Policy Act"<sup>142</sup> implements one key recommendation of the Commission on Government Procurement. The Act establishes

... an Office of Federal Procurement Policy in the Office of Management and Budget to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies in accordance with applicable laws.<sup>143</sup>

Consequently, the OFPP has authority to establish a system of uniform government-wide procurement regulations.

The Act designates an Administrator for Federal Procurement Policy as the head of OFPP, appointed by the President and confirmed by the Senate. This is but one provision of the Act which illustrates the congressional intent that the OFPP, although part of O.M.B., be independent in its ability to provide overall direction of procurement policies.

The specific functions of the Administrator include, among others, establishing a system of coordinated, and to the extent feasible, uni-

<sup>139</sup> FED. CONT. REP., *supra* note 126, at A-12.

<sup>140</sup> H.R. 9059, *supra* note 130.

<sup>141</sup> *Id.*

<sup>142</sup> Act of August 30, 1974, Pub. L. No. 93-400, 88 Stat. 796 amending 40 U.S.C. § 471 et seq. (1964).

<sup>143</sup> *Id.* at § 3(b).

form procurement regulations for the executive agencies.<sup>144</sup> The term "executive agency" is defined in section 4 of the Act to include military departments.

Now that the "machinery" exists to achieve uniformity in procurement regulations, the question is, "what and when will the machine produce?" The rapidity of progress in achieving any degree of uniformity, of course, remains to be seen. The passage of Public Law 93-400 does not immediately alleviate the problems created by multiplicitious military department and civilian agency procurement regulations and other low level procurement directives. Section 10 of the Act validates continued use of all policies, regulations, procedures and forms until repealed, amended or superseded.<sup>145</sup>

The problems presented by all multiplicitious military department and civilian agency procurement regulations as well as other low level procurement directives<sup>146</sup> will continue to plague contractors and contracting officers for the immediate future. If the pace set by section 10 of the Act is strictly followed, uniformity in procurement regulations will likely be achieved in a painstakingly slow process.

To accelerate the transition to a uniform system, the Administrator of the Office of Federal Procurement Policy should direct that the Armed Services Procurement Regulation alone govern federal procurement at the present time. If ASPR needs to be modified or supplemented, it should be expanded to accommodate needed changes until superseded by uniform government-wide regulations promulgated by the Administrator. In the interim, with ASPR as the only authority, defense contractors and contracting officers would be less restricted and would be relieved of the necessity of constantly reviewing and updating multiplicitious regulations on the same subject. Finally, the frequent changes made in industry operating procedures to comply with procurement requirements unique to a single military department would be eliminated.<sup>147</sup>

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<sup>144</sup> *Id.*, at § 6(d)(1).

<sup>145</sup> This section is identical to § 9 of H.R. 9059. See note 141 and accompanying text *supra*.

<sup>146</sup> See notes 130-41 and accompanying text *supra*.

<sup>147</sup> The recent *Report of the Commission on Government Procurement* observed that most regulatory inconsistencies arise simply because there are two basic procurement statutes (Federal Property and Administrative Services Act of 1949 and the Armed Services Procurement Act of 1947) and because each is amended at different times in different ways. The Commission recommended government-wide uniform regulations. See REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, Chapter 4, at 31.

### B. THE UNDUE PREFERENCE FOR FORMAL ADVERTISING

The Canadian Government Contracts Regulations provide the contracting officer flexibility in choosing which procurement procedure should be applied in making a given purchase. He has authority to negotiate any contract under fifteen thousand dollars if he determines it is in the government's interest to do so.<sup>148</sup> With Treasury Board approval, the contracting officer may negotiate contracts over fifteen thousand dollars.

Canada's selective discretionary tendering process provides the contracting officer with practically the same flexibility by permitting him to restrict the total number of bidders. Some factors, already mentioned, which qualify a bidder are product quality, reputation and follow-up service. Hence, price only becomes a factor after the bidders are selected.

The above procedures are applicable to any type of government purchase in Canada. The public tendering process is relied on even less, however, in Canadian defense purchasing. In explaining tendering practices followed by the Department of Defence Production, the OECD stated:

. . . This Department does not, relatively speaking, rely on public advertisement for tenders to the same extent as certain other departments, but relies instead on invitations from lists of suppliers comprising firms which are in a position to compete for the requirement.<sup>149</sup>

Canada's preference for competitive negotiation procedures (the selective discretionary tendering process) in procurement puts the emphasis where it should be. It provides the contracting officer the needed flexibility to cope effectively with conditions under which military procurements are made and to apply the best methods of purchasing which have been developed by industry.

In direct contrast to Canada, the emphasis of United States defense purchasing has been on the use of formal advertising. The formal advertising system has in the past been favored by Congress over negotiated procurement for several reasons: it lessens the probability of favoritism and fraud by reducing the area of administrative discretion in selecting the sources of supply; and it protects the government fisc by awarding contracts solely on the basis of price.

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<sup>148</sup> GOVERNMENT CONTRACTS REGULATIONS, *supra* note 83, at § 10(c).

<sup>149</sup> GOVERNMENT PURCHASING, *supra* note 43, at 20.

Use of the formal advertising procurement method has proven, however, that its usefulness in defense purchasing is limited. In order for it to be effective certain conditions must exist:

1. That the government interests are best protected if the items are rigidly specified; *i.e.*, that it is best to develop competition in price and not in product, service, or other terms of sale;
2. That it is possible and that there is sufficient time to develop rigid specifications prior to the selection of the source of supply;
3. That it is not contrary to the public interest to publicize such specifications;
4. That the specifications are honestly drawn in terms of genuine technical requirements and that they are not specifically tailored for the purpose of limiting the number of eligible sources;
5. That there are several alternative sources of supply which are in active competition with one another in the matter of price for government contracts;
6. That the government is concerned solely with the technical specifications of the item supplied and its price and is, consequently, prepared to purchase from any responsible supplier.<sup>150</sup>

The prerequisites for formal advertising thus remain the same today as they did over twenty years ago. This method of procurement is successful when the desired item will not vary from seller to seller and the only concern of the government is obtaining the lowest possible price.

More often than not, however, formal advertising is neither feasible nor practical in military procurement because one or more of the above cited conditions fail to exist.<sup>151</sup> In fact, it has been reported that the Government uses formal advertising for purchasing only from 10 to 15 percent of its needs in terms of reported contract award dollars.<sup>152</sup>

These facts suggest that the emphasis on the use of formal advertising has been misplaced in United States defense purchasing. Negotiation and formal advertising should be afforded at least an equal

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<sup>150</sup> Miller, *Military Procurement Policies: World War II and Today*, 42 PAPERS & PROCEEDINGS AM. ECON. REV. 454-55 (1952).

<sup>151</sup> For a full discussion of the failure of formal advertising to protect government interests because of the conditions under which military purchases are made and because of the unique nature of the goods and services sought, see Miller, *Military Procurement in Peacetime*, 1947 HARV. BUS. REV. 444-62.

<sup>152</sup> REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, Chapter 3, at 20 (1972). The Report compiled its statistics from annual reports of the Department of Defense.

status. Based on the high percentage of military purchases which are not appropriate for formal advertising and based on the overall impact of each type of defense procurement in terms of dollars spent, one must wonder why negotiation has not been recognized as the preferred method.

Negotiation means "make without formal advertising."<sup>153</sup> Therefore, all procurements not formally advertised are statutorily categorized as "negotiated." Although the Armed Services Procurement Regulation authorizes the use of negotiated procurement, its use is restricted by numerous procedural requirements. Seventeen specific exceptions to the use of formal advertising are presently prescribed and negotiation may be used, provided an exception to the requirement for formal advertising is sufficiently justified. To justify many of the exceptions, written findings and determinations must be supplied and approval by the agency head is required in some instances. The prerequisites to use of negotiation in lieu of formal advertising are imposed despite the fact that the negotiation involved is a competitive one.<sup>154</sup>

The *Report of the Commission on Government Procurement* noted that "these justification provisions are intended to discourage sole-source negotiation."<sup>155</sup> Although the *Report* favors formal advertising wherever practical, it would eliminate the unnecessary expenditure of time and money required by the numerous high-level agency reviews of decisions to use negotiation rather than formal advertising.<sup>156</sup>

The *Report of the Commission on Government Procurement* made the following specific recommendations in the formal advertising-negotiation problem area:

- (a) Require the use of formal advertising when the number of sources, existence of adequate specifications, and other conditions justify its use.
- (b) Authorize the use of competitive negotiation methods of contracting as an acceptable and efficient alternative to formal advertising.
- (c) Require that the procurement file disclose the reasons for using competitive methods other than formal advertising in procurements over \$10,000 or such other figure as may be established for small purchase procedures.<sup>157</sup>

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<sup>153</sup> 10 U.S.C. § 2302(2) (1964).

<sup>154</sup> REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, *supra* note 152, at 21.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 20.

Each of the Commission's recommendations was embodied in a bill introduced in the House of Representatives during 1973<sup>158</sup> and partially enacted after the submission of the thesis upon which this article is based.<sup>159</sup> H.R. 9061 proposed the enactment of the "Federal Procurement Act of 1973" which would provide "policies and procedures for the procurement of property and services" for the entire Federal Government. The bill would give contracting officers more discretion to negotiate contracts without requiring costly justification procedures. It would additionally provide for the use of negotiation in all purchases up to ten thousand dollars, an upward revision (from \$2,500 to \$10,000) much needed in view of the large administrative costs of formal advertising.<sup>160</sup> The argument of defense contractors that the government will obtain end products at lower overall costs through negotiated procurement<sup>161</sup> has been verified by a study initiated by the Comptroller General.<sup>162</sup> Estimates of yearly savings of one hundred million dollars in the Department of Defense alone have been forecast from such a switch. In view of these enormous savings and increased efficiency, Congress recently amended the Armed Services Procurement Act and the Federal Property and Administrative Services Act to provide for the use of negotiation in all purchases up to ten thousand dollars.<sup>163</sup>

Another area in need of legislative attention is the conduct of contract negotiation. The contracting officer is restricted in choosing with whom he may negotiate largely "as a result of Congressional concern over the number of sole-source negotiations conducted by

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<sup>158</sup> H.R. 9061, 93d Cong., 1st Sess. (1973).

<sup>159</sup> Act of July 25, 1974, Pub. L. 93-356, 88 Stat. 390, amending portions of Titles 10, 16 and 41 of the United States Code.

<sup>160</sup> Both the *Report of the Commission on Government Procurement* (Vol. 1, at 26-27), and H.R. 9061 provide for the upward or downward revision of the \$10,000 small purchase procedure amount whenever over a three-year period costs of labor and materials increase or decrease by 10%.

<sup>161</sup> See survey by Albert N. Schnieber, et al., *Defense Procurement and Small Business* (1961). Mr. E. F. Leatham points out that industry rarely used formal advertising to enter into contracts to purchase material for the production of its commercial products. See note 135 *supra*, at 6.

<sup>162</sup> U.S. GENERAL ACCOUNTING OFFICE, WAYS FOR THE DEPARTMENT OF DEFENSE TO REDUCE ITS ADMINISTRATION COSTS OF AWARDED NEGOTIATED CONTRACTS, B-168450 at 19 (September 17, 1973).

<sup>163</sup> Pub. L. 93-356, *supra* note 159.

the Department of Defense.”<sup>184</sup> To insure maximum competition in negotiated procurements Congress passed legislation to provide that:

In all negotiated procurements in excess of \$10,000 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the *maximum number of qualified sources* consistent with the nature and requirements of the supplies or services to be procured. . . .<sup>185</sup>

In actual practice the obstacle presented by the above quoted language is the requirement that proposals be solicited “from the maximum number of sources consistent with the nature and requirements” of the procurement. In research and development contracts this problem becomes particularly acute since a large number of firms usually seeks such contracts and the proposals are of an unusually complex nature. These proposals are not only costly for industry to prepare but are also costly for the government to evaluate. Where such factors exist, the solicitation of bids from a maximum number of firms often complicates the selection process and adds significantly to the costs of both government and industry.<sup>186</sup>

The *Report of the Commission on Government Procurement* recommended that the statute be revised to provide for the solicitation of a “competitive” rather than a “maximum” number of sources in negotiated procurements. To prevent abuse or favoritism, the Commission also recommended retaining the statutory provision which calls for public announcement of procurements and adding to that provision the requirement that agencies honor “all *reasonable* requests by uninvited firms to compete.”<sup>187</sup>

These recommendations were also included in H.R. 9061, but have yet to be enacted. Explaining competitive negotiation, that bill provided:

Except when rates or prices are fixed by law or regulation, proposals, including price, shall be solicited from an adequate number of qualified sources to permit reasonable competition consistent with the nature and

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<sup>184</sup> U.S. DEP'T OF ARMY, PAMPHLET NO. 27-153, PROCUREMENT LAW, para. 4-5 (1972).

<sup>185</sup> 10 U.S.C. § 2304(g) (1964); ASPR Part 3, paragraph 3.101 (emphasis added).

<sup>186</sup> REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, *supra* note 152 at 23.

<sup>187</sup> *Id.* (emphasis added).

requirements of the procurement. The solicitation shall be publicized and, to the *maximum extent practicable*, other sources so requesting shall be given copies of the solicitation and allowed to compete.<sup>168</sup>

The first of the above two quoted sentences is roughly equivalent to the Canadian selective discretionary tendering process. Disputes may be anticipated over how many sources are adequate to insure competitive procurement in a given situation. In Canada, for example, we have seen that as few as two firms may be considered sufficient competition in a given situation. It is impossible to provide any more definitive guidelines than H.R. 9061 provided without restricting the very flexibility the bill was intended to provide.

The second sentence offers even more troublesome language. Other sources are to be given copies of the solicitation upon request and "to the maximum extent practicable" they must be permitted to compete. When read with the Commission's recommendations, it is obvious that this merely means that consent must be given to *reasonable requests* by uninvited offerors to compete. When read alone, however, the sentence may be interpreted to mean that permission to compete must be given to all those firms so requesting. Assume that all firms requesting to compete are qualified sources. In a large and well publicized R&D contract, the number of qualified firms requesting to compete may well be the same as the number of firms contacted when soliciting bids from the "maximum number of qualified sources." An interpretation of this nature preserves the dilemma now faced and defeats the relief H.R. 9061 sought to provide. This sentence should be rephrased to avoid any such misunderstandings.

Legislative enactment of a provision like, or having the same effect as Section 8(c) of H.R. 9061 would give the contracting officer the flexibility he now lacks to procure products satisfactory to the government at or near minimum cost. Neither H.R. 9061 nor the recommendations of the *Report of the Commission on Government Procurement* are intended to eradicate or even retard competition. The Commission explained its intent clearly:

The point is not that there should be more negotiation and less advertising, but that competitive negotiation should be recognized in law for what it is; namely, a normal, sound buying method which the Government should

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<sup>168</sup> H.R. 9061, *supra* note 158.

prefer where market conditions are not appropriate for the use of formal advertising.<sup>169</sup>

Both the recommendations of the Commission and the draft provisions of H.R. 9061 provide for four distinct procurement methods. These methods include (1) small purchase procedures; (2) formal advertising; (3) competitive negotiation; and (4) noncompetitive negotiation (sole source procurement).<sup>170</sup> Currently, only advertised and negotiated procurement are recognized as having an essential and proper place in our method of defense procurement. Small purchase procedures, of course, are included in negotiated procurement. The singular important distinction between the proposed arrangement and the present structure is that negotiated procurement would no longer be legally recognized as one method of procurement embodying several different procedures. Instead competitive negotiation would be distinguished from sole-source procurement.

In response to congressional concern over the high number of sole-source contracts awarded in defense purchasing, the Commission recommended removal of some of the major statutory restrictions on the use of competitively negotiated contracts, but concluded that written documentation should be required for all procurements "over \$10,000 where formal advertising is not used and where only one source is solicited."<sup>171</sup> Additionally, the *Report* recommended that the Office of Federal Procurement Policy establish classes of sole-source procurements requiring approval at an agency level above the contracting officer.<sup>172</sup>

This suggested separation of competitive negotiation and sole-source procurement into two distinct categories would remove the legislative restrictions which were introduced to curb the unwarranted use of sole-source contracts from competitive negotiation procedures. Thus, only sole-source procurements would require careful justification and the emphasis would be placed where it belongs.

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<sup>169</sup> REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, *supra* note 152, at 21.

<sup>170</sup> H.R. 9061, *supra* note 158, at § 5.

<sup>171</sup> REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, *supra* note 152, at 26.

<sup>172</sup> REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, *supra* note 152, at 26. This recommendation is in accord with Pub. L. 93-400. See note 142 *supra*.

Negotiated procurement has been utilized as the most appropriate method for the expenditure of the vast majority of the United States' defense dollars. On this basis and in light of the above discussion, the current preference of advertising over negotiation should be eliminated by amendment of the present statute. ASPR should be changed accordingly to give the contracting officer the flexibility needed to choose the procurement method which best satisfies the particular conditions existing in a given contract situation. Greater emphasis should be placed on all the usual procurement considerations, including but not limited to product quality, dependability, delivery and technical advances rather than only on price. This type of evaluation might be made in both advertised and negotiated procurements.

In line with the Commission's *Report*, sole-source contracts should receive special and separate treatment in both the statute and the regulations. As a safeguard against possible misuse and to suppress any further congressional concern, sole-source procurement should continue to require careful justification. The seventeen exceptions now required by 10 U.S.C. 2034 should be reduced by amendment so that only those exceptions which apply to sole-source procurement remain in effect. This would free the competitive negotiation process of these justification requirements and put it on an equal basis with formal advertising. Finally, the statute should be amended and the regulations modified to clearly define formal advertising, competitive negotiation, noncompetitive negotiation (sole-source), and small purchase procedures.

Most of these recommendations were embodied in H.R. 9061 and the passage of a similarly drafted bill should be vigorously endorsed by those desiring to improve the United States system of defense purchasing.

## VII. CONCLUSION

The purchasing system of the Canadian Government, in addition to procuring needed government material and services, is structured to achieve certain national objectives among which are the protection of domestic industry and labor. The Department of Supply and Services, the operative agency of Canada's centralized purchasing system, within the confines of its statutory limits determines what governmental purchases should be made; the source from which a given purchase shall be made, whether domestic or foreign; and how the

purchase should be made. The discretion exercised by the Department of Supply and Services in making these determinations is an example of Canadian purchasing policy at work.

Observing Canada's procurement experience helps isolate certain areas within the United States military procurement system which are in need of improvement. One of the two areas, the need for uniform contract regulations has been recognized by Congress and is currently being remedied. The second, the necessity of providing contracting officers with increased flexibility in choosing the type of procurement procedure to be used, still remains in need of reform.

This introduction to Canada's procurement system has hopefully provided procurement officers and policy makers with an appreciation of the structure and operation of that country's system. Perhaps such an appreciation will inspire further research into Canadian or other foreign procurement systems with the ultimate goal of improving the methods by which the United States Government meets its procurement needs.



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\* Mention of a work in this section does not preclude later review in the *Military Law Review*.

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