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Anna Kronlund

Parliamentary Oversight of the Exceptional Situations in a Presidential System

Debating the Reassertion of the Constitutional Powers of the US Congress

JYVÄSKYLÄN YLIOPISTO

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ABSTRACT

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The study examines, through politically and historically relevant examples, the differences and conflicts between presidential and parliamentary powers for dealing with exceptional situations. The study investigates the US Congress debates of the 1970s and after 9/11 in relation to the Weimar debates on constitutional interpretation as a context of reference for the 'state of exception' problematic. The debates on the Weimar 1919 Constitution and its Article 48 raise questions that can be applied to the US Congress debates of the 1970s and after 9/11.

The study's approach to parliamentary oversight is illustrated by Walter Bagehot's *The English Constitution* (1867). Bagehot emphasized how control of the executive and parliamentary supremacy can be me maintained through the parliamentary debate. The parliament is approached on the presumption that the motions of the agenda are debated from opposing views according to the rules of parliamentary procedures which is also applicable in a balance of powers system. The distinctive approach of the study is to analyze the primary sources by drawing on rhetorical and conceptual reading of the war and emergency powers debates.

The growth of executive branch powers in foreign policy has been a dominant trend in the United States since Franklin D. Roosevelt's presidency. The Congress, however, has not submitted to this trend without raising opposing arguments. The study examines a period of time that could be also described as a (lost) momentum of the reassertion of the Congress' powers through the debates of the *War Powers Resolution* (1973) and the *National Emergencies Act* (1976). These two congressional debates and decisions are set against a third example of an extraordinary political situation: the September 11, 2001 terrorist attacks.

The study provides a new point of view for examining how the US Congress understands its role within a presidential system. The connection between the state of exception problematic and parliamentary powers provides also a new perspective on the study of constitutional law and politics.

Keywords: US Congress debates, war and emergency powers, the War Powers Resolution of 1973, the National Emergencies Act of 1976, 9/11, Constitution of the Weimar Republic 1919, Article 48, rhetoric

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Originally, it was what happened in the aftermath of 9/11 that inspired me to examine the theory of the state of exception in the United States. While this dissertation in a sense concludes a process that was started in my earlier studies, it has also provided an opportunity to incorporate a wider perspective and collection of materials on my chosen topic.

First of all I want to express my gratitude to my supervisor, Professor Kari Palonen, for his support and guidance during the process of writing the thesis. He has always had time for a detailed discussion at different stages of the study. I would also like to thank the two reviewers of the thesis, Professors Hubertus Buchstein and Katri Sieberg.

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Jyväskylä 23.4.2013
Anna Kronlund

TABLE

APPENDICES

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LIST OF ABBREVIATIONS

AUMF	Authorization for Use of Military Force, P.L.107-40
DDP	Deutsche Demokratische Partei
DVP	Deutsche Volkspartei
DNVP	Deutschnationale Volkspartei
HSA	Homeland Security Act of 2002, P.L.107-296
MCA	Military Commissions Act of 2006, P.L.109-366
NEA	National Emergencies Act 1976, P.L.94-412
SPD	Sozialdemokratische Partei Deutschlands
USPD	Unabhängige Sozialdemokratische Partei Deutschlands
WPR	War Powers Resolution 1973, P.L.93-148

1 INTRODUCTION

1.1 The emergency powers problematic and parliamentary oversight

War powers and emergency powers are of special political interest because they shed light on how the executive branch of government can respond in a time of war and crisis while at the same time showing how the legislative may put checks on the exercise of such powers. Two politically important ways to limit the use of these powers include: (1) establishing new constitutional emergency power provisions (as was done in the 1919 Constitution of the Weimar Republic) and (2) to rely on statutory laws authorizing necessary powers in times of crisis (as is the case in the United States).

The focus of this study is an analysis of presidential and parliamentary powers dealing with emergency situations. This will be done through politically and historically relevant examples, for example, the US Congress debates of the 1970s and after 9/11. These will be investigated in relation to debates in the Weimar Republic on constitutional interpretation, which will serve as a context of reference for the 'state of exception'. The study will address questions of parliamentary control and oversight of the executive powers in exceptional situations within the limits of a constitutional separation of powers.

The main task is to consider how members of Congress introduced and debated the motions to secure not only adequate discretionary powers for the executive, but also sufficient parliamentary oversight. The research perspective of the study focuses on Congress' interpretation of political situations in terms of the possibilities they provide for strengthening its own institutional capacities. The effort is to understand this through the congressional debates on the different proposals for strengthening Congress' oversight role. These debates were conducted in order to, as Congress saw it, restore the constitutional framework of the separation of powers.

Congress' debates on its parliamentary means to oversee the use of war and emergency powers provides the chance to examine US constitutional poli-

tics from a perspective rare in the research settings of recent decades. The approach differs from that of legal scholars, who have mainly been interested in legislative outcomes and their constitutional importance in the 1970s and after 9/11 (e.g. Ely 1988; Koh 1988; Scheppele 2004). More generally studies on Congress have tended to overlook the rhetorical aspects of Congress concentrating instead on its institutional features, or votes and voting patterns and what can be said about Congress on the basis of them.

Some research is available on the debates considered in the thesis. For example Phelps & Boylan (2002) have written an article dealing with the discourse of war in the United States. Another example is, historian Geoffrey R. Stone's book "*PERILOUS TIMES*: *Free Speech in Wartime*" (2005), about the constitutional history of free speech in times of war, but it concentrates mainly on the institutional settings and on legal and historical perspectives.

Closer to the research practiced in this study are the studies that examine the special character of the US system against the parallels of other constitutional and political settings (e.g. Ackerman 2000; Zurcher 1950). Also close are studies on the debates on US institutions, balance of powers and legitimacy in US politics (e.g. Fisher 2007; Mann & Ornstein 2008; Pyle & Pious 1984). The research subject of this study concerns the presidential and parliamentary systems' ways of dealing with exceptional situations, as well as emergency powers in the Weimar Germany and in US constitutional politics. I have benefited to some extent from the institutional literature, but it ought to be mentioned that my intention is not to take part in these debates as such.

The use of emergency powers comprises a large corpus of debates, which could be viewed from a variety of perspectives. The aim of the study is not to contribute to the debates on the normative theories of the state of exception as such. A wide range of literature has been published, especially after 9/11, related to the emergency powers, the state of exception and the law in times of crisis.[1] The interest of this study lies rather in the debates over what parliamentary means Congress has to exercise control over the executive. As a point of departure, the use of emergency powers is considered through an analysis of congressional rhetoric. Given the growth of studies on emergency powers surprisingly little research has been done on the empirical materials of the parliamentary debates themselves.[2]

My focus on the debates of the US Congress suggests the linkages of this study to rhetorical and parliamentary studies, and in particular to studies on the rhetoric of parliamentary debate. The study has been conducted in the research environment of the political science unit at the University of Jyväskylä,

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1 For more detail, see Honig, Bonnie. 2011. *Paradox, Law, Democracy, Emergency Politics*. New Jersey: Princeton UP; Gross, Oren & Aoláin Ní, Fionnuala. 2006. *Law in Times of Crisis. Emergency Powers in Theory and Practice*. New York: Cambridge UP; Lazar, Nomi Claire. 2009. *States of Emergency in Liberal Democracies*. New York: Cambridge UP; Ferejohn, John & Pasquino, Pasquale. 2004. The law of the exception: A typology of emergency powers. *International Journal of Constitutional Law*. Vol. 2, No. 2, 210-239.

2 I am using 'parliament' and 'parliamentary' to refer to the US Congress and congressional debates.

which has conducted much research in both areas (e.g. Palonen 2006; Soininen & Turkka eds. 2008; Björk 2011; Haapala 2012). The research setting will be discussed in greater detail in Section 1.3.

One of the most significant discussions in contemporary political science is the debate between the presidential and parliamentary systems. The United States is considered to be the typical example of a presidential system. According to its balance of powers, the interdependency between Congress and the president is considered more or less indispensable. To date, however, there has been relatively little discussion about the parliamentary means of Congress to control the executive. Congress has certain institutional feature and resources in the presidential system. The study attempts to show, by analyzing the means of parliamentary control of Congress as expressed by the members themselves, a new viewpoint for interpretation the role of Congress in the US presidential system.

The research setting of this study implies a return to the British style on parliamentarism, which involves a broader range of features than a cabinet government's responsibility to the parliament. In short, the vote of no confidence and the election of the cabinet are not the only available ways to control the executive. British parliamentary procedure of sixteenth and seventeenth centuries covered, for example, the rules of order in debate and the forms of debating bills (Campion 1958, 15). Campion (ibid.) writes that the period in which the procedure developed "*is full of suspicion of the executive government, insisting upon the rights of the Commons*." In the US, adherence to the formal procedure is one additional way in which Congress can control the executive. The control of time, particularly the filibuster in the Senate and the control of the agenda, could be also mentioned in this regard.

The power of the Senate minority to veto legislation is not based on the Constitution, unlike the legislative veto of the president, but rather on informal Senate practices and precedents (Koger 2010, 3). The House does not have a similar procedure, but Koger (2010, 5) writes that during the nineteenth century, the members of the House used numerous parliamentary means to delay the legislative process, eventually paralyzing the legislative process altogether. The use of filibuster has increased with the increased partisanship of Congress since the 1970s. As a result, the parties in Congress have increasingly directed their concern towards means for keeping issues off the agenda (ibid. 6).[3]

The approach of this study to the question of parliamentary oversight is illustrated by Walter Bagehot's *The English Constitution* (1867). This book, a classic of British constitutional and political thought, draws comparisons between the British parliamentary system and the US presidential system.[4] For Bagehot

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3 Oversight functions of Congress are also performed by agents such as the Government Accountability Office or the Congressional Budget Office. In 1995, the House of Representatives amended their rules to authorize the speaker to establish "special ad hoc committees". It seems that the speakers have not really utilized that authority since it was granted. (For more detail, see McKay & Johnson 2010, 310-311)

4 On differences between the presidential and parliamentary systems with reference to Bagehot's *The English Constitution,* see Palonen, Kari (forthcoming, 2013). Parliamen-

(2001, 16) the legislature is "the great scene of the debate", thus emphasizing the rhetorical aspect of the parliament. Bagehot (2001) also emphasized how control can be exercised over the administration and parliamentary supremacy maintained by the means of parliamentary debates.

Woodrow Wilson, for his part, wrote in *Congressional Government* that "the enacting, revisiting, tinkering, and repealing of laws should engross the attention and engage the entire energy of such a body as Congress", giving a legislative characterization of Congress. But, as Wilson (1900, 297) also emphasized, Congress should also oversee the executive branch: "*Quite as important as legislation is vigilant oversight of administration.*" Wilson (ibid. 303) further wrote: "*It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.*" I have taken this idea of Wilson in my approach to the oversight function of Congress.

In recent debates, Linz (1990), for example, discusses the parliamentary and presidential system and concludes that the former provides better opportunity for a stable democracy. In *Deliberative Politics of Action* (2004) Steiner et al. attempt to link the literature on deliberation to a theoretical and empirical understanding of parliamentary and presidential political institutions. The purpose of this study is not, however, to contribute to the discussion of institutions or to the differences between parliamentary and presidential regimes as such.[5] A wide-range of studies has been published comparing the US Congress to other parliaments, and to Westminster in particular (e.g. Ackerman 2000; Fraenkel 1960; Jefferson 1801; McKay & Johnson 2010; Pradshaw & Pring 1972; Graham Wilson 2009; Woodrow Wilson 1908, 1900). Although the question of the executive-legislative relation is significant, my intention is not to concentrate on separation of powers debates, but to examine, through a more specific corpus of debates, the parliamentary powers Congress has available to control the executive in exceptional situations.

The balance of powers established in the US Constitution is not a fixed system but rather constantly evolving. After the publication of Bagehot's *English Constitution* there have been some proposals to reorganize the US system according to "the parliamentary style of politics". Zurcher (1950, 78) illustrates the reception of the Bagehot in the US context as follows: "*Whether as a direct result of Bagehot's uncomplimentary analysis or because of the grave constitutional problems existing at the time his book was published, or for both reasons, the fact remains that the appearance of the* English Constitution *heralded a turning point in the American's view of his own constitutional structure, particularly with respect to the relationship of Congress and the President.*"

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tarism as a European type of polity. Constructing the presidentialism vs. parliamentarism divide in Walter Bagehot's English Constitution in Meike Schmidt-Gleim and Claudia Wiesner (eds.), *Meanings of Europe*. London: Routledge.

5 About the relationship between the executive and legislative branches of government and the debate on the separation of powers system, see: Thurber, James A (ed). 2009. *Rivals for Power. Presidential – Congressional Relations*. Lanham: Rowman & Littlefield Publishers, INC.

In fact, Zurcher (1950, 78) has argued that, about the 1870s onwards political scientists and others interested in the topic began to consider the British parliamentary regime and other systems as examples of an ideal relationship between the executive and the legislative. For instance, in 1864 Representative George H. Pendleton from Ohio introduced a motion in Congress suggesting that congressional seats be provided for members of the cabinet so that they had the possibility to engage in the debates involving their department's affairs. According to supporters the motion was not unconstitutional, since Congress establishes Cabinet offices and their duties and approves the Cabinet officers and in addition both houses determine their own rules. Proposals to unify the branches of the US government were also made "by a number of publicists" as late as the 1940s. (Zurcher 1950, 78-79, 83.)

Within the constitutional framework, there have also been debates on reinterpreting the balance of powers as established in the Constitution. In *Youngstown* v. *Sawyer*, 343 US 579 (1952) Justice Jackson's concurring opinion illustrated the relationship between the executive and legislative branches of government as follows: "*While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government*." Jackson (ibid.) continued by emphasizing that the constitutional powers between the president and Congress are to some extent contingent: "*Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress*." The Constitution provides a certain framework, but does not give absolute answers related to the uses of war and emergency powers and therefore there is some room for change and flexibility built into the system.

For Bagehot (2001, 23), the presidential system, however, lacks the needed flexibility to deal with crises due to the fixed terms of Congress and of the president as well as the constitutional divisions of government. According to Bagehot (ibid.), the "supreme people" are not to be found in moments of crisis when sovereign power is needed. Bagehot (2001, 22) claims that the separation of powers exposes the nation to danger in times of crisis because of the inefficiencies of the decision-making. It should be said, however, that the US has attempted to resolve this by typically concentrating sufficient power in the hands of the president while, at the same time trying to maintain congressional control and oversight.

1.2 Congressional attempt to reassert its powers

The discussions of emergency powers and the state of exception in the United States can be traced back to the foundation of the Republic in 1787. From the Continental Congresses onwards, the question concerning emergency powers has often been a key topic of political discussions in the US, even though the issue was not discussed in detail in the Constitutional Convention (e.g. Relyea

2007).[6] The expansion of presidential powers in foreign policy to the extent that it is perceived as undermining the balance of powers as it was envisaged in the Constitution has been major trend since the Second World War. The debates on war and emergency powers after the Vietnam War are especially relevant to this. With regard to the 1970s debates, Stone (2007, 107) writes, "*The Vietnam War triggered one of the most turbulent periods in American history. It raised old - and new - questions about the nature and depth of the American commitment to civil liberties in wartime.*" The trend of growing executive power has not been accepted without resistance and in some situations Congress has seriously attempted to reassert its powers.

The focus of the thesis will be on the two major examples of this reassertion, namely the *War Powers Resolution of 1973* (WPR) and the *National Emergencies Act of 1976* (NEA), bills enacted in the wake of the Vietnam War. The WPR was a major effort by Congress to restore, as it saw it, the constitutional framework. The executive branch's dominance in war and foreign policy matters after the Second World War was seen as having undermined the constitutional balance, because according to the interpretation that Constitution clearly states that Congress declares war. By enacting the resolution Congress' aim was to restore its constitutional powers in war-making. According to the legislation, the president was expected to report and consult the Congress in regard to any decisions to introduce the US armed forces. The NEA followed the trend to include Congress in the decision-making process and placed the process of national emergencies on a statutory footing. The idea was to enhance the possibilities for congressional control and oversight in order to avoid an "arbitrary use of powers", as noted by Senator William V. Roth Jr. (R-DE) during the NEA debates: "*In my judgment, this bill devises a sensible way of insuring that rapid action can be taken to meet an emergency situation while safeguarding against the arbitrary and irresponsible use of such power by a future President*" (quoted in the NEA Source Book 1976, 176).

The political arguments are always responses to the political context, which has to be understood in order to analyze the arguments. In my view, in order to understand the context here we should not only concentrate on the why, what, and how of Congress' actions but also on the timing (on seizing the moment, see Palonen 2006, 241-245). The context in which both the WPR and NEA legislation originated was quite specific not only due to the Vietnam War, but also the Watergate and resignation of Nixon on August 7, 1974. Gerald Ford, who had become vice president following Spiro Agnew's forced resignation on October 10, 1973, assumed the presidency on August 9, 1974. In the political process of enacting new legislation, the timing is essential, especially with legislation such as the WPR bill enacted under the threat of a presidential veto. The relevant question is why Congress finally succeeded in 1973 after having lost eight other bills that year to President Nixon's vetoes (New York Times Nov. 11,

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6 The Continental Congress, which was a body of the 13 states' delegates that acted as a governmental body during the revolution, enacted between 1775-1781 a set of resolutions and acts that stand as the first US legal forms relating to emergency powers and authority. (Relyea 2007, 2)

1973).[7] It should be pointed out that overriding a presidential veto is not usual. From 1789 to the end of the presidency of George W. Bush, 36 of 44 presidents have used their veto powers. The total amount of vetoes during that time is 2562, and only on 110 occasions Congress was willing and able to override the veto. (Davidson et al. 2012, 297.)

It ought to be, however, mentioned here that the intention of the thesis is not to provide a detailed historical analysis of the situation in the US in the 1970s, but rather to tackle the questions that led to enacting the WPR and NEA from the point of view of Congress by examining the discussions themselves. It seems that the introduced legislative motions were meant to be a watershed marking Congress' restoration of its constitutional powers. However, this effort failed to have significant impact in the long run. In order to understand this situation it should be considered whether it is best interpreted as temporary or as a turning point that implicates more substantial change.[8]

In order to understand the moment of the congressional action, we need to take into account not only the power differences between the executive and the legislative branches, but also the political situation, including the Vietnam War and Watergate, in which Congress felt bypassed. In other words, it was only in a situation of bipartisan support, that there was a chance for Congress to reclaim its powers. During the years from 1969 to 1977 the US government was divided. The Democratic Party controlled the majority of both houses of Congress whereas the Republican Party held the presidency. The political context of the time had an effect on the legislation. The WPR bill, in particularly, was a compromise bill. The interesting question that followed is to what extent the compromise bill was considered "passable" at the beginning by the members of Congress when they initiated the proposed legislation.

The 1970s political context is significant not only because Congress enacted this new statutory law to, as they saw it, restore the constitutional balance of powers, but also because it put into practice certain institutional changes. The seniority system, for example, was redesigned especially in the House of Representatives to increase the authority of the rank-and-file-members and the independence of the subcommittee chairmen. Congress also took measures to stay

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7 The president needs only one-third of the vote [plus one] from one house of Congress in order to sustain a veto. The WPR veto by President Nixon was overridden on November 7, 1973 in the House by 284 to 135, only 4 votes over the required majority. In 1973 Congress tried to cut off funding for the war in Southeast Asia, but Nixon's veto was sustained with a vote of 241 to 173 on June 27, 1973 (See S. HRG. 107-892, 2002, 14, 17). However, a couple of days later Congress was able to enact an appropriation bill requiring the termination of all "combat activities" in Southeast Asia by August 15 (Dean 2002).

8 Kari Palonen (2008, 28) has written on momentum as follows: "The aspect of the momentum lies in the estimation of the art and degree of the contingency of the situation." For Palonen (ibid.), the following three categorizations confines the question: first, the moment of change can be considered to be a situation that does not have any effect on the momentum as such; secondly, the situation may initially be considered to be something extraordinary, the beginning of a "new era", that however will terminate after normality is regained; thirdly, it can be understood afterwards as in fact a real "turning point" that changed the policy or action. About the situational assessments and their hierarchies, see Palonen 1997, 13-31.

more up-to-date and informed on foreign policy issues. The research capabilities for example within Congressional Research Services were enhanced and the amount of foreign policy specialists within the Committee staff was increased. Significantly, the number of "reformist liberal Democrats" also grew in the post-Watergate elections of 1974. (Koh 1988, 1263, fn. 31.)

The reassessment of Congress' constitutional powers seemed to originate from a general view that war powers and the legitimacy to act in times of crisis had shifted to the president. Senator Hubert Humphrey (D-MN) described the shift in following words during a Senate debate on the WPR Conference Report:

> Presidential power has grown at the cost of diminished accountability and public scrutiny of executive branch activities. And it has grown at the cost of respect for and confidence in the constitutional processes of government. […] In the field of foreign policymaking, Presidents have been able to base their actions not on legislative authority, but on inherent powers vested in the Presidency. (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33552)

As Senator Humphrey notes, the imbalance of powers was undermining trust in the constitutional processes and the constitutional framework. While the Constitution is silent on emergency powers, it divides war powers between Congress and the president. Therefore, the study examines what arguments and formulations were selected to conceptualize the executive-legislative relationship in war-making and in regards to war powers and emergency powers. For example, the WPR opponents questioned to what extent it is possible to rely, in the event of nuclear war, on a strict constitutional reading of the division of war-making powers. In the 1970s, the intention of the Congress was to restore the constitutional framework, rather than to rely on the political practices that had developed over time. The idea was not that the war powers should be redone from a scratch, but rather about how to provide and realize the Constitution in practice.

The congressional debates of the 1970s relating to the WPR and the NEA are relatively unknown in the contemporary debates. It seems to me that the debates of the 1970s deserve more attention than they have received. The thesis suggests that the members of the Congress understood the momentum in the debates better than has been later acknowledged or appreciated. The members did not dispute the right of the president to act in times of war and crisis, but that the powers were used without first seeking congressional consent, or without including Congress in the decision-making processes. The long-term trend that has emphasized the powers of the president in the name of urgency and necessity seems regularly to force Congress to reassert the balance of powers in executive-legislative relations.

The importance of the two congressional debates and decisions of the 1970s mentioned above are set against a third example, which refers to the extraordinary political situation that seemed to undermined the powers Congress had regained in the 1970s: the September 11, 2001 terrorist attacks, which were the first attacks on US soil since Pearl Harbor in 1941.

Originally, it was what happened in the aftermath of "9/11" that inspired me to examine the theory of the state of exception in the United States (Kronlund 2009). The terrorist attacks were considered as something unforeseen and unimaginable. In response to the situation, President George W. Bush declared a national emergency a couple days after the attacks.[9] Following the NEA the president by an executive order explicitly informed the Congress and the public of the statues that were activated by the national emergency proclamation.[10] Further, the Congress gave the president an *Authorization for Use of Military Force in Response to the 9/11 Attacks* (AUMF, P.L.107-40). According to the authorization the president was able, "[*T*]*o use all necessary and appropriate force against those nations, organizations, or person he determines planned, authorized, committed or aided the terrorist attacks* […] *or harbored such organizations or persons*" (S.J.Res.23, 107th Congress 2001). Congress followed the historical precedents by enacting statutory authorization granting powers to the president in order to respond to the novel threat of terrorism.

In addition to the AUMF, this study examines the following 9/11 debates: the *USA Patriot Act of 2001* (P.L.107-56), the *Homeland Security Act of 2002 (*P.L.107-296), the *Patriot Reauthorization Act of 2005* (P.L.109-177*)*, and the *Military Commissions Act of 2006* (P.L.109-366*)*. The laws examined are taken as well known, and the focus is directed on the debates rather than the possible outcomes of the passage of the bills. The above-mentioned post-9/11 debates were selected because these debates were about the laws that were the direct responses to the 9/11. These debates involve questions such as how much power should Congress authorize for the use of the president in times of crisis, to what extent should Congress be the equal branch of government in the "War on Terror", and how may the necessary oversight be provided over the actions of the executive branch.

Despite the novelty of 9/11, and its aftermath, there were parallels for example in what happened in connection with Pearl Harbor. There is a certain historical-legal paradigm of emergency powers in the US that includes custom, the Constitution and historical precedent. What, however, have been missing from the post-9/11 debates are historical references to the previous political

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9 "A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States. Now, therefore, I, George W. Bush, President of the United States of America, by virtue of the authority vested in me as President by the Constitution and the laws of the United States, I hereby declare that the national emergency has existed since September 11, 2001, and, pursuant to the National Emergencies Act (50 USC. 1601 et seq.), I intend to utilize the following statutes: sections 123, 123a, 527, 2201(c), 12006, and 12302 of title 10, United States Code, and sections 331, 359, and 367 of title 14, United States Code." Federal Register: September 18, 2001 (Vol. 66, Number 181) Presidential documents. http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010914-4.html

10 These statutes included, for instance, the "Authority to suspend officer personnel laws during war or national emergency" (US Code, Title 10 Subtitle A, Part 1, Chapter 3, §123); "Strength limitations: Authority to Waive in Time of War or National Emergency" (US Code, Title 10, Chapter 1201, §12006); and "The Ready Reserve" (US Code, Title 10, Subtitle E, Part 2, Chapter 1209, § 12302).

debates on national emergencies and emergency powers. Several liberal democracies have included emergency power provisions in their constitutions. The United States has been an exception in that the US Constitution does not include emergency power provisions. Therefore, it seems curious that in the history of the United States there has not been more congressional debate related to the use of emergency powers.

In order to contextualize and thus analyze the "exceptionality" of the 9/11 debates, the focus should be on earlier political debates on executive and legislative powers in times of war and crisis. The debates related to the Great Depression and the *New Deal* in the early 1930s, for example, would be to some extent comparable to the debates after 9/11. However, it seems to me that the WPR and NEA debates are particularly interesting reference to look at because they can be considered the "culmination" of the executive and legislative relationship as related to war and emergency powers.

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To give historical and comparative dimension to the study, the US Congress debates of the 1970s and after 9/11 are considered in relation to the Weimar debates on constitutional interpretation as a context of reference for the 'state of exception'. While the US and Weimar cases have many differences, they include the same thematic. The Weimar Government was the first republican government to include an emergency power provision in its constitution and thus is a classic example of constitutional emergency powers. The US discussions concerning emergency powers cannot be paralleled closely, however, to the discussions of the Weimar Republic's 1919 Constitution and its Article 48 in particular.[11]

There are historical and contextual differences that one must be aware of when applying the Weimar experience on the state of exception to the discussions in the United States. Conceptual and theoretical adaptations are needed. Furthermore, there is no concept comparable to *Ausnahmezustand* in the US discourse, and US national emergencies have never resulted in a situation like that of Brüning's government in Germany in the 1930s, when the parliament's agenda and powers were severely restricted. It is possible, however, to distinguish debates, conceptions and arguments in the US discussions that are analogous to the state of exception discussions in the Weimar Republic.

Before considering the Congressional debates, the origins and application of the Weimar Constitution around the debates of Article 48 in the *Nationalversammlung* (constitutional convention) is discussed in Chapter 2. The analysis is accompanied by commentaries from, for example, Carl Schmitt and Hans Kelsen, on Article 48 as well as by discussions on emergency powers and how they were included in the Weimar 1919 Constitution. Schmitt's conception of

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11 In the post-9/11 debates Carl Schmitt's conception of *Ausnahmezustand*, the state of exception, has gained a lot of attention in US debates. See, Scheppele, Kim Lane. 2004. Law in a time of emergency: States of exception and the temptations of 9/11. *Journal of Constitutional Law*. Vol. 6, No. 55, 1001-1083.

Ausnahmezustand is especially relevant in this regard because it provides useful insights for analysing the contemporary debates of the problematic of the use of constitutional emergency powers.[12] However, instead of focusing on the Schmittian (1985, 19) conception of *Ausnahmezustand (*which refers primarily to a juxtaposition between the *Ordnung* and *Recht*), the actual locus for the 'state of exception' in the US discussions is in the relationship between the powers of the president and Congress, in other words between decision-making and debate.[13]

There are few references in the debates on NEA to the Weimar Republic, to Article 48 of the 1919 Constitution or to its interpretation. The Weimar case was used as a negative example of how the emergency powers could be used. The interpretation of Article 48 given in this study is, however, rather different. The main point is to use Article 48 as an example of how an emergency powers provision may be included in a constitution. What happened after 9/11 is very different from the state of the exception experienced in the Weimar Republic; nevertheless, Schmitt's idea of the *Ausnahmezustand* has reemerged in the contemporary context. Wolfe (2009, 151) for instance has concluded that any debates "by serious thinkers and policymakers" on bypassing, suspending or surpassing the rule of law principle in the United States implies that to some conservatives, the US actually is "facing a Schmittian moment." Wolfe (ibid. 151-152) means by this that for Schmitt only an instance that could declare *Ausnahmezustand* could reclaim sovereignty and this idea has reemerged in the contemporary debates. For Wolfe (ibid. 145) the Schmittian tone has been discernible in US politics at least during the first term of George W. Bush's presidency. Schmitt's writings should, however, be understood in the context of the Weimar Republic.

The present study illustrates how Congress has lost its momentum of 1970s, and how what happened in the aftermath of 9/11 may be viewed in terms of an increase in *presidential momentum.* The trend of presidential momentum is not only a US phenomenon, but has been common since the 1920s in several countries.[14] This momentum also relates to the Schmittian idea of emphasizing the thematic of necessity and urgency. Schmitt emphasized not only *Ordnung* over *Recht* but also the role played by limitations of time.[15]

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12 I would like to note that by the term 'state of exception', I am not suggesting that there exists a kind of Schmittian state of exception in the context of the United States. Rather, my intention is to show that by using the concept of the state of exception it is possible to illustrate controversies and disputes that are comparable to the history of this concept in the international debates on constitutional law and political theory.

13 Agamben (2005) has also presented a similar idea. Schmitt's ideas seem to be reemerging also in the contemporary context. To Wolfe (2009, 144) there "will exist a Schmittian temptation whenever the leaders of political movements or parties become convinced that obtaining and holding on to power are the only objectives that matter and that any tactics helpful to realizing those ends, no matter how much they may violate the conditions of fairness, understandings of reciprocity, or respect for procedures, are justified."

14 For more detail on the growth of the executive powers in the interwar period and after, see Lindseth 2004; Palonen 2010; Wilson 2009.

15 See for instance Schmitt 1985. Schmitt actually does not speak about the limitation of time as a problem of parliamentary politics. But he refers to the lack of capability to make decisions. According to Schmitt (1922, 83) the decision over the state of excep-

Do the four debates (WPR, NEA 9/11 and Weimar) share the same set of ideas? This is also a part of the research agenda of this study. It should be stated that, while it is not possible to find exactly the same debates in different legislatures or in different periods of time, this is not considered a problem since my intention is not to compare the institutions or debates as such. Rather, by concentrating on the cluster of concepts relevant to all of the debates, such as the Constitution, the balance of powers, and parliamentary oversight, the differences between the parliamentary and presidential system in dealing with emergency powers can be illustrated. The differences and similarities can be considered by asking in what manner the historical examples are used as part of the newer debates, and in what terms the historical debates are interpreted and employed in the contemporary debates.

1.3 The US Congress as a "special speech spot": a rhetorical and conceptual reading of the war and emergency powers debates

The recognition given to rhetoric in different disciplines has risen dramatically in the recent decades. Pocock (1981, 50), for example, describes his and Quentin Skinner's work as a "*program of remodeling the history of political thought as the history of political language and discourse*." If we accept Ludwig Wittgenstein's famous formulation that "words are deeds" (Skinner 1996, 8) then parliamentary politics should be considered something more than a matter of party constellations, votes and legislative results. The idea is to shift focus, within the balance of powers system, to how agenda motions are debated from opposing views and according to the rules of parliamentary procedure (For more detail on the rhetorical paradigm, see Soininen & Turkka 2008). The inherent value of debate itself is of special importance in my approach as I concentrate on the self-assertion of Congress and the analysis of the political circumstances of the time.

The novelty of this study derives from its examination of the state of exception problematic in constitutional law and politics by using parliamentary debates as the primary sources. The idea is to establish a connection between the parliamentary powers of oversight and, on the other hand, the state of exception problematic through a detailed study of the concepts, arguments and rhetoric used in the parliamentary debates. It has become a commonplace in political theory to consider politics as constituted through language (e.g. Farr 1989; Palonen 2007). In taking this as my starting point, I concentrate particularly on the rhetorical and conceptual reading of the debates themselves. In these debates we can hear the voice of the political agents themselves and focus the detailed analysis on the basis of their own viewpoints and actually used formulations.

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tion is "eine reine, nicht räsonierende und nicht diskutierende, sich nicht rechtfertigende, also aus dem Nichts geschaffene absolute Entscheidung."

The congressional debates provide a possibility to analyze the rhetorical devices and juxtapositions relevant for the rhetorical aspects of the study. The main controversy concerns the degree to which of the debates analyzed in the study are novel or unique. My rhetorical analysis focuses more on the topical substance of the rhetoric than on rhetorical forms and figures used per se. The various rhetorical strategies used in the debates are not themselves examined in the study; instead, the rhetoric used is studied in terms of its political significance. To summarize, the research design does not to analyze the effects of laws passed, but focuses instead on the parliamentarians' own perceptions of their congressional powers and of the intended efficacy of the motions on the agenda in remedying the problem of the imbalance of powers as formulated in the debates.

The debates of the concepts are central for the study, and are natural suited to rhetorical approach. Since parliamentary materials constitute such a large corpus, they provide good research opportunities for the conceptual historian, though such research has been systematically taken only recently (See Ihalainen & Palonen 2009).

The question of specifying certain situations as opportune for political action is a question of interpretation and conceptualization. In short, occasions for political action cannot be utilized if they are not first identified. The political context investigated in the study could be described as one of lost congressional momentum. I argue that the momentum that Congress had in the 1970s and tried to use in the wake of Nixon's presidency was lost by time when Reagan gained office in 1981. During the Senate debate on the War Powers Act (July 20, 1973, 25051) Senator Jacob K. Javits (R-NY) referred to this as follows: "[*T*]*he bill is a historic piece of legislation. It represents an effort to define a situation which has not been defined since our Republic was founded. The need to define it now has become unavoidable. Events in the last two decades have convinced us that is must be defined*."

In applying the concept of moment and momentum the thesis has been inspired by J.G.A. Pocock's well-known book, *The Machiavellian Moment* (1975). In the first part, Pocock analyzes Florentine political thought in the era of Machiavelli, especially republicanism. By Machiavellian moment Pocock (2003, vii-viii) refers to two different ideas. First, it specifies how Machiavellian thought came into being. Second, for Pocock the moment is not unique to the time of Machiavelli, but is a recurring problem. In the *Machiavellian Moment*, the moment refers to the idea of a "republic's existence in time" (Pocock 2003, vii). By the end, Pocock shows how the moment has been actualized again at later times; Pocock traces the new actualization of the Machiavellian moment in what he terms the 'Atlantic Republican' tradition. According to Pocock, the moment can be discerned and described only when the moment is either terminated or been actualized again. 'Moment' and 'momentum' are relevant here. I have relied mainly on the concept of momentum as emphasizing the possibility of "recycling" a situation; in other words, momentum can be re-actualized or re-activated, whereas moment may refer to a passing occasion.

The moment of the Congress in the 1970s required not only that Congress read the political situation correctly, but also proceeded to take action. According to Palonen (2008, 232-234), the concept of *momentum* can be defined as an original situation of change, one that can be applied in later circumstances. Restoring the momentum in particular situations assumes that both the former and present situations share fundamental similarities, and also that the restoring agent has enough power to carry through the momentum through to completion (Palonen 2008, 232-234).

Inspired by Pocock's work, this study analyzes the momentum experienced and interpreted by the US Congress in the 1970s by taking into account not only how the momentum of Congress can be specified or defined but also the way the momentum has emerged through the congressional debates. The momentum calls on one to distinguish the ordinary situation from the extraordinary, and is thus always relative to the agent's own interpretation of the situation in reference to a past momentum (Palonen 2008).

Politics is always, to quote Harold Lasswell (1936) also about who gets what, when, and how. Therefore, the relations between Congress and president, the political context and the historical setting are significant for this study. The table included at the end (see, p. 219) illustrates the division of powers in the Senate and the House of Representatives in the 1970s. The list of the key figures who participated in the debates is included in Appendix 5. More detailed information about the legislative histories of the WPR and the NEA are provided in appendices 1 and 2. The floor proceedings relating to the two bills are documented in appendices 3 and 4.

'Momentum' is used in the thesis to refer to the Congress' efforts to restore the constitutional balance of powers by returning to the original language of the Constitution and to the principles underlying the Constitution. Members of the Congress used the concept themselves, as illustrated by Representative John Anderson (R-IL):

> The 93rd Congress, to its credit, made immense strides in the reassertion of Congressional prerogatives through the enactment of the budget reform and war powers acts as well as the responsible exercise of its impeachment powers. The torch has now passed to this new Congress to continue the momentum in checking the potential abuse of Presidential powers and reestablishing the delicate balance of powers between the great branches of our Government. (House debate and adoption of H.R. 3884, September 4, 1975, quoted in the NEA Source Book 1976, 259)

Other concepts referring to the idea of momentum are distinguishable in the debates such as "historic opportunity". It should be noted that the questions remain highly controversial about how the Constitution and balance of powers should be restored if indeed there is a need and whether the motions under debate (such as the WPR) contributed to such restoration in an appropriate manner. This study will review these controversies in the congressional debates.

The study's discussion of concept of the exception and its parallels in debates on war, crisis, emergency and extraordinary situations are largely based relying on Carl Schmitt's writings and related secondary literature. Notwith-

standing this basis, in relation to the use of powers the concept of liberty as an absence of dependence (Skinner 1998; Pettit 2002) is very relevant for the debates, especially when e.g. the NEA debates addressed congressional oversight of government. From the standpoint of the Constitution, there is a need to find a balance between *raison d'état* and political freedom (as freedom from the possible use of "arbitrary power"). My purpose is not to examine the horizons or histories of the concepts as such but rather the controversies over the concepts in the specific debates. To summarize, the conceptual history approach practiced in the study is one that seeks to distinguish on macro scale the inconsistencies and consistencies, and continuities/discontinuities of specific concepts in the debates. In regard to the concept of the Constitution, for example, a conflict between the original reading vs. the contemporary reading of the Constitution is evident.

1.4 Parliamentary culture and the US Congress

The US Congress is not a parliament if the parliament is considered to mean a cabinet government regime. US Cabinet ministers (secretaries) are not members of the Congress, nor elected by Congress nor present in the sessions of Congress. The US system is a presidential system in which Congress has a legislative role.[16]

The origins of the US Congress can, however, be traced back to Westminster, which is often understood as the quintessential parliamentary system. Representative Kirk (R-IL) illustrated the tradition of Westminster in the Congress with the following words: "*Mr. Speaker, our only manual of House Rules, Jefferson's Manual, traces its heritage back to the mother of parliaments at the Palace of Westminster in London. Our manual still refers to the upper and lower Chambers of this House as the Commons and the Lords*." (Our Political Tradition, February 8, 2001, H236-238.) The two institutions have, however, divergent directions. Campion (1958, 57), for example, wrote that the procedures are different in the US vs. Britain despite there being "superficial" parallels in the parliamentary concepts, and even in such procedures as having several readings of a bill (the US practice originated in the seventeenth century House of Commons procedure).

Whether Congress functions like a parliament or not depends on the approach one adopts to the question. Congress certainly corresponds to a parliament when the focus is on the debate, concepts, and procedure, although they

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16 Hamilton or Madison describes the separation of powers system in the Federalist No. 51 in 1788 with the following words: "In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others."

do differ from those of a parliamentary regime such as the Westminster. It is possible to distinguish important elements of a "parliamentary style of politics" (in the sense of Soininen & Turkka 2008) in the US Congress. Congress' procedures and speech practices are roughly similar to those of other parliaments. By following the example of the British system, the Congress was meant, however, to be a place where decisions are made through discussion, where issues on the agenda are supposed to be debated pro et contra, a special speech spot as Amar (2005, 102) has written. Indeed, debate and deliberation are considered essential to the legislative process in the United States.

US parliamentary procedure is well illustrated and documented in *Jefferson's Manual* (1801) and *Robert Rules of Order* (1876). Jefferson prepared his manual in the years of his vice presidency, 1789-1801. In it he combined his own remarks on the US Congress with his reading of the parliamentary practices of Westminster. The House adopted Jefferson's manual in 1837: "[The procedures of the manual would] *govern the House in all cases to which they are applicable and in which they are not inconsistent with the standing rules and orders of the House and the joint rules of the Senate*". The Senate did not formally adopt the manual, but did publish it regularly as part of its rules until 1977 (Patrick, Pious, Ritchie 2001, 332).[17]

The Congress can determine its own rules and procedures. The Constitution of the United States, Article 1, Section 5 states, "*Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member*". The Senate rules have not changed as often as the rules of the House, which are readopted at the beginning of every Congress.[18] The rules of the House in generally are more formal than the rules of the Senate. Understanding and knowledge of the rules are expected from the members of Congress: "*Learn the rules and understand the precedents and procedures of the House. The congressman who knows how the House operates will soon be recognized for his parliamentary skills - and his prestige will rise among his colleagues, no matter what his party." (*House Speaker John W. McCormack (1962-1971) of Massachusetts, giving advice to new House Members.)[19] The rules and procedures of both houses give the legitimacy to system and to how the decisions are made.

Debate has a different role in the presidential system than in the parliamentary system. Bagehot (2000, 34-35) claims that the characteristic feature of parliamentary government is that there is discussion at every stage of the process with a public exchange of ideas and the public able to participate in the discussion. But then again, according to Bagehot (ibid.), the presidential system often does not have that kind of discussion, and when there is not that kind of discussion the "fate" of government cannot be changed by means of it, nor do people take part in fully; therefore in a presidential system the administration

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17 For more detail, see: http://www.senate.gov/artandhistory/history/common/generic/VP_Thomas_Jefferson.htm

18 These include: the *Senate Rules and Manual* and the *House Rules and Manual*.

19 Quoted in http://conginst.org/112th-congress-house-floor-procedures-manual/

can almost function as it likes, restrained only by the need giving too much offence to "the mass of the nation".

Debate is, however, an essential part of how Congress is expected to work in the US. The privilege of free speech in the Congress is recognized in the Constitution:

> They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place. (US Constitution 1787, Article 1, section 6)

For the Founding Fathers, Congress was meant to be a representative institution that debates:

> The truth is, that in all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes; as, on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever character composed, passion never fails to wrest the sceptre from reason. (Madison/Hamilton, Federalist Papers No. 55, 1788)

The role of speech and debate is recognized in both houses of Congress, although the role of speech varies in practice. Because of institutional differences, such as the size of the houses and the nature of the representation, the mode of debate is different. According to President Wilson (1961, 88) the Senate can be a "talkative assembly". The House of Representatives Wilson (ibid.) describes as a "business body". Phelps & Boylan (2002, 645) state regarding the role of the speech in US Congress: "*It is rare for a legislator to be moved by the logic, passion, or eloquence of a colleague's oratory into changing her own position*". Phelps & Boylan seem to question the rhetoric of Congress by implying that the argumentation on the floor does not really have an impact on the actual legislative results. As noted above, debate seems to play a different role in presidential and parliamentary regimes (e.g. Bagehot 2001). This does not, however, mean that we should not be interested in the debates in the US Congress. Lately, a common argument has been that Congress should provide legislative results rather than debate. However, as the debates analyzed in the thesis illustrate, debate is relevant in several ways, not only for maintaining the separation of powers system, but also for ensuring that "popular sovereignty" is taken into account in the legislative process. These approaches are discussed in detail in Chapters 3, 4, and 5.

1.5 The primary sources of the study

The primary material consists of congressional debates, which are often neglected as research material in the United States. The studies of the rhetoric of

Congress are largely overlooked in favor of the popularity of the presidential rhetoric studies in the United States. After 9/11, scholars have been extensively interested in emergency powers. Parliamentary sources have usually been, neglected, however, in this context. Parliamentary debates can, however, provide an empirical textual basis for the kind of conceptual analysis that is needed in order to understand how emergency powers can best be managed and dealt with (See more in detail about the use of parliamentary materials Ihalainen & Palonen 2009).

The special character of the sources under consideration has to be taken into account in the actual analysis. The reading of the debates presumes some understanding of the procedures of the US Congress. Further, when analyzing the debates, the stage of parliamentary deliberations and the political circumstances to which they are connected should be taken into account. The possible changes of Senate or House practices as a result of the debates are, however, excluded from the scope of the analysis.

The debates are collected from the *Congressional Record*, which has been published since 1873. The US Constitution requires both houses to keep a journal,[20] but the *Record* is more comprehensive. It should be pointed out that there are two types of records, the daily record and the permanent or final record. The permanent record is bound and published at the end of the session, whereas the daily record is published immediately after the legislative day. The Library of Congress has specified the difference between the daily and the permanent edition as follows: "*The permanent edition differs somewhat from the daily edition. Its text is somewhat edited, revised and rearranged. The pagination is continuous for each session; but there is no H, S, or E before each page number. There is a volume number for each session and numerous parts to each volume*." The record is for the most part a verbatim record of the floor proceedings. The members have, however, the opportunity to edit "the transcript of their remark" afterwards, both in the daily record and in the permanent record before publication.[21]

Speeches that are not held on the floor can be included later in to the record. The extension of remarks section in each day's records is a possibility for the members (currently used only by House members) to insert legislative remarks not delivered on the floor, and other materials such as articles or speeches given outside of Congress. (The corresponding materials of Senators are included usually in the "Additional Statements" section) I have limited the primary materials to consist mainly of the "debates". The War Powers Resolution debates and some of the National Emergencies Act debates analyzed here are

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20 "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member;
Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal." (US Constitution 1787, Article 1, section 5)

21 For more detail about the Congressional Record, see:
http://thomas.loc.gov/home/cr_help.html;
http://thomas.loc.gov/home/abt.cong.rec.html

from the permanent record without the H or S before the page number. Most of the National Emergencies Act debates considered and referred in the study are from the NEA Source Book (1976), published by the US Government Printing Office. The debates included in the NEA Source Book are from the daily record. The WPR debates and part of the NEA debates are collected from the *Hein-online* database. The post-9/11 debates, which are available online from the year 1995, referred in the study are from the daily record that includes the H or S before the page numbers. The dates of the debates are included in the references in order to further indicate the different stages of the legislative process.[22]

A few words should be said about the procedure of the Congress related to the different readings of the materials. Bills have to be passed by both houses. Usually, however, the House and the Senate have their own bills under consideration. In the Conference Committee, the differences between different versions of bills are settled and the houses then vote on the conference report and on the passage of bill. The Senate might, however, pass a House version of bill and vice versa. In general, the WPR debates generated more materials than the NEA debates. The difference can be attributed to the legislative process. The WPR went through a conference committee and veto process. Enacting the NEA was altogether a simpler process. The NEA bill was drafted in close cooperation with the executive branch, and there were no discussions on the Conference Report or a veto threat from the president. In Chapter 4, I have relied more on committee reports and hearings in my examination of the emergency powers debates because there are fewer materials available than there were for the WPR. Therefore, in Chapter 4, a slightly different method is applied. The WPR included many constitutional controversies and debatable questions for analysis. A great point of contention was the controversy between the ideal of the Constitution and the real political practices in regard to the use of war powers. In the NEA debates, there were no constitutional provisions to refer to. The debates referred rather to the values of the Constitution in trying to ensure a government of limited powers.

In order to examine the momentum of Congress in the 1970s, I could have explored newspaper materials as well, in order to better illustrate the very specific political context in which the WPR and NEA legislation was drafted. However, since the purpose of the study includes a thematization of the debates themselves as a gauge of parliamentary powers, I decided to limit myself to the analysis of parliamentary materials only.

As noted above, the debates analyzed in the thesis are mainly plenary session debates, but committee hearings and reports were also selectively included when they provided information relevant to the topic. Since there is such a great amount of materials available, the debates analyzed are mainly the de-

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22 It should be mentioned here that I have not systematically indicated the stage of the legislative process (that is, the reading) in relation to the arguments used in the debates, but I have indicated the debate titles and dates. When it seemed necessary I have noted the specific amendment an argument related to.

bates of "consideration and passage", as termed in the official congressional histories of the bills.

A few words should be also said about the Weimar debates, which will be analyzed in Chapter 2. A considerable amount of literature has been published on Weimar 1919 Constitution and its Article 48, but few works have actually analyzed the debates of the constitutional convention as such. *Die Stenographische Berichte Verhandlungen der Verfassunggebenden Deutsche Nationalversammlung* and *Verhandlungen das Reichstag,* referred in the thesis are available online in Fraktur form via the German Reichstag Session Reports website, provided by Bayerische Staatsbibliothek. It ought to be mentioned that I have not systematically read through all of the debates of the *Nationalversammlung* but concentrated mainly on debates of certain dates that I have first chosen on the basis of secondary literature and on the drafts of the Constitution. A few references are also made to the later debates of the *Reichstag* on the Art. 48, following the method mentioned above.

1.6 The setting of the study

The outline of the thesis is set forth chronologically and thematically. Chapter 2 deals with the Weimar Republic's context and it mainly concentrates on the debates in the *Nationalversammlung* over Article 48 of the Weimar 1919 Constitution and on the views of relevant commentators, such as Carl Schmitt. As a point of departure, I attempt to show that the emergency powers granted in the Weimar Constitution were considered legitimate in relation to the political context at the time. The chapter draws on the idea of the need for a parliamentary means of control of the executive powers in times of crisis.

Chapters 3 and 4 focus on the idea of US congressional momentum in the early 1970s. The War Powers Resolution debates are introduced and considered in Chapter 3. The idea is to examine the gap between constitutional theory and practice. I begin with an analysis from the view point of the congressional debates as to extent to which Congress can control the use of war and emergency powers by the president while keeping within the separation of powers system. In short, the focus is on the question of how Congress attempted to strengthen its own institutional capacities, as expressed in the debates, and whether the WPR served this purpose in an effective and appropriate manner? The collective judgment concept used in the debates emphasizes that Congress should be a branch of government equal to the executive in regard to the introduction of US armed forces into hostilities. The main controversy in the WPR debates was the question of to what extent the explicit language of the Constitution was applicable to the political circumstances of the time. What does it mean to say that Congress shall have power to declare war?

The momentum of Congress was still high in the mid-1970s when Congress passed the National Emergencies Act. The Weimar Constitution's Article 48 was referred to in the NEA as an unsuccessful example of the use of emer-

gency powers. These debates are introduced and examined in detail in Chapter 4. Central to both of the debates of the 1970s was the question of what does it mean to maintain a separation of powers in times of war and emergency? Can the contingency in executive-legislative relations regarding war and emergency be reduced by enacting and thus defining in greater detail the war powers between Congress and the president.

In Chapter 5 the contemporary debates on the "state of exception" are examined in detail. The focus of Chapter 5 is on Congress' debates after 9/11 and to what extent the 1970s legislation is used as a point of reference. The analysis in Chapter 5 draws on Schmitt's conception of *Ausnahmezustand*. The main question seemed to be whether there is the room and need for debate and deliberation in times of crisis, as opposed to the necessity and urgency arguments that followed the terrorist attacks.

In the conclusion, the findings of the research are summarized in a comparative manner. The aim is to outline the argumentation through analysis of rhetorical topoi present in the debates. Finally, the significance of the turning point of the 1970s is discussed from the perspective of momentum.

2 CONSTITUTIONALIZING THE EXCEPTION

Article 48 of the Weimar 1919 Constitution has a decisive place in the history of constitutional law and the politics of emergency powers. The Weimar Constitution was the first republican constitution to include a provision for how to deal with the emergencies. The US Constitution does not recognize the concept of emergency or the state of exception or include any constitutional emergency (powers) provisions similar to the Article 48. The US Constitution also does not legitimatize any opportunities for suspending the constitutional powers or for transferring powers between the branches of government in times of crisis other than the writ of habeas corpus. Justice Davis, delivering a Supreme Court opinion in *Ex Parte Milligan*, 71 US 2 (1866) noted that the Constitution "is a law for rulers and people" and it should work "equally in war and peace", safeguarding "all classes of men, at all times, under all circumstance."

This chapter 2 looks at how the Weimar interpretation of constitutions and emergency powers contributes to the state of exception problematic in constitutional law and political theory. The focus is on the parliamentary control of emergency powers. The political context of Article 48 is introduced in section 2.1. The idea is not, however, to write about the Weimar history. I have limited myself to an examination of the original sources on the *Nationalversammlung* and the Weimar Constitution in contrast to the posterior scholarly commentaries and the Weimar narrative.[23] The controversies related to defining the constitutional emergency power provision and the "correct" interpretation of the language of the Constitution are considered in section 2.2. The juxtapositions between the debates on how to decide between the norm and the exception through the views of Hans Kelsen and Carl Schmitt are examined in the section 2.3.

In relation to the debates of Article 48 in the *Nationalversammlung*, Carl Schmitt's conception of *Ausnahmezustand* and his reading of Article 48 are relevant since they provide useful insights for further analysis of the use of emergency powers in the US context. For Schmitt the *Ausnahmezustand* refers a jux-

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23 About the debates on Article 48 in the *Nationalversammlung*, see Kurz 1992.

taposition between the *Ordnung* and *Recht,* which is also about the relationship between the norm and the decision. For Schmitt (1985, 11), the one who is able to decide on the state of exception is the sovereign: „*Souverän ist, wer über den Ausnahmezustand entscheidet*". Schmitt has a novel approach to connecting the concepts of the sovereign and the state of exception.

The Schmittian decision on *Ausnahmezustand* could also be examined through the concept of moment. For Schmitt the state of exception and the *Freund und Feind* distinction presumes that the "correctness of the decision", the right moment and the competence to make the decision are interconnected (Palonen 2006, 243). Palonen (ibid.) writes that for Schmitt the requirement to act "at the right moment" is oppositional to the need for debate and discussion regarding the nature of the given circumstances. It seems that for Schmitt there is no need for a debate in order to determine the right moment.

For Schmitt the norm always relies on the exception. Schmitt criticized Article 48 for circumscribing the powers of the president to act in times of crisis. For Schmitt the president acting under Article 48 was indeed a form of commissarial dictatorship: „*Die kommissarische Diktatur hebt die Verfassung in concreto auf, um dieselbe Verfassung in ihrem konkreten Bestand zu schützen*" (1994, 133). Schmitt's view seems, however, to differ from the general view of the members of the *Nationalversammlung*. The Weimar example aptly illustrates the problematic character of constitutional emergency powers. The provisions included in constitutions have to be carefully specified. Article 48, for example, raised several questions regarding how to correctly interpret the authorities granted to the president.

The debates referred to in this chapter are mainly debates that were carried out in the *Nationalversammlung*. The Weimar Constitution was defended by Hugo Preuss[24] in the assembly on February 24, 1919. Following a week of general debate the draft was send unaltered to a committee of 28 members. The assembly gave a second and third reading to the Constitution on July 2-22, 1919. (Holborn 1975, 545-546.) Article 48 was considered in the *Nationalversammlung* on various dates, for example, on July 5, 1919 (Vorsetzung der zweiten Beratung des Entwurfs einer Verfassung des Deutschen Reichs). Representative Bruno Ablass' (DDP) report on the section of the Constitution dealing with the powers of the president (IV. Abschnitt Der Reichspräsident Referat des Berichterstatters Dr. Ablass) has been particularly useful in regard to the analysis of Art. 48. It seems that the article, authorizing emergency powers for the president, was not that extensively debated in the *Nationalversammlung*. In this regard, Caldwell (1997, 66) writes that the article was "hardly discussed at all" and was considered only a "carryover from the 1871 Imperial Constitution and the 1850 Prussian Constitution."

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[24] German lawyer and the Founding Father of the Weimar 1919 Constitution; liberal politician; Reich Minister of the Interior (February–June 1919)

2.1 The political context of Article 48

In order to understand the political system of the Weimar Republic it is essential to notice that when the social democrats and left-liberals had demanded a parliamentary government in 1916 and 1917, they had assumed that the monarchical system would continue to exist to balance the parliament. When the monarchy collapsed, both conservatives and liberals feared the possibility of parliamentary absolutism. (cf. Caldwell 1997, 67.)[25] The pro-monarchist parties DNVP and DVP endorsed a strong presidency, and also the republican parties DDP and SPD did not seem to have anything against the exception paragraph. Especially the DDP as represented by Minister of Justice Eugen Schiffer[26] considered that the president had a wide-range of authority under Art. 48.[27] The independent socialists (USPD), especially Oskar Cohn, were more skeptical. Article 48 was included in the Weimar Constitution "with the support of an overwhelming majority," according to Watkins (1939, 14).[28]

The principal author of the Weimar 1919 Constitution, Hugo Preuss, and the constitutional committee agreed on the need for the president to be granted the power to dissolve parliament and to be elected by a popular vote, in order to provide a counterforce to the strong parliament. The debates of the constitutional assembly show that a strong presidency was welcomed. Representative Ablass stated in the constitutional assembly,

> Die Stellung des Reichspräsidenten der Regierung und des Reichstags beruht bei uns auf dem Grundsatz des echten Parlamentarismus, im Gegensatz zu dem unechten, von dem ich bei der französischen Republik gesprochen habe. Der französische Parlamentarismus hat einen Vorteil im Interesse der unbegrenzten Machtstellung des Parlaments, weil das Parlament eine Reihe von Jahren völlig unkontrolliert dem Volke gegenübersteht. Infolgedessen hat die Demokratie, wie sie in Frankreich besteht, nach den Wahlen gar keinen Einfluss mehr. Der echte Parlamentarismus besteht aber darin dass das Parlament nicht allmächtig sein darf, dass es einer Gegenkontrolle unterliegt, die wiederum durch eine demokratische Instanz ausgeübt werden muss: und jene demokratische Instanz ist bei uns der Reichspräsident. (Verfassungsgebende Deutsche Nationalversammlung Aktenstück Nr. 391 1919, 232)

Dr. Ablass (ibid. 233), who was the reporter for the section of the Constitution argued that the president, based on Art. 49 (corresponding to later on the sec-

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25 The Constitution specified the following branches of government: Der Reichstag, Der Reichspräsident und die Reichsregierung (Der Reichskanzler und die Reichsminister), der Reichsrat and der Staatsgerichtshof. The Reichstag was the legislative institution. The representatives of the parliament represented the German people and were elected for four years. (See Articles 20, 21, 23, Weimarer Reichsverfassung 1919) The version of the Constitution from 11. August 1919 that I refer to in the study is available online, http://www.documentarchiv.de/wr/wrv.html

26 Minister of Finance and Vice Chancellor, February-April 1919 (Scheidemann Cabinet), October-March 1920 (Bauer Cabinet); Minister of Justice 1919-1920

27 About the views of the parties in regard to Art. 48, see Kurz 1992.

28 The Constitution was adopted by a vote of 262 to 75 on July, 31, 1919 (opposing members from the USPD, DVP & DNVP). The Constitution was signed by Friedrich Ebert on August 11, 1919. (See Frykholm 1942)

ond paragraph of Art. 48), indeed had far-reaching powers, but that these had grown out of the emergency circumstances.[29]

The members of the *Nationalversammlung* seemed to be more concerned about how to limit the powers of parliament than the powers of the president. The Independent Socialists proposed to withdraw the presidential system, but all the other parties voted against this proposal. Similarly, a proposal by the Social Democrats to restrict the powers of the president was overruled. As a result, the parliament would act as a counterweight to the president, but both would be based, however, on the idea of popular sovereignty. (Caldwell 1997, 67.)

Balakrishnan (2002, 29) writes that Article 48 was not considered that exceptional in the debates because of the previous practice of the *Belagerungszustand*. Article 68 of the old Constitution (1871) had provided "a loose legal framework" for quite extensive martial-law practice during war. According to Article 68, the Kaiser could not only declare war but also in his position as the Commander-in-Chief grant unlimited state-of-siege authority to the military. These arrangements followed the practice of Prussian state-of-siege law (1851), were defined retroactively and had their origins in the revolutionary crisis of 1848-1849.[30] Prussian law provided that at the start of a state-of-siege, the top official at the local level concerned gained control over the local civil government and with it the authority to suspend basic rights, issue decrees and in some cases, to create special courts. However, according to Balakrishnan (2002, 29-30) while the traditional interpretation and wording of the state-of-siege specified what basic rights could be suspended, the increasing military mobilization led to a form of administration that regularly exceeded these constraints. The courts, which had only a limited role in reviewing in the *Kaiserreich* – permitted legislative authority (still in effect) to be transferred to the "martial law administration", thus allowing the state of emergency laws to have an extensive scope (Balakrishnan 2002, 29-30).

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29 Verfassunggebende Deutsche Nationalversammlung Aktenstück 391. Artikel 48: "Wenn ein Land die ihm nach der Reichsverfassung oder den Reichsgesetzen obliegenden Pflichten nicht erfüllt, kann der Reichspräsident es dazu mit Hilfe der bewaffneten Macht anhalten." Artikel 49: „Der Reichspräsident kann, wenn im deutschen Reichsgebiet die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, unter Verantwortlichkeit des gesamten Reichministeriums mit Hilfe der bewaffneten Macht einschreiten und die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung erforderlichen Maßnahmen treffen. Zu diesem Zwecke, darf er vorübergehend die in den Artikeln 113, 114, 116, 117, 121, 122 und 150 Festgesetzen Grundrechte, ganz oder zum Teil außer Kraft setzen. Er ist verpflichtet, unverzüglich die Genehmigung des Reichstags einzuholen und seine Maßnahmen aufzuheben, wenn der Reichstag die Genehmigung versagt. Das Nähere bestimmt ein Reichsgesetz." (Entwurf einer Verfassung des Deutschen Reichs nach den Beschlüssen des 8. Ausschusses June 21, 1919)

30 „Der Kaiser kann, wenn die öffentliche Sicherheit in dem Bundesgebiete bedroht ist, einen jeden Teil desselben in Kriegszustand erklären. Bis zum Erlass eines die Voraussetzungen, die Form der Verkündigung und die Wirkungen einer solchen Erklärung regelnden Reichsgesetzes gelten dafür die Vorschriften des Preußischen Gesetzes vom 4. Juni 1851 (Gesetz-Samml. für 1851 S. 451 ff.)." Gesetz betreffend die Verfassung des Deutschen Reiches vom 16. April 1871.
http://www.documentarchiv.de/

According to Representative Cohn, a member of the *Nationalversammlung*, the difference between Art. 49 (later on part of Art. 48) compared to previous practices was that the previous institutions of *Kriegs-* and *Belagerungszustand* were more specific and limited in the following sense: "*Frühe Kriegszustandserklärung und Belagerungszustandsgesetz nur im Falle der Gefährdung der Sicherheit, und zwar nicht einmal im jedem Falle der Gefährdung der Sicherheit, sondern nur bei dringender Gefahr für die öffentliche Sicherheit*" (47. Sitzung 5. Juli 1919, 1329). Representative Cohn also stated that both in theory and practice there was certainly a difference between the concepts of urgent (*dringend*) or as describing something as considerable (*erheblich*), but for example in the establishment of administrative agencies, these two senses often become mingled:

> Der Unterschied zwischen „dringend" und „erheblich" ist sicherlich – theoretisch und praktisch – vorhanden: für die richterliche Auslegung oder für die Auslegung der Verwaltungsbehörden wird er aber vermischt werden. Die Besonderheit des Art. 49, der sozusagen besonders große Fortschritt in dem Zustande der „Vollendeten Demokratie" den sie uns verheißen haben, besteht aber darin, daβ auch bei Gefährdung der öffentlichen Ordnung, nicht nur bei Gefährdung der Sicherheit nunmehr die zur Wiederherstellung der Öffentlichen Sicherheit und Ordnung erforderlichen Maßnahmen getroffen werden können. (47. Sitzung 5. Juli 1919, 1329)

Representative Cohn argued that Art. 49 was not only about the measures to respond to an endangering of security or public order, but about adopting the measures necessary to restore security and public order. Representative Cohn further criticized the constitutional assembly during the discussions, by noting that the parliament should set some boundaries on the authority of the president:

> Geehrte Versammlung, es ist jetzt vielleicht die letzte Gelegenheit bei der Verfassungsberatung, Sie zu warnen und Ihnen vor Augen zu führen, in welche Gefahr sich das Deutsche Reich, das deutsche Volk begibt, wenn man dem Toben der Offiziere alten Geistes keinen Zügel anlegt. Anstatt dass sie sich durch die tatsächlichen Vorgänge warnen lassen, sind sie im Begriffe, alle die Handlungen der Willkür und der militärischen Tobsucht wie wir sie im Kriege und nach dem Kriege in der Bekämpfung politischer Bestrebungen erlebt haben, durch Art. 49 zu legalisieren. (47. Sitzung Juli 5. 1919, 1331)

Representative Cohn seemed to be one of the few that were afraid that the emergency powers could be misused.

The constitution of the Weimar Republic was formed in a very special context. Arnold Brecht (1944, 48) writes,

> Taking the Weimar Constitution as a whole, it was from the democratic point of view a document worthy of veneration. But the haste in which it had been composed, its author's lack of experience, the absence – not only in Germany but also elsewhere in the world – of advanced political theory with regard to several problems of greatest importance, and furthermore, the reassuring presence of a first President, Friedrich Ebert, whose deep adherence to democratic principles was beyond any doubt, led to the incorporation of fatal clauses.

Brecht (1944, 47-48) specifies three significant problems in the Weimar Constitution: 1. proportional representation; 2. presidential election by a popular vote; and 3. the powers of the president granted without adequate consideration. It seems that the particular problems of the Constitution, at least those related to Article 48, were not really understood in the *Nationalversammlung*. Mommsen (1996, 56) indeed claims that the members of the *Nationalversammlung* never considered that the constitutional system could be undermined by manipulation of the democratic processes, especially because the Constitution included certain safeguards for its preservation (including the right to proclaim a state of emergency and to take "special executive powers", using Mommsen's words, that were authorized for the president under Art. 48). The German Democratic Party (DDP) even suggested that the president could use his emergency powers without the requirement to obtain the countersignature of the appropriate minister or the chancellor (Mommsen 1996, 57).

The Weimar Republic is well known in Kolb's (1983, 1) words as "*Eine improvisierte Demokratie*".[31] This means that the parliamentary regime and the idea of democratic government did not have strong roots in the German history. The major problem for the parliament in the Weimar Republic was that it could not form a functional majority to defend parliamentarism. Even though a strong role of the parliament was envisioned and institutionalized in the 1919 Constitution, the practice turned out indeed very different, as Mergel in his book *Parlamentarische Kultur* (2002) argues. According to Stirk (2005, 514), Hugo Preuss could have followed the American example, but in the American system, "*parliament was* [...] *limited to abstract legislation, to criticism and negotiation, impotent in the face of the administration, which really decided the practicalities of life*" (quoted in Stirk 2005, 514). Preuss considered it essential that the parliament govern the administration: "*the real leadership of the Reich administration lies publicly and clearly in the hands of the government, which is politically responsible to the parliament*" (ibid.). Preuss turned down the American model of presidency, because he thought, not without grounds, that it would have maintained the old problems of the Reich (Stirk 2005, 514).

According to Lindseth (2004, 1361) the Weimar Constitution, in order to avoid the dangers related to the French type of "absolute" parliamentarianism, established "a dual system of government" where the popularly elected president would act as a counterweight to the parliament.

Article 48 was considered in the discussions of the constitutional assembly to be a more or less necessary provision to ensure that the Republic would manage in the future. It seems that the representatives were not worried that the article would undermine the role of the parliament or would be misused by the president. The president was expected to use the powers under Art. 48 in the event of an emergency. The emergency measure would remain under parliamentary control because the president had to inform the Reichstag about them and the Reichstag could invalidate them. However, in addition to the

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31 Theodor Eschenburg's book "*Die improvisierte Demokratie der Weimarer Republik*" was published already in 1951.

powers granted to the president by Art. 48, the president had other significant powers in the Weimar Constitution, for instance the power to dissolve the Reichstag. There were many different factors important in the development of Art. 48. Kurz (1992, 44) claims that Article 48 was above all a response to the military dictatorship that had been imposed in Germany during the First World War.

According to Brecht (1944, 48) the adoption of extensive presidential emergency powers under parliamentary control may have been unavoidable in Germany after the war. It seems that the emergency powers were not in themselves necessarily "objectionable" as long as parliament retained the right to demand the termination of emergency decrees and emergency decrees required the countersignature of other member of cabinet. The vague conception of president's right to appoint and dismiss the Chancellor proved to be, however, problematic. Brecht (ibid.) argues that according to a broad interpretation of the provision, the Chancellor could be dismissed even if he still enjoyed the confidence of the parliament. Similarly, a person who was unlikely to obtain a vote of the confidence of the parliament could still be appointed Chancellor by the president and could participate in the use of emergency decrees and in dissolving the parliament.[32]

To summarize, it is clear that Article 48 was influenced by the circumstances of the year 1919 and by previous German experiences of the use of emergency powers. Preuss at the time had also emphasized that the circumstances implicitly had an impact on the content of Art. 48, but he felt that the parliament could reconsider the article later when the situation was different: „*Die nähere Regelung ist einem Reichsgesetz vorbehalten, das in ruhigen Zeiten ausgearbeitet werden wird*" (47. Sitzung 5. Juli 1919, 1332). Therefore, the Reichstag should have enacted a law, as it was obligated under Art. 48 that would have further specified the use and the content of the Article.[33]

Preuss' intentions in regard to the Article 48 seemed to be that the power to interpret the exceptional situations, as opposed to the old *Belagerungszustand* should be divested from the military (Kurz 1992, 23). Preuss indeed explained that a president's authority was circumscribed and not absolute as such:

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32 Brecht refers to Articles 53 and 54 of the Weimar Constitution. Artikel 53: „Der Reichskanzler und auf seinen Vorschlag die Reichsminister werden vom Reichspräsidenten ernannt und entlassen." Artikel 54: „Der Reichskanzler und die Reichsminister bedürfen zu ihrer Amtsführung des Vertrauens des Reichstags. Jeder von ihnen muß zurücktreten, wenn ihm der Reichstag durch ausdrücklichen Beschluß sein Vertrauen entzieht."

33 Stolleis (2004, 95) refers to constitutional jurists (possibly Carl Schmitt & Erwin Jacobi) urging the legislature in 1924 to finally enact a law defining the powers as indicated in the Constitution (Art. 48, para. 5) and to prevent abuse of the law of emergency decrees as a substitute for legislative action. The 1931 press release of the association mentioned (presumably the German Teachers of State Law) argued "[I]t is a task of the governments of the Reich and the Länder to ensure, more strictly than they have so far, that the device of the emergency decree is not abused through the insertion of decrees that are not even indirectly related to protecting public safety and order or resolving the present crisis"(Quoted in Stolleis 2004, fn. 238, p. 95).

> Sie haben sogar mit einem Belagerungszustand regiert, zu dessen Härten m man auf Grund dieser Bestimmungen niemals fortschreiten wird. Herr Dr. Cohn, dessen Ausführungen in vieler Beziehung sehr interessant waren, und der im Verlaufe seiner Ausführungen dazu kam, sich einem begeisterten Verlaufen der Unantastbarkeit des Privateigentums emporzuschrauben, überzieht vollständig den großen entscheidenden Unterschied gegen der früheren Zuständen. Wenn während des Krieges im Reichstag über den Belagerungszustand und über die Härten, die bei der Handhabung des Belagerungszustand hervorgetreten sind, geklagt wurde, so hat es sich immer als das Unerträglichste herausgestellt, dass die verantwortliche Regierungsbehörde außerstande war, die Verantwortung für das Geschehene wirklich zu übernehmen, weil mit der Erklärung des Belagerungszustandes die letzte entscheidende Gewalt auf die Militärbefehlshaber überging, die dem Reichstage unverantwortlich waren und blieben. Dazu stellt sich nun der Artikel 49 in entschiedenen Gegensatz. (47. Sitzung 5. Juli 1919, 1331)

Preuss continues by emphasizing that the powers granted under Article 48 are different because of the control mechanisms:

> Was in dieser Beziehung angeordnet wird, wird vom Reichspräsidenten unter Verantwortlichkeit des Reichministeriums angeordnet, und auch die Durchführung in allen Einzelheiten steht unter der Verantwortung des Reichsministeriums, muss von ihm vor dem Reichstag vertreten, verantwortet werden; die Anordnungen müssen außer Kraft treten, wenn es der Reichstag beschließt. (47. Sitzung 5. Juli 1919, 1331)

Preuss (1923, 100) argued in his Article "*Reichsverfassungsmässige Diktatur*" that if ever in the course of history a dictatorship was needed, it was the case in the Weimar Republic: „*Wenn jemals in der Geschichte für eine Staatsgewalt diktatorische Vollmachten unentbehrlich waren, so waren sie es für die Reichsregierung der jungen deutschen Republik*." Preuss (ibid. 113) further considered in 1923 that the „constitutional dictatorship" (*reichsverfassungsmäßige Diktatur*) practiced under Article 48 to protect the Reich and its integrity would have to play a more significant role in the future: „*Alle Zeichen der Zeit weisen darauf hin, dass die reichsverfassungsmäßige Diktatur des Art. 48 zum Schutze des Reichs und seiner Einheit leider noch eine größere Rolle wird spielen müssen, als bisher*."

It is obvious that Art. 48 provided the German president with constitutional powers that can be called dictatorial, but in rather a narrow sense. Indeed, Preuss claimed that Article 48 does not include any "*Ausnahmezustand*" as such: „*Man spricht immerfort von militärischem oder zivilem Ausnahmezustand. Artikel 48, 2 der Verfassung kennt überhaupt keinen Ausnahme–oder Belagerungszustand und vollends keinen militärischen."* (Quoted in Lehnert 1999, 276) Preuss also highlighted that even the best of constitutions is no good if it is wrongly used by its executioners: „*Die Feinde der Verfassung von Weimar sehen in all diesen Wirren den Beweis für deren Fehlerhaftigkeit und Revisionsbedürftigkeit. Nun taugt die beste Verfassung nichts, wenn sie von ihren berufenen Vollstreckern falsch oder dilettantisch angewendet wird*." (Quoted in Lehnert 1999, 276)

2.2 Article 48 in the Weimar Republic's 1919 Constitution

Article 48 consisted of several parts. The first paragraph states that if the state (*Land* within the *Reich*) cannot fulfill its constitutional duties, the president can use the armed forces to compel it to do so.

> Wenn ein Land die ihm nach der Reichsverfassung oder den Reichsgesetzen obliegenden Pflichten nicht erfüllt, kann der Reichspräsident es dazu mit Hilfe der bewaffneten Macht anhalten.

The second and most well-known paragraph authorizes the president to use certain emergency powers if the public security and order are seriously disturbed or endangered within the Reich:

> Der Reichspräsident kann, wenn im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen, erforderlichenfalls mit Hilfe der bewaffneten Macht einschreiten. Zu diesem Zwecke darf er vorübergehend die in den Artikeln 114, 115, 117, 118, 123, 124 und 153 festgesetzten Grundrechte ganz oder zum Teil außer Kraft setzen.[34]

Further, Art. 48 authorized the president to suspend certain enumerated basic rights. The second paragraph of Article 48 is considered especially controversial. The question is whether the measures mentioned in the Article meant suspending the enumerated basic rights only or whether the measures mentioned in the Article could be read as providing the president with the authority to restore public security and order by "any means necessary".

The authorities granted under Article 48 were employed by President Friedrich Ebert[35] during the *Kapp Putsch* in March 1920 when a group of monarchists tried to overthrow the Republic (Watkins 1939, 30). The use of the powers granted in Art. 48 was not really contested. Representative Clemens von Delbrück (DNVP) defended it in the *Nationalversammlung* discussions, referring to the *Spartacist* uprising in January 1919 (which is discussed more fully later in this chapter) (See 47. Sitzung 5. Juli 1919, 1335).

As discussed above, whereas the Weimar Republic's Constitution marked the first time a republic had included a state of exception provision, the US Constitution was silent on emergency powers. The war powers are, however, divided between the executive and legislative branches of government in the US. According to the US Constitution, Congress shall have the power "to de-

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34 3§: Von allen gemäß Abs. 1 oder Abs. 2 dieses Artikels getroffenen Maßnahmen hat der Reichspräsident unverzüglich dem Reichstag Kenntnis zu geben. Die Maßnahmen sind auf Verlangen des Reichstags außer Kraft zu setzen. 4§: Bei Gefahr im Verzuge kann die Landesregierung für ihr Gebiet einstweilige Maßnahmen der in Abs. 2 bezeichneten Art treffen. Die Maßnahmen sind auf Verlangen des Reichspräsidenten oder des Reichstags außer Kraft zu setzen. 5§: Das Nähere bestimmt ein Reichsgesetz. (Artikel 48, Weimarer Reichsverfassung 1919)

35 First president of the Weimar Republic elected on February 11, 1919; in office 1919-1925

clare war, grant letters of marquee and reprisal and make rules concerning captures on land and water; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States" (US Constitution 1787, Article 1, section 8).[36] More importantly, Congress shall have the power "*To make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the Government of the United States, or in any department or officer thereof*" (ibid.). The war powers of the president, in what is known as the Commander-in-Chief clause, is defined in the Article Two of the US Constitution with the following words: "*The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual services of the United States*." The president is further authorized, "*To take care that the laws be faithfully executed*" (US Constitution 1787, Article 2, section 3).

Regarding Weimar, Representative Ablass noted that Article 48 granted the president new authority. First, the president can restore public security and order with the help of the armed forces when needed, and then the president can suspend basic rights:

> In dem nächstfolgenden Artikel hat der Reichspräsident eine ganz neue Befugnis erhalten. Es ist einmal die Befugnis, die öffentliche Sicherheit und Ordnung nötigenfalls unter Zuhilfenahme der bewaffneten Macht wiederherzustellen, und dann die Befugnis eventuell die Grundrechte ganz oder zum Teil außer Kraft zu setzen. Jene Befugnis geht sehr weit. Aber wenn wir die Geschehnisse unserer Lage überblicken, werden wir finden dass sie aus der Not der Zeit heraus geboren ist und dem Präsidenten ein starkes Mittel an die Hand gibt, auf das er unter seinen Umständen wird verzichten können. Diese Stärkung der Macht des Präsidenten begrüße ich aufs freudigste. (Verfassungsgebende Deutsche Nationalversammlung Aktenstück Nr. 391 1919, 233)

According to Schmitt (1994, 228) this is the clearest presentation of the relationship between sentence 2 and sentence 1 of the second paragraph of Art. 48. In other words, the president is given two different authorities. (This will be discussed in a more detailed manner later in this chapter.)

In order to confirm the validity of emergency powers used under Art. 48, the president needed the countersignature of the *Reichskanzler* (Chancellor of the Reich). This limitation could be, however, bypassed as the president had the right to appoint and to dismiss the Chancellor and the members of the cabinet

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36 The US Constitution was drafted in Philadelphia in 1787 and became binding when the ninth state ratified the Constitution in 1788. The old Confederation went out of existence in 1789 and the new Constitution and government became legally operational. The year 1787 is used here because the Constitution was drafted and in general use then. For more about the first stages of the US Constitution, see Edling, Max. M. 2003. *A Revolution in Favor of Government. Origins of the US Constitution and the Making of the American State*. Oxford: Oxford UP; Amar, Akhil Reed. 2006. *America's Constitution*. A Biography. New York: Random House trade paperbacks.

(Art. 50 WR) [37]. A restriction on this the practice appears, however, in Art. 54, which states that the members of the cabinet and the Chancellor must enjoy the confidence of the Reichstag. Despite the decisive role of the president, the parliament was given the central role of government. A coalition or majority party would control the cabinet and the cabinet would control the president. According to Dyzenhaus (1997a, 20) it was also thought the some constraints on the president were provided due to the fact the he was elected by a popular vote. The president could, however, quite easily avoid the parliamentary oversight of the use of Art. 48 by dissolving the parliament.

The last section (paragraph 5) of Article 48 established that further practical details of the article would be defined later by statutory law. Schmitt writes that the powers of the President of the Reich contained in Art. 48 are not, however, dependent on passing the statutory law. This view was pointed out also during discussions on the article in the *Nationalversammlung*. According to Representative von Delbrück:

> Eine weitere Schwierigkeit, die jedenfalls klargelegt werden muss, ist folgende. Der Art. 49 gibt in seinem ersten Satz dem Reichspräsidenten uneingeschränkt das Recht, für den Fall der Gefährdung der öffentlichen Sicherheit und Ordnung im Reichsgebiet mit Hilfe der bewaffneten Macht einzuschreiten und zur Wiederherstellung der Ruhe und Ordnung die erforderlichen Maßnahmen zu treffen. Am Schlusse heißt es dann: „Das Nähere bestimmt ein Reichsgesetz." Dabei könnte die Frage aufgeworfen werden, was den Rechtens sein soll, bis dieses Reichsgesetz ergangen ist […] ich möchte das ausdrücklich feststellten – selbstverständlich der Artikel nicht so zu verstehen, dass bis zum Erlass dieses Reichsgesetz die Befugnis des Reichspräsidenten, einzuschreiten, ruht, sondern umgekehrt die Befugnis des Reichspräsidenten ist bis zum Erlass dieses Gesetz eine unbeschränkte. (46. Sitzung 4. Juli 1919, 1304)

Both representatives von Delbrück and Alexander Graf zu Dohna (DVP) concluded that the powers of the president under Art. 48 would be valid at the moment the constitution came into force even without passing the specifying law (Schmitt 1994, 222). Until such times as the rights of the president were specifically laid out by a legislative statute, as required by Art. 48, Representative von Delbrück thought the president's powers were limitless (*unbeschränk*t).

> Der Reichspräsident hat das Recht im Deutschen Reichsgebiet, wenn die öffentliche Sicherheit und Ordnung erheblich gestört und gefährdet wird, mit Hilfe der bewaffneten Macht einzuschreiten und die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung erforderlichen Maßregeln zu treffen. Er kann ferner eine Reihe von Grundrechten – und zwar würde ich auch dafür sein, das der Art. 150 darunter bleibt – außer Kraft setzen. Solange nun ein Reichsgesetz nicht ergangen ist, ist diese Befugnis des Reichspräsidenten eine unbeschränkte, und es ergibt sich daraus, dass dieses Reichsgesetz ergangen ist, der Reichspräsident in der Lage ist, alle zur Durchführung dieser seiner Befugnisse erforderlichen Maßnahmen zu treffen, dass er insbesondere auch befugt sein würde zum Erlass von Rechtsvorschriften, zum Erlass

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[37] Artikel 50 Weimarer Reichsverfassung 1919:
„Alle Anordnungen und Verfügungen des Reichspräsidenten, auch solche auf dem Gebiete der Wehrmacht, bedürfen zu ihrer Gültigkeit der Gegenzeichnung durch den Reichskanzler oder den zuständigen Reichsminister. Durch die Gegenzeichnung wird die Verantwortung übernommen."

> von Strafvorschriften sowie zur Einsetzung außerordentlicher Kriegsgerichte. (47. Sitzung 5. Juli 1919, 1335)

Von Delbrück indeed claimed that until the specifying law was passed, the president could take all necessary measures, including the decreeing of legal provisions (*Rechtsvorschriften*).

According to Schmitt, statements made for instance by representatives Graf zu Dohna and von Delbrück in the constitutional assembly illustrate the "*bis dahin*" (until then) idea. A certain gap (see argument of Graf zu Dohna, Chapter 2, p. 53), would exist before the law was passed. Representative Ludwig Haas (DDP) also noted in the constitutional assembly that the forthcoming *Reichsgesetz* (statute) would specify the terms of the use of emergency powers under Art. 48:

> Wenn aber nun einer behaupten würde, dass wir wehrlos sind, bis das Reichsgesetz gemacht ist, so wäre das ja eine lächerliche Auslegung. Selbstverständlich können die Möglichkeiten des Art. 48 angewandt werden, bevor das Reichsgesetz erlassen wird, und wir haben die Reichsregierung nur zu bitten, dass uns der Entwurf des Gesetzes so bald wie möglich vorgelegt wird. Bis das Gesetz gemacht ist, werden eben der Reichspräsident und der Reichswehrminister im Rahmen des Art. 48 verfahren. (112. Sitzung 29. Oktober 1919, 3563)

Schmitt further commented in his book *Die Diktatur* (1994, 219) that dealing with Art. 48 would be easier if the Government of the Reich decided the particularities for its use: „*Es würde die staatrechtliche Behandlung des Art. 48 Abs. 2 erleichtern, wenn die Reichsregierung selbst ihr Vorgehen mit einer klaren Begründung versehen hätte. Leider ist das nicht der Fall*." One of the reasons why the extensive emergency powers were accepted by the *Nationalversammlung* might have been the expectation that further forthcoming statute would define the particularities in more detail.

Schmitt (1994, 213) claims that president's authority in times of crisis was not restricted to the suspension of basic rights mentioned in Art. 48: „*Daher kann der Reichspräsident Nach Abs. 2 alle zur Wiederherstellung der erheblich gefährdeten öffentlichen Sicherheit und Ordnung für nötig erachteten Maßnahmen treffen*." According to Schmitt, Art. 48 provided for the president "a commissarial dictatorship", a concept, derived from *Die Diktatur*, which was published in 1921. This means that the president was empowered to act for the security and for the constitution as a whole (Schmitt 1994, ix). Preuss (1923, 101) later on commented that Schmitt's definition of dictatorship[38] fully corresponds to the essence of the extraordinary powers set out in the paragraph 2 of Art. 48: „*Dieser Definition des Diktaturbegriffs entspricht durchaus das Wesen der Außerordentlichen Vollmachten, die Art. 48 Abs. 2 Reichsverfassung dem Reichspräsidenten überträgt.*" Preuss (ibid.) continued by referring to Schmitt's distinction between a commissarial and a

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38 Preuss (1923, 101) refers here to the quote by Schmitt: "Die Diktatur ist wie die Notwehrhandlungen immer nicht nur Aktion, sondern auch Gegenaktion. Sie setzt demnach voraus, daß der Gegner sich nicht an die Rechtsnormen hält, die der Diktator als Rechtsgrund für maßgebend anerkennt. Als Rechtsgrund, aber natürlich nicht als sachtechnisches Mittel seiner Aktion."

sovereign dictatorship:"*Will man dieser Terminologie folgen, so war die Diktatur der Volksbeauftragten eine souveräne, während die des Reichspräsidenten nach Art. 48 eine kommissarische ist*."

It was obvious that "*Maßnahmen*" could not mean amending the constitution or increasing the authorities of the executive beyond constitutional limits. Further, the president was not supposed to delegate the authority to declare the *Ausnahmezustand* (Kurz 1992, 61). Justice Minister Schiffer argued in the constitutional assembly that, according to paragraph 2, the president could take necessary measures when public security and order were seriously disturbed. According to Schiffer it was not possible to define the measures in advance: „*Irgend eine Einschränkung bezüglich dieser Maßnahmen ist nicht vorgesehen*." Schiffer also claimed that measures (*Maßnahmen*) mentioned in Art. 48 were not limited to a suspension of the enumerated basic rights: „*Es können also Maßnahmen aller Art sein, Maßnahmen der Gesetzgebung oder Maßnahmen der Verwaltung oder auch rein tatsächliche Maßnahmen und Vorkehrungen. Nur eine begriffliche Schranke liegt allerdings vor*." (147. Sitzung 3. März 1920, 4636.) In a similar vein, Representative von Delbrück argued in the constitutional assembly that the president does possess, according to a closer consideration of the law of the Reich, „unlimited" authority: „*Er kann also alle erforderlichen Maßnahmen treffen, er ist auch in der Lage, Rechtsverordnungen zu erlassen, soweit sie notwendig sind, bis das Nähere durch das Reichsgesetz bestimmt wird*" (46. Sitzung 4. Juli 1919, 1304). However, the representative also refers to the requirement of Art. 48 to pass a statute in order to specify the authorities granted in the article in more detail.

Justice Minister Schiffer, however, argued that the president could not suspend the constitution as a whole: „*Es können Maßnahmen nicht in Frage kommen, die die Verfassung selbst betreffen. Es ist undenkbar, dass auf Grund dieser Bestimmung der Reichspräsident die Verfassung außer Kraft setzen, beseitigen könnte, die die Grundlage der Bestimmung selbst und die Grundlage seiner eigenen Machtvollkommenheit ist*." (147. Sitzung 3. März 1920, 4636.) For Justice Minister Schiffer the measures could not concern the Constitution as such.

According to Schmitt (1924, 96), the word *Maßnahmen* was perhaps not unintentional, since both Preuss' earlier draft of the constitution (§63) and the first draft of the government had spoken of "rules" (*Anordnungen*).[39] Representative Cohn argued that the representatives of the constitutional assembly surely understood that the *Maßnahmen* as used in Art. 48 could not mean anything other

[39] The first draft of the Constitution from January 3, 1919 was not published. The second draft from January 20, 1919, contained the Article 63, which was very similar to the later Art. 48. "Dem Reichspräsident war gestattet, wenn, "in einem deutschen Freistaat die öffentliche Sicherheit und Ordnung in einem erheblichen Umfang gestört oder gefährdet" war „mit Hilfe der bewaffneten Macht" einzuschreiten und „die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung erforderlichen Anordnungen" zu treffen." Further, the president was obligated immediately to gain the authorization from the Reichstag and the Reichstag had the power to demand the revocation of presidential emergency measures. (Kurz 1992, 15.) On the drafts' different in wordings of the "emergency powers provision", see Frykholm 1942; Kurz 1992.

than external rules (*äußerliche Anordnungen*) used to restore an unstable security situation:

> Zunächst – und ich rufe hier das Zeugnis aller Mitglieder des Verfassungsausschusses an – hat, als wir die Verfassung berieten, niemand von uns auch nur entfernt mit der Möglichkeit gerechnet, daß die Maßnahmen im Sinne des Art. 48, die der Reichspräsident zur Wiederherstellung der öffentlichen Sicherheit und Ordnung treffen dürfte, etwas anderes seien als äußerliche Anordnungen zur Wiederherstellung eines gestörten Sicherheits- und Ruhezustandes. Ganz klar tritt das hervor, wenn man bedenkt, daß lediglich durch einen Nebensatz, durch ein Komma, von dem Hauptsatz getrennt die Bestimmung eingeführt wird: erforderlichenfalls mit Hilfe der bewaffneten Macht einzuschreiten. Es stand uns allen – und das ist auch in aller Geschichte des Belagerungszustand niemals anders gewesen – lediglich der Fall vor Augen, daß die jeweiligen Sicherheitsorgan des Staates nicht ausreichen könnten, die Ordnung wiederherzustellen und dazu besondere Maßnahmen, insbesondere die Aufbietung der Reichswehrtruppen nach Meinung des Reichspräsidenten nötig werden könnten. (147. Sitzung 3. März 1920, 4642)

Justice Minister Schiffer responded to Representative Cohn that no restrictions related to these measures had been indicated, and therefore all kinds of measures - legislative, administrative, as well as any necessary ad hoc measures and provisions - were permissible:

> Der Reichspräsident kann, wenn im Deutschen Reich die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen. Irgend eine Einschränkung bezüglich dieser Maßnahmen ist nicht vorgesehen. Es können also Maßnahmen aller Art sein, Maßnahmen der Gesetzgebung oder Maßnahmen der Verwaltung oder auch rein tatsächliche Maßnahmen und Vorkehrungen. Nur eine begriffliche Schranke liegt allerdings vor. Es können Maßnahmen nicht in Frage kommen, die die Verfassung selbst betreffen. […] Dieser zweite Satz ist also nicht etwa, wie man dem Vortrage des Herrn Dr. Cohn entnehmen konnte, eine Einschränkung für die Anwendung des ersten Satzes, die Maßnahmen zur Wiederherstellung der öffentlichen Sicherheit und Ordnung, sondern eine Erweiterung. (147. Sitzung 3. März 1920, 4636)

He felt that Cohn had given to some extent a "false" description of the powers under Art. 48, in order to question the Article and that Cohn himself had also referred to the authority that the president was granted under the Article:

> Er hat nämlich in seinem Kampf gegen diesen Art. 48, den er beseitigt haben wollte, eine mögliche extensive Schilderung seines Inhalts gegeben. Er (Representative Cohn) hat gesagt: jetzt aber wollen sie nach Art. 49 dem Reichspräsidenten die allgemeine Vollmacht geben, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung erforderlichen Maßnahmen zu treffen. Auch praeter legem, sogar gegen das bestehende Gesetz darf danach der Reichspräsident oder der Reichskommissar oder der Befehlshaber, dem er die Wiederherstellung der Sicherheit und Ordnung überträgt, seine Maßnahmen treffen. (147. Sitzung 3. März 1920, 4637)

The second paragraph of Art. 48 drew upon two different propositions, and for that reason the wording led to differing interpretations of the relationship between the *Maßnahmen* (mentioned in the first sentence of paragraph 2) and on the other hand with the president's right to suspend the basic rights (mentioned in the second sentence of paragraph 2). According to Schmitt (1994, 222) the idea that certain basic rights could be suspended was discussed by the commit-

tee (*Staatenausschuss*), where they simply added "*zu diesem Zwecke*" before the second sentence of paragraph 2, to follow the phrase "*zur Wiederherstellung der öffentlichen Sicherheit und Ordnung erforderlichen Maßnahmen treffen*." Schmitt (1994, 227) claimed that if the president wanted to suspend the basic rights, he could suspend (*Außer Kraft setzen*) only the basic rights enumerated in the article, but that restriction concerned only that particular authorization and did not circumscribe the president's rights to take all the necessary measures to restore public security and order.

Schmitt (1994, 222-223) also noted that, proposed by Representative Konrad Beyerle (Zentrum, from January 1920, BVP) in the constitutional assembly, the possibility of military intervention mentioned in paragraph two was moved from the beginning to the end of sentence, because no one wanted to suggest the most radical measures first:

> Im Übrigen sind nur noch einige wenige Worte zu machen. Der. Art. 49 in der Fassung, wie sie uns zunächst vorliegt, stellt in den Vordergrund das Recht des Reichspräsidenten, mit Hilfe der bewaffneten Macht einzuschreiten und die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung erforderlichen Maßnahmen zu treffen. Es erscheint gerechtfertigter, die Hilfe der bewaffneten Macht als letzen Ausweg und die zweite Stelle treten zu lassen und erst nach Erschöpfung anderer Maßnahmen die Hilfe der bewaffneten Macht aufzurufen. (47. Sitzung 5. Juli 1919, 1328)

The argument by Beyerle seems to emphasize that the use of the military force should be only employed as a last resort.

The earlier version of the article required the president to obtain permission (*Genehmigung*) to carry out the measures. Representative Simon Katzenstein (SPD) argued that it is good for the president before using emergency powers to consider obtaining Reichstag's approval for his actions: „*Es ist besser, es wird vorher geprüft. Es ist besser, der Reichspräsident Weiß vorher, dass er nachher die Genehmigung haben muss*." (47. Sitzung 5. Juli 1919, 1324.) Representative Haas seemed to question whether under the Article that particular condition was important for the use of the powers:

> Mit unserem Abänderungstrag auf Nr. 703 erstreben wir zunächst eine formelle Erleichterung für den Reichspräsidenten bei Erklärung des Belagerungszustands […] Dann haben wir gegen die jetzige Fassung das starke Bedenken, das jedesmal, wenn der Belagerungszustand erklärt wird, nachträglich der Reichstag seine Genehmigung zu erteilen hat. Das würde bedeuten, dass, wenn in irgend einem Orte in Deutschland Unruhen entstehen und der Belagerungszustand notwendig wird, eine Verhandlung im Reichstag stattfinden muss. Das wäre doch unzweckmäßig. Wir sind der Meinung, dass der Reichspräsident seine Anordnung lediglich dem Reichstag, und zwar zu Händen des Präsidenten des Reichstags, mitzuteilen hat. (70. Sitzung 30. Juli 1919, 2111)

For Haas it was impractical to expect the Reichstag to deliberate every time whether a state of siege was necessary for some part of Germany. The Representative seems to have thought that the president should be given the possibility of dealing with such situations independently, though informing the Reichstag. The final version of the Article states only that the president must inform

the Reichstag on the measures taken (*dem Reichstag Kenntnis zu geben*) in addition to the countersignature requirement

The earlier version of Art. 48 (i.e. then Art. 49) (Entwurf einer Verfassung des Deutschen Reichs June 21, 1919) stated that „*Der Reichspräsident kann, wenn im Deutschen Reichsgebiet die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, unter Verantwortlichkeit des gesamten Reichsministeriums mit Hilfe der bewaffneten Macht einschreiten und die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung erforderlichen Maßnahmen treffen*." Relatedly, Representative Haas noted in the Nationalversammlung:

> Was hat alles der arme Reichspräsident, wenn er den Belagerungszustand erklären soll, zu machen? Erstens muss er – so lautet jetzt die Vorlage – die Genehmigung des gesamten Reichsministeriums einholen. Es genügt also nicht die Unterschrift des Reichskanzlers, es genügt nicht die Unterschrift des Ressortministers; das ganze Reichsministerium muss zusammenberufen werden […] wenn dann der Belagerungszustand erklärt ist, ist der Reichspräsident verpflichtet unverzüglich die Genehmigung des Reichstags einzuholen. (47. Sitzung 5. Juli 1919, 1333)

This means that the whole cabinet was expected to support any presidential actions taken under Art. 49. In the final version of the *Weimarer Reichsverfassung* 1919 this has been left out of Art. 48, but Art. 50 required that the presidential decrees (*Anordnung/Verfügung*) must have a countersignature from the Chancellor or from a minister.[40] Therefore parliamentary control was maintained, even though the requirement of the countersignature was a rather weak control mechanism when considering the president's power to dismiss the Chancellor and the Cabinet.

Early drafts of the Weimar Constitution dealt separately with the president's emergency powers (Art. 48, paragraphs 2-4) as well as the power to take over administration of the *Länder,* if necessary (Art. 48, paragraph 1), but on the third reading these two provisions were brought together in Art. 48 (See Preuss 1923, 108; Kurz 1992, 16).[41] The reason that these provisions were combined lay in the third paragraph of Art. 48, which states that the president must immediately inform the parliament of the measures taken:

> Der erste Artikel, der jetzt den Abs. 1 des Art. 48 bildet, spricht dem Reichspräsidenten die Befugnis zur Reichsexekution zu gegen ein Land, das die ihm nach der Reichsverfassung oder den Reichsgesetzen obliegenden Pflichten nicht erfüllt. Der Grund, weshalb die Nationalversammlung diese Bestimmungen über die Reichsexekution mit den folgenden über die Diktatur zu einem Artikel zusammengefasst hat, war, dass die Vorschriften des Abs. 3, wonach der Reichspräsident von seinem Maßnahmen dem Reichstag unverzüglich Kenntnis geben und sie auf dessen Verlangen außer Kraft setzen muss, sowohl auf die Maßnahmen der Reichsexekution, wie auf die der Diktatur Anwendung finden sollen. (Preuss 1923, 108)[42]

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40 „Alle Anordnungen und Verfügungen des Reichspräsidenten, auch solche auf dem Gebiete der Wehrmacht, bedürfen zu ihrer Gültigkeit der Gegenzeichnung durch den Reichskanzler oder den zuständigen Reichsminister. Durch die Gegenzeichnung wird die Verantwortung übernommen." (Artikel 51 Entwurf einer Verfassung des Deutschen Reichs 21.6.1919)

41 See fn. 29, p. 35

42 The version of the Constitution from February 21, 1919 contained Articles 67 and 68 that dealt with the issue. (See Aktenstück Nr. 59, Verfassungsgebende Deutsche Na-

Despite the concept of the *Maßnahmen,* the expression *„öffentliche Sicherheit und Ordnung"* raised questions in the discussions. For instance, representative Katzenstein argued that the *Ausnahmezustand* competence of the President of the Reich should belong to President of the Reich alone, but only when there was a possible endangerment (*Gefährdung*) or disturbance (*Störung*) of public order (*öffentliche Ordnung*). For Katzenstein the expression "öffentliche Sicherheit und Ordnung" included the risk of excessively broad interpretation: *„Man hat dort unter dem Begriff der öffentlichen Sicherheit alles Mögliche einbegriffen, was meines Erachtens kaum noch durch den Begriff der öffentlichen Ordnung gedeckt werden kann*" (47. Sitzung 5. Juli 1919, 1334).

The discussions show that the emergency powers were intended to be available only when the need to restore security and order was evident. According to Schmitt (1924, 70), the widely cited comment of Justice Minister Schiffer in the *Nationalversammlung* states that the second paragraph of Art. 48 authorizes the president to take necessary measures regarding administration and legislation but not change or suspend the Constitution, since according to Schiffer paragraph 2 sentence 2 extends the powers referred to in sentence 1: *„Weil zitiert wird die Äußerung des Reichjustizministers Schiffer aus der 147. Sitzung der Nationalversammlung vom 3. März 1920, wonach der Reichspräsident auf Grund des Art. 48 alle Maßnahmen treffen kann, solche der Gesetzgebung wie der Verwaltung wie rein tatsächliche Maßnahmen, aber keine solchen, die die Verfassung außer Kraft setzen oder beseitigen, weil solche nur nach Satz 2 möglich sind; Satz 2 erweitere den Satz 1.*"

According to Schmitt (1994, 230) the authors of Article 48, paragraph 2 did not consider how its second sentence restricted the powers authorized in its first sentence:

> [K]einer der Urheber des Art. 48 Abs. 2 ging davon aus, dass in Abs. 2 Satz 2 eine allgemeine Einschränkung der in Satz 1 erteilten allgemeinen Befugnis enthalten sei. Dem Reichspräsidenten wurde die Befugnis erteilt, alle nötigen Maßnahmen zu treffen. Davon, dass die Aufzählung in Satz 2 eine fundamentale Abgrenzung der in Satz 1 erteilten Befugnis enthielte, war nicht nur nicht die Rede, sondern Satz 2 wurde im Gegenteil aufgefasst als eine zwar in sich durch die Aufzählung begrenzte, im Übrigen aber zu der Befugnis aus Satz 1 hinzutretende eigenartige Befugnis.

Schmitt claims that it was not even discussed that the basic rights suspension mentioned in sentence 2 of the second paragraph limited the powers of sentence 1. But while sentence 2 limited the scope of the measure (i.e. only the basic rights that were listed could be suspended), it at the same time provided additional authority mentioned in sentence 1.

According to Schmitt (1994, 231), the members of the constitutional assembly were surely aware that the President of the Reich was vested with extraordinary powers (Schmitt 1994, 230 referred to the "plein pouvoir" argument made by Representative Graf zu Dohna). Members' misgivings about the concentration of presidential power were alleviated by the requirement for ministerial countersignature as well as the parliamentary check provided in paragraph

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tionalversammlung 1919) Later on, there were Articles 48 and 49 and in the final version of the constitution there was only Art. 48.

3. The latter stated that the parliament must be notified immediately when emergency measures are used and the validity of the measures could be decided by the parliament. Schmitt claimed that this "parliamentary responsibility" (*Verantwortlichkeit*) was understood as an obvious guarantee against the misuse. Preuss emphasized in the constitutional committee that it was not possible that the civil power would abandon its responsibility to be the final authority in times of crisis. The government of the Reich would remain accountable to the parliament, also during an emergency when the military was entrusted (*beauftragen*) to carry out the measures. (Schmitt 1994, 231-232.)

It seems also that the members of the constitutional convention relied on the "forthcoming" statute that would define the particularities and serve as an absolute check on the president. Schmitt (1994, 232) argues that the eventual drafting of this statute was probably considered so certain that members did not seriously entertain the possibility that the president would dissolve the parliament. During 1919, representatives from all parties (e.g. v. Delbrück, Graf zu Dohna, Peter Spahn (Zentrum), Haas) referred to the forthcoming legislation. No one seemed to reckon that several years later the statute still would not have been written or adopted (ibid.).

The debate on the emergency powers of the president authorized under Art. 48 continued after the enactment of the Constitution. Schmitt and Erwin Jacobi commented on Article 48 in a meeting of German constitutional lawyers in Jena in 1924 (Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu Jena am 14. und 15. April 1924). Both Schmitt and Jacobi endorsed a broad interpretation of paragraph 2. This view had support also from members of the DDP (see Schmitt's interpretation of Justice Minister Schiffer's argument, Chapter 2, p. 48).

As discussed above, the powers of the president did not, however, mean for Justice Minister Schiffer the suspension or repealing of the Constitution, other than those basic rights mentioned in the article. For Schiffer, the relation between sentences one and two of paragraph 2 of Art. 48 was clear: the second sentence extends the first one. According to the interpretation of Reichskanzler Gustav Bauer (SPD, in office 1919-1920) the authority of the president under Art. 48 includes the necessary measures: „*Nach dieser Vorschrift* (*Art. 48*) *ist der Reichspräsident befugt, die nötigen Maßnahmen zu treffen*; *er kann insbesondere* (*sic*) *verfassungsmäßige Grundrechte vorübergehend außer Kraft setzen und erforderlichenfalls mit Hilfe der bewaffneten Macht einschreiten*." (Quoted in Schmitt 1924, 70.) According to Bauer the president could suspend the constitutional basic rights and intervene with the armed forces if necessary to maintain public security and order.

For Schmitt Article 48 did not grant the president the power to legislate, and therefore the authority was limited: „*Der Reichspräsident ist kein Gesetzgeber*" (Schmitt 1994, 249). For Schmitt (ibid.) the president could not, under Article 68,

enact formal laws.[43] Jacobi (1924, 118) shared a similar view: „*Da die Maßnahmen des Reichspräsidenten unter der ausschließlichen Zweckbestimmungen der wiederherzustellenden Sicherheit und Ordnung stehen und diese Sicherheit und Ordnung im Sinne der bestehenden Verfassung zu deuten ist* (*vgl. hierüber Carl Schmitt*), *so können als solche Maßnahmen Änderungen der Verfassungsurkunde niemals in Frage kommen*." The president could not change the qualities of the institutions as such, or as Jacobi mentions, the measures referred to in Article 48 did not grant the president the power to change the Constitution. Whether the president had the right to give emergency decrees or not was not really settled in Article 48.[44]

Schmitt (1994, 249) also notes that the Art. 48 does not grant the president the power to declare war: „*Es ist ihm ferner nicht möglich, auf Grund Art. 48 gemäß Art. 45 RV. den Krieg zu erklären, gemäß Art. 85 den Haushaltsplan festzustellen oder das in Art. 18 vorgesehene Reichsgesetz als Maßnahme zu treffen*." For Schmitt (ibid.) the powers granted in Article 48 should not be used to undermine the powers of the Reichstag.

It is important to notice that, although the powers of the president were relatively extensive, they were meant to be temporary and apply only in exceptional conditions. Minister of the Interior Karl Jarres (DVP)[45] quoted a speech in which the Chancellor of the Reich noted in 1924 that the exception was meant to remain only an exception and should be terminated as soon as the circumstances permitted: „*Selbstverständlich ist, daß der Ausnahmezustand seinem Namen entsprechend eine Ausnahme bleiben und abgebaut werden muss, sobald es nur immer die Verhältnisse erlauben*" (405. Sitzung 5. März 1924, 12595).

Chancellor of the Reich Gustav Stresemann (DVP)[46] had noted earlier that the essential feature of *Ausnahmezustand* was that it was limited:

> Im Charakter des Ausnahmezustandes liegt, dass er begrenzt ist; er ist eigentlich dazu da, um aufgehoben zu werden und Ausnahme zu bleiben. Auf der Konferenz der Ministerpräsidenten habe ich die Erklärung abgeben, dass die Reichregierung den Reichsausnahmezustand aufheben würde, sobald sich die Verhältnisse beruhigt hätten. (392. Sitzung 22. November 1923, 12191)

Therefore, emergency powers were meant to be available only for restoring public security and order. Kolb (1984, 19) writes that the potentially "explosive nature" of Art. 48 did not really come up in debates among members of the ruling coalition, only the representatives of the USPD, particularly Representative Cohn, were concerned about giving a blank check to the president. During the debate on Article 49 in the *Nationalversammlung* Cohn further refers to Article 68 of the 4. June 1851 Constitution as an example of how extensively emergency

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43 Artikel 68
„(1) Die Gesetzesvorlagen werden von der Reichsregierung oder aus der Mitte des Reichstags eingebracht. (2) Die Reichsgesetze werden vom Reichstag beschlossen."

44 About the debates on the right of the president to legislate, see Kurz 1992.

45 Minister of the Interior in Stresemann II cabinet, from 11 Nov. 1923. Vice Chancellor and the minister of Interior in the cabinets of Marx I, 30 Nov.1923-3 Jun.1924 and Marx II, 3 Jun.1924-15.Jan.1925

46 Minister of Foreign Affairs and the Chancellor of the Reich, 1923

powers had been used during war in order to urge members to be cautious when granting emergency powers to the president:

> Dieses alte Gesetz war also auch die Grundlage des Belagerungszustands in Kriege. Es ist ja noch in unser aller brennenden Erinnerung, wie sehr Militärbefehlshaber, die militärische Gewalt während des Krieges auf Grund des Gesetzes vom Juni 4 1851, die Presse schikaniert, die wissenschaftliche Forschung gehindert, und unterdrückt hat – wir haben Zeugen im Hause, die darunter gelitten haben, wie sie das Versammlungsrecht vernichtet, und zahllose Personen ihrer persönlichen Freiheit beraubt oder in ihrer Bewegungsfreiheit eingeschränkt hat. (47. Sitzung 5. Juli 1919, 1329)

According to Cohn there were representatives who had personal experience of how the military powers had been used during the war to suspend the basic rights. Representative von Delbrück, however, referred to the *Spartacist* uprising of the newly founded Communist Party in January 1919 in order to emphasize that the president should have some effective means available to respond.

> Ich hätte nicht erwartet, dass sich in dieser hohen Versammlung jemand finden würde, der die Streichung des. Art. 49 beantragen und zu begründen versuchen würde. Ruhe und Ordnung lassen sich nur aufrecht erhalten, wenn die legitime Regierung das Recht hat, gewaltige Störungen der Ruhe und Ordnung ihrerseits mit Gewaltmitteln und zwar mit hinreichenden Gewaltmitteln zu unterdrücken. Wenn man der Regierung die Befugnisse versagt, die ihr hier in Art. 49 gegeben werden sollen, dann heißt das auf Deutsch: Spartacus und Konsorten können mit Mord und Raub und Plünderung die öffentliche Ordnung stören, aber die Regierung soll mit Handschellen an den Händen dabeistehen und zusehen. Das ist ein Zustand, der in einem geordneten Staatswesen ganz unmöglich ist. (47. Sitzung 5. Juli 1919, 1335)

Representative von Delbrück feared that the Spartacists were threatening the public order while the government had no proper means to respond. Surely the representatives from the grand coalition were, however, aware that the President of the Reich was granted a wide-range of powers. According to Kurz (1992, 30), Richard Fisher (SPD) in February 1919 was the first to use the concept "*Diktaturgewalt*" regarding the emergency powers of the President of the Reich:

> Der Reichspräsident kann die Militärmacht auch aufbieten, wenn in einem Gliedstaat die öffentliche Sicherheit und Ordnung in erheblichem Masse gestört oder gefährdet ist. Er kann dann aber auch das Vereinsrecht, Versammlungsrecht, Koalitionsrecht, die Pressfreiheit, er kann alle garantierten Rechte persönlicher Freiheit aufheben, er wird geradezu mit Diktaturgewalt ausgerüstet. (17. Sitzung 28. Februar 1919, 374)

According to Fisher the president could restore public security and order with the help of the armed forces. The president could also repeal certain basic rights and therefore according to the Representative, the president was provided a "*Diktaturgewalt*".

Stolleis (2004, 48) argues that most state law theorists at the time, as well as the national assembly later, thought that a strong president was needed to fill the gap that appeared when the monarchist state collapsed and the sovereign was replaced by popular sovereignty. The problem, however, was that despite creating a parliamentary system, the old constitutional-monarchical system continued to function implicitly.

2.3 How to differentiate the norm from the exception

Whereas the Weimar Constitution included an exception paragraph, the Austrian Constitution of 1920, drafted by Hans Kelsen, had no similar paragraph. The analogy is rather interesting in relation to differing interpretation of the emergency powers between Kelsen and Schmitt. The essential difference between the two commentaries concerned the question of the sovereign. For Schmitt (1985, 12) it is impossible to foresee the state of exception; at the most the constitution can try to define beforehand who should deal with emergencies: „*Die Verfassung kann höchstens angeben, wer in einem solchen Falle handeln darf.*" Schmitt (ibid.) criticized liberalism for its intention to get rid of the ambiguity by circumscribing the sovereign through a legal definition of his jurisdiction: „*Ist dieses Handeln keiner Kontrolle unterworfen, wird es nicht, wie in der Praxis der rechtsstaatlichen Verfassung, in irgendeiner Weise auf verschiedene, sich gegenseitig hemmende und balancierende Instanzen verteilt so ist ohne weiteres klar, wer der Souverän ist.*"

For Schmitt (1985, 13) the sovereign stands out from the normal legal order, but at the same time remains part of it, because the sovereign makes the decision whether the Constitution can be suspended completely (in toto). Schmitt criticizes (ibid.) modern constitutional tendencies to banishing the sovereign in this sense. According to Schmitt (ibid.) the question of whether the extreme exception (*der extreme Ausnahmefall*) can be eliminated from the world is not a juristic one.

Article 48 of the Weimar Constitution stated that the President of the Reich declares the exception or the state of emergency, but it remains under the control of the parliament, and parliament can demand its termination at any time. For Schmitt this clause is typical of the practice and development of the liberal constitutional state, which tries to put off the question of sovereignty by establishing a shared and joint control of powers. The liberal tendency corresponds, however, only to the regulation of conditions of how exceptional powers may be exercised and not to the content of Article 48. For Schmitt Article 48 authorizes unlimited powers:

> In der geltenden deutschen Verfassung von 1919 wird nach Artikel 48 der Ausnahmezustand vom Reichspräsidenten erklärt, aber unter der Kontrolle des Reichstags, der jederzeit die Aufhebung verlangen kann. Diese Regelung entspricht aber nur die Regelung der Voraussetzung der Ausnahmebefugnisse, nicht die inhaltliche Regelung des Artikels 48, der vielmehr eine grenzenlose Machtvollkommenheit verleiht und daher, wenn ohne Kontrolle darüber entschieden würde, in derselben Weise eine Souveränität verleihen würde, wie die Ausnahmebefugnisse des Artikels 14 der Charte von 1815 den Monarchen zum Souverän machte. (Schmitt 1985, 17-18)

For Schmitt Art. 48 explains the *Ausnahmezustan*d of the President of the Reich, but the authority is subsumed to the control of the Reichstag. The regulation corresponds only to the conditions of the state of exception authority and not the authority itself.

Kelsen exemplifies this liberal tradition in his effort to resolve the ambiguity by bypassing the exception and thus depriving sovereignty of having any independent role in the legal order (Dyzenhaus 1997a, 43; Schmitt 1985, 13). Schmitt claims that Kelsen worked out the problem of sovereignty by abolishing it. The end of his thinking for Schmitt (1985, 31) is: „*Der Souveränitätsbegriff muss radikal verdrängt werden*".

According to Kelsen the Weimar Constitution did not contain proper tools for its preservation. Kelsen criticized the lack of a constitutional court that would have been aware of and able to supervise the application of Art. 48 (Dyzenhaus 1997b, 128). Judicial review, was in fact, discussed generally in the drafting committee (Friedrich 1928, 190). Article 48 did not, however, specify any judicial controls as such but relied on legislative measures instead. As mentioned above, the intention was for parliament to fill in the details of Article 48 by enacting further statutory law. Thomas Mergel (2002, 77) indeed points out how the measures the president had according to Article 48 made no reference to judicial review. As discussed, the Reichstag was the only party meant to control the use of presidential emergency powers.

According to Dyzenhaus (1997a, 127) the lack of judicial control over the application of Art. 48 relates to the old problem in German jurisprudence: judicial control is considered to be "an extra-legal political sphere." The discussions show that the members of the constitutional assembly relied primarily on legislative control rather than judicial. For example, Representative Graf zu Dohna asked in the assembly how it was possible to allow extraordinary courts even though the enumerated list of basic rights that can be suspended does not include Art. 105? Representative Graf zu Dohna further stated that a law must be passed to define how the "*Belagerungszustandsgesetz von 1851*" should be applied to war and martial courts (*Kriegs- und Standgerichte*). Dealing with this issue is important in order to resolve the vagueness of Article 48: „*Weil ja doch gerade die Frage, ob Standgerichte, außerordentliche Kriegsgerichte und derartiges auf Grund dieser Bestimmungen (Art. 48 Abs. 2) eingesetzt werden können zweifelhaft ist.*" Before, the issue is determined by statutory law (*Reichsgesetz*), there is a gap (*Lücke*). (47. Sitzung 5. Juli 1919, 1332.)

It seems that the drafters of the Constitution intended that the powers of the president would be restricted to the restoration of security and order only, but how could this be ensured? The crucial problem seemed to be that the authors of the Constitution could not imagine a situation in which parliament would be unable to act. According to Brecht (1944, 27) they believed that they had created sufficient safeguards against possible anti-democratic misuse of these powers. The emergency decrees by the president needed the countersignature of the Chancellor or other ministers, who were subject to a vote of censure in the parliament. Furthermore, emergency decrees could be suspended at any time by the simple majority of the parliament. What was missing, however, was an efficient constitutional mechanism for cases when the *Reichstag* failed in its legislative role (Lindseth 2004, 1365). For example, the enabling acts (*Ermächtigungsgesetz*) were considered exceptional, because in the minds of most

contemporaries, the parliament had thereby given up its most essential constitutional duty - the power to make the laws - to the president without any scrutiny or reasoning (ibid.).

The *Reichstag* insisted on repealing the emergency decree, for example, during Heinrich Brüning's chancellorship in the 1930s. However, Brüning appealed straight to the people and as a result the president dissolved the *Reichstag* and maintained the decree.[47] While waiting for new elections, Brüning could impose other decrees. (Brecht 1944, 27; Caldwell 1997, 109.) Brüning's government (1930-1932) was an example of how the control of the *Reichstag* failed, while parliamentary powers were practically suspended.[48] Patch (1998, 2) writes that Brüning's intention was to restore parliamentary government with only modest changes after the economic crisis had passed. For Patch (ibid.) it was Brüning's dismissal rather than his appointment as Chancellor that defined the turning point of the Weimar Republic.

The *Staatsgerichtshof für das Deutsche Reich* (Constitutional Court of the German Reich) was established in 1921 according to the Constitution (Art. 108). The Court could decide on constitutional disputes between the *Länder* (states), as well as between the *Reich* and a *Land* when there was no other appropriate constitutional court available and on other specific issues unrelated to the *Reich-Länder* relationship. The controversies between the organs of the government were settled in the *Reichsgericht*. The Administrative Court implicated in the Weimar Constitution was also given some jurisdiction initially, but the court was never fully established during the time of the Republic. (Stolleis 2003, 276.)

It seems that the *Staatsgerichtshof* was not a constitutional court as such, because it was not clear if the Court had jurisdiction to decide on the constitutionality, for instance, of the statutes or the actions of the executive (Dyzenhaus 1997a, 20).[49] Challenges to the emergency decrees of the president typically involved constitutional law disputes over e.g. the constitutionality of ministerial activities, impeachment proceedings against *Reich* officials (such as president or ministers), in addition to the disputes between *Länder or* between the *Reich* and a *Land*. (Caldwell 1997, 160-161). The *Reichsgericht* (the highest of the ordinary courts) declined to rule on "political" issues. Because the cases involved contestations in constitutional law, they ended up in the jurisdiction of the *Staatsgerichtshof*, which consisted of a jury of seven judges and which, according to Caldwell (1997, 161), "*began to develop a jurisprudence of emergency decrees during the mid-1920s in its rulings on actions by the government of the Länder*."

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47 Artikel 25 „(1) Der Reichspräsident kann den Reichstag auflösen, jedoch nur einmal aus dem gleichen Anlaß. (2) Die Neuwahl findet spätestens am sechzigsten Tage nach der Auflösung statt." (Weimarer Reichsverfassung 1919)

48 About the debates between Brüning and Reichstag on the issue, see Patch 1998.

49 Artikel 19 „Über Verfassungsstreitigkeiten innerhalb eines Landes, in dem kein Gericht zu ihrer Erledigung besteht, sowie über Streitigkeiten nicht privatrechtlicher Art zwischen verschiedenen Ländern oder zwischen dem Reiche und einem Lande entscheidet auf Antrag eines der streitenden Teile der Staatsgerichtshof für das Deutsche Reich, soweit nicht ein anderer Gerichtshof des Reichs zuständig ist. Der Reichspräsident vollstreckt das Urteil des Staatsgerichtshofs." (Weimarer Reichsverfassung 1919)

The *Staatsgerichtshof* refused to rule until 1931 about whether and how to review the emergency powers of the president under Article 48. After Chancellor Brüning's government began extensively to issue emergency decrees the Court had no other option than to react. The court case *Prussia* v. *Reich* in 1932 illustrates the problematic role of this "constitutional court" in Weimar Germany. In 1932 the Court took up the case whether President Hindenburg was allowed under Art. 48 to appoint the Chancellor, who by this time was Franz von Papen (Zentrum)[50] to be the presidential commissar for Prussia in order to restore public security and order. Papen dismissed the Prussian ministers and replaced them with his own appointees. The Prussian representatives appealed to the Court. According to the government, it had acted in accordance with paragraphs 1 and 2 of Art. 48. Notwithstanding the government's interpretation, the Court made a controversial decision, ruling that according to the Court the ministers could not be dismissed under Art. 48. The Court did not, however, settle the question whether the President of the Reich did have such broad powers under Art. 48 in the event that a state was seen to have violated its constitutional responsibilities to the government. (Art. 48, paragraph 1) The government should be able to show that the Prussian government had neglected its constitutional duties. (Dyzenhaus 1997a, 32-37 & 1997b, 124; Caldwell 1997, 162, 164-170.)[51]

The Court, however, had a different solution in relation to paragraph 2 of Art. 48. The Court completely bypassed the question of the Court's eligibility to decide on whether there was a disruption of public security and thus whether the Court could issue a ruling on that basis. It was evident that an emergency was pending, and the president, by concentrating his powers, was trying to alleviate the situation. As a result the Court approved the president's interpretation and refused to decide on whether it had the right to review or not. The Court also examined whether the president had abused his discretionary powers and proceeded too far in order to settle the matter. The Court presumed that the president and not the Court had jurisdiction over his commissar's actions and the appointment of a commissar as such did not extend the president's emergency powers. On the other hand, the Court imposed a restriction for the use of emergency powers by referring to Art. 17, which defined that every state should have democratically elected government and therefore the federal commissar could not be the representative of the government of a state.[52] Further-

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50 Chancellor of the Reich 1932 (replaced Brüning); Vice Chancellor of the Reich 1933-1934; resigned from the party in 1932.

51 About Schmitt's and Kelsen's view on the court decision, see Dyzenhaus 1997a; 1997b.

52 Artikel 17
(1) „Jedes Land muß eine freistaatliche Verfassung haben. Die Volksvertretung muß in allgemeiner, gleicher, unmittelbarer und geheimer Wahl von allen reichsdeutschen Männern und Frauen nach den Grundsätzen der Verhältniswahl gewählt werden. Die Landesregierung bedarf des Vertrauens der Volksvertretung.
(2) Die Grundsätze für die Wahlen zur Volksvertretung gelten auch für die Gemeindewahlen. Jedoch kann durch Landesgesetz die Wahlberechtigung von der Dauer des Aufenthalts in der Gemeinde bis zu einem Jahre abhängig gemacht den." (Weimarer Reichsverfassung 1919)

more, Articles 60 and 63 of the Constitution defined the *Reichsrat,* which consisted of the representatives of the *Länder*. The Reich commissar would not be able to appoint members to the *Reichsrat* because he was not the representative of the state. (Brecht 1944, 66; Dyzenhaus 1997a, 32-37 & 1997b, 124; Caldwell 1997, 166-167.)[53]

Contrary to the German case, the Constitution of Austria, enacted in 1920, did establish a constitutional Court (*Verfassungsgerichtshof*). Since the *Verfassungsgerichtshof* could annul statutes that it considered unconstitutional, it performed "a negative act of legislation." The Constitution granted the Court the right to legislative action, though this authority was primarily vested in the parliament. The Constitution, however, determined that the members of the Court had to be appointed by the parliament. Half of the members of the Court, as well as the president and vice-president, were elected by the House of Representatives (Nationalrat) and the rest of the judges were nominated by the Senate (Bundesrat). By constituting the Court in this particular way, the intention was to protect the independence of the Court from undue political influence. (Kelsen 1942, 187-188.)

Kelsen (1942, 188) argues that the independence of the Court was essential to preserve, since the Court had supervision over governmental actions and especially the power to review ordinances proclaimed by the head of the state or the prime minister, given that these ordinances were "of the greatest political importance." If it abused this power the administration could overcome the parliament and thereby "eliminate the democratic basis of the state." Kelsen (1942, 188 fn. 2) writes, "*The misuse of Article 48 of the Weimar Constitution authorizing the Government to enact ordinances was the way in which the democratic character of the Republic was destroyed in Germany and the entrée of the National Socialist régime prepared. It is noteworthy that the semi-fascist Austrian Constitution of 1934 was enacted by an ordinance of the Government.*" (Vdg. V. 24. April 1934, B.I, 239) Kelsen (1942, 192) further argues that when there is a lack of clear provisions in the Constitution, "all questions concerning the effect of an unconstitutional statute may be answered in contradictory ways". In Austria, the uncertainty indeed was one of the reasons to centralize the judicial review of legislation. Kelsen (ibid.) understood the political nature of the constitutional court elected by the parliament.

Kelsen (1930-31, 579) also criticized the Weimar Constitution and its Art. 48 by saying that Art. 48 undermines the Constitution and had this been understood, the further constitutional guarantees would have not been neglected:

> In der politischen Situation, in die die demokratisch-parlamentarische Verfassung des Deutschen Reiches – zwangsläufig – geraten ist, zu einem Zeitpunkt, in dem sich diese Verfassung – zu ihrem Schutz, wie ihre Freunde hoffen – sozusagen in einen einzigen ihrer Artikel, den Art. 48, und damit in einen Rechtsraum zurückgezogen hat, der offenbar zu eng ist, als dass er durch dieses Manöver nicht in die Gefahr kommen müsste, gesprengt zu werden, bei einer solchen Lage der Dinge wäre es gewiss zu verstehen, wenn die Diskussion über die Frage der Verfassungsgarantien bis auf weiteres aussetzen würde.

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53 For other emergency decree cases decided by the Court, see Caldwell 1997.

For Kelsen the political function of the Constitution was to impose judicial restrictions on the executive powers. By constitutional guarantee (*Verfassungsgarantie*), Kelsen refers to the means for ensuring that these judicial restrictions are not exceeded (Kelsen 1930-31, 577). This argument clearly illustrates Kelsen's contrast to Schmitt's idea of the sovereign who must not be restricted. Kelsen disputes the need for a sovereign. He decentralizes the idea of the sovereign in a way that locates the sovereign in different levels in different contexts.

Article 48 of the Weimar Constitution clearly illustrates some of the difficulties in providing for constitutional emergency powers. It seems that effective restrictions were written in the Constitution. The problem, however, was that the Reichstag could not sustain its constitutional position, and there was no actual oversight for the use of emergency powers. Schmitt's interpretation of Art. 48 accentuates the vagueness of the wording that resulted in extensive interpretations in relation to presidential emergency powers. The problem of the vagueness was meant to be deferred until statutory law could be enacted that would have defined the particularities of Art. 48. As the 1932 case of *Prussia* v. *Reich* shows, the Court was not willing or able to decide whether it had the right to make a ruling on the constitutional powers of the president. The solution might have been different had there been a constitutional court like that in the 1920 Constitution of Austria. Of course, judicial review is always *ex post facto* and does not as such eliminate the possibility of extra-legal actions. The Constitution of the Weimar Republic, in Article 34, provided the possibility to establish a parliamentary commission that could have been used to review the presidential use of emergency powers.[54]

In short, what ought to be noticed is that Article 48 was a response to the domestic political instabilities. The bad reputation of article and the 1919 Weimar Constitution in retrospect seems partly the result of taking Article 48 out of context. The debates in the Weimar Republic's *Nationalversammlung*, especially those arguments that were put forward on behalf of greater presidential powers based on Art. 48, were a response to the political situation of time.

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54 Artikel 34 „Der Reichstag hat das Recht und auf Antrag von einem Fünftel seiner Mitglieder die Pflicht, Untersuchungsausschüsse einzusetzen. Diese Ausschüsse erheben in öffentlicher Verhandlung die Beweise, die sie oder die Antragsteller für erforderlich erachten. Die Öffentlichkeit kann vom Untersuchungsausschuss mit Zweidrittelmehrheit ausgeschlossen werden. Die Geschäftsordnung regelt das Verfahren des Ausschusses und bestimmt die Zahl seiner Mitglieder. Die Gerichte und Verwaltungsbehörden sind verpflichtet, dem Ersuchen dieser Ausschüsse um Beweiserhebungen Folge zu leisten; die Akten der Behörden sind ihnen auf Verlangen vorzulegen. Auf die Erhebungen der Ausschüsse und der von ihnen ersuchten Behörden finden die Vorschriften der Strafprozessordnung sinngemäße Anwendung, doch bleibt das Brief-, Post-, Telegraphen- und Fernsprechgeheimnis unberührt." (Weimarer Reichsverfassung 1919)

3 FROM UNILATERALISM TO COLLECTIVE JUDGMENT – DEBATING THE WAR POWERS

In the aftermath of the Vietnam War, the Watergate scandal and the US bombing campaigns in Laos and Cambodia, the members of Congress felt that they had been bypassed in foreign policy. The trend of growing presidential powers since President Franklin D. Roosevelt's time has been particularly acknowledged.[55] In the 1970s Congress began to demand the restoration of the constitutional balance of powers; they did so by enacting new statutory laws in order to spell out in detail the war and emergency powers of Congress and of the president. In the following chapters, two of those cases will be discussed more closely, namely the *War Powers Resolution* of 1973 and the *National Emergencies Act* of 1976.[56] Chapter 3 focuses on the debates on the War Powers Resolution in the early 1970s. The National Emergencies Act will be discussed in Chapter 4.

As discussed in Chapter 1, the momentum, or utilizing an occasion as an opportunity to take action, are matters that must explained and therefore an agent cannot use just any occasion. According to Palonen (2006, 246) "*The point is not to identify some situations as extraordinary for acting, but to interpret acting politically in terms of the utilization of occasions in general*." I have taken this as my point of departure in analyzing the war powers debates of the US Congress. Chapter 3 concentrates its analysis not only on how the political occasion used

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55 Davidson et al. (2012, 463–464), for instance, write, "A fundamental change has occurred in the division of war powers between Congress and the president. The change occurred in 1950 when President Truman took the nation to war against Korea without seeking a declaration of war or any formal congressional authorization. Instead he received war-making authority form the Security Council of the United Nations."

56 The emergency and war powers are separate issues, but the WPR and NEA bills are to some extent analogous. During the House debate on the NEA, Representative Drinan illustrated the bill's similarities: "[I]t seems to me that the problem of declaring a national emergency is very analogous to what this Congress did in the War Powers Resolution Act of 1973. In the act, as is well known, Congress reviewed the Presidential powers and the Congressional powers and brought about a relatively happy marriage of those two powers." (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 257)

by Congress to restore its constitutional powers is expressed in the debates, but also on the concepts used in the debates.

The collective judgment concept in the title of this chapter should be briefly explained. By no means does it refer to parliamentary judgments as such. Even if a decision of Congress were unanimous, this is not necessarily the same as collective judgment. However, members of Congress did use the term in the debates around war-making powers. The concept is used here as it was in Congress to refer to the role of Congress as an equal partner with the president. Therefore, it refers to rhetorical strategy rather than a disinterested description of the decision-making process.

The main emphasis in Chapter 3 will be on the historic opportunity that Congress had to restore its constitutional powers vis-à-vis the president. The substance of the bill is dealt with in detail in section 3.1. The actual controversies surrounding the WPR bill that can be distinguished in the congressional debates are considered in section 3.2. and in section 3.3. In sections 3.4 and 3.5, the ways the differences were settled between the Senate and House bill is analyzed as well as the arguments related to the debates on overriding the presidential veto. Section 3.6 deals with the question of whether the War Powers Resolution made any difference or not. Finally, the concepts and arguments used in the debates are analyzed in more detail in section 3.7.

3.1 The War Powers Resolution of 1973

The War Powers Resolution was a major effort by Congress to reassert its constitutional powers in war-making. The unpopular Vietnam War and the bombings in Cambodia and Laos without specific congressional authorization other than the Gulf of Tonkin Resolution of 1964 raised many questions in regard to the powers of the president in times of war and crisis. Members of Congress considered that the concentration of powers in the hands of the executive threatened the constitutional separation of powers.

Three years of debates and several war powers bills later, Congress managed by a small margin to get the bill passed over President Nixon's veto. Passing the bill was a bipartisan effort of the Congress that did not follow any strict party lines. The division of government between the Democratically controlled Congress and the Republican presidency is noticeable, however. (For more on the power divisions in Congress in the early 1970s, see Table 1, p. 219.)

In regard to the substance of the WPR bill, the House version was preferred in the conference committee, which is the body that negotiates between the houses. It seems that it was more important for the Senate to get the bill passed than for the House if we turn our attention to the conference committee and the final outcome of the bill. This is particularly interesting because it is usually acknowledged that Senators can afford to be more critical than House Representatives in regard to their relationship with the president.

The War Powers Resolution has never been repealed despite later scholarly commentaries that have often referred to the "failure" of the bill (e.g. Fisher & Adler 2008) and the proposals that have been introduced time after time in the Congress to amend the bill. (On the proposed amendments, see the National War Power Commission report, appendix one, 2008.)

The Vietnam War was an impetus for members of Congress to draft the War Powers Resolution. The Committee on Foreign Affairs' report, written to accompany the House bill on war powers, illustrates the context:

> The Cambodian incursion of May 1970 provided the initial impetus for a number of bills and resolutions on the war powers. Many members of Congress, including those supported the action, were disturbed by the lack of prior consultation with Congress and the near crisis in relations between the executive and legislative branches which the incident occasioned. (H.Rept. 93-287, 3-4),

The bill originated from the fact that war-making had become the sole prerogative of the executive branch. Many times Congress has, however, authorized the president to use the armed forces, with resolutions such as *the Formosa Resolution of 1955, the Middle East Resolution of 1955, the Middle East Resolution of 1957, and the Gulf of Tonkin Resolution of 1964*. The Authorization for the Use of Military Force against those held responsible for the September 11, 2001 terrorist attacks is a more recent example, which will be discussed more fully in Chapter 5.

The Senate Committee on Foreign Relations' report published in 1973 (93-220, 4) to accompany S.440 on war powers described the legislative history of the bill as follows: "*The immediate legislative history of the war powers bill can be dated to the controversial Gulf of Tonkin Resolution of 1964 and the subsequent conduct of hostilities in Vietnam, Laos, and Cambodia without valid Congressional authorization.*"[57] Several legislative measures were introduced both in the Senate and in the House of Representatives before the actual enactment of the War Powers Resolution in 1973.[58] For instance, Representative John M. Ashbrook (R-OH) introduced in 1968 a constitutional amendment "to limit the power of a President to dispatch troops and wage war" (War Powers Resolution – Veto, November 7, 1973, 36219).[59] In 1969 the Senate also enacted the *National Commitments Resolution*, which idea was to secure that "*national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government*" (S.Rept. 93-220, 4).

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57 Appendix 3 includes further details.

58 According to Spong (1975, 823) numerous war powers motions were introduced in the Congress, following enactment of the Senate's National Commitments Resolution and the reappearance of proposals for establishment of "a new joint congressional committee for consultation with the President regarding emergency military undertakings".

59 Again in May 1973, Representative Ashbrook proposed the Bricker amendment to restore the proper role of Congress in foreign affairs. (War Powers Resolution – Veto, November 7, 1973, 36219)

According to the Senate Foreign Relations committee report of the war powers legislation, passage of the bill was essential in order to restore the constitutional powers in war-making: "*The transfer from Congress to the executive of the actual power – as distinguished from the constitutional authority – to initiate war has been one of the most remarkable developments in the constitutional history of the United States. For this change Congress as well as the Executive bears a heavy burden of responsibility*." (S.Rept. 93-220, 14.) The fact that several bills were introduced related to the topic and that WPR was enacted in 1973 despite a presidential veto (thus requiring a two-thirds vote in each house) clearly shows that the matter was one of the highest priorities in the legislative agenda of Congress in the early 1970s.

The timing and the political context of the time seemed to be crucial factors in the struggle to get the WPR bill passed in the Congress. Palonen (2008, 28) writes that central to the concept of momentum is the assessment of the degree and quality of contingency in the circumstances. As examined in the current thesis, momentum refers especially to the idea of the turning point. It does not refer only to substituting any "one line of action" for other, but rather the reassertion of a previously existing one, here seen as involving, "the original intent and the spirit" of the constitutional framework.

The members of Congress have a split opinion as to whether the political context of the time was right for restoring the powers of Congress. For the opponents, the period after the Vietnam War was not the right time (see, for example, Jack Kemp's (R-NY) argument below); the opponents worried that acting in the "heat of the moment" would have the wrong impact in the long run. The proponents of the bill, however, thought the moment was indeed the right time. Senator Bob Dole (R-KS) described the situation as follows: "*This is a unique moment in our history, and it is an appropriate interval for Congress to assert its authority in a proper, constructive and worthwhile manner*" (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33566). The question was whether the need and opportunity to restore the constitutional balance of powers was connected only to the Vietnam War and the current political situation or to a broader idea about restoring the powers of Congress and the constitutional framework.

During the debate on the Conference Report, Senator Javits emphasized the connection of the appropriate timing for passage of the bill to the political climate of the moment as follows: "[*T*]*he time when you prove something is in a moment of crisis precisely like this. So, it is timely – not untimely, that we bring this conference report before Congress*." (War Powers Resolution of 1973 – Conference Report, October 10, 1973, 33549.)[60] Opposing the view of Javits, Representative Kemp criticized in the House context in which the WPR bill was being considered:

> It [the WPR bill] has come to the floor at the conclusion of an unpopular military conflict in Southeast Asia, an engagement strongly opposed by a large number who now

[60] For more detail about the legislative process and key figures related to the WPR bill, see Appendices 3 & 5.

> support this resolution. It has come to the floor in the midst of a confrontation between the Congress and the President on certain constitutional prerogatives and powers. It has come to the floor when the President is of one political party and general philosophical disposition and the Congress of another party and disposition. (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33867)

Kemp seems to think that the War Powers Resolution was mainly supported because of the Vietnam War. His argument seeks to undermine the importance of the resolution by claiming that the timing of the bill is inappropriate due to the disagreement between Congress and the president on constitutional powers. Interestingly, Kemp also suggested that, in a situation of divided government, Congress should not undertake to make significant decisions. During the same debate, Peter Frelinghuysen Jr. (R-NJ) also questioned the timing of the bill, saying that recent events in the Middle East challenged the wisdom of imposing restrictions on the war-making authority of the executive (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33868).

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The controversies around the WPR bill that are analyzed here can be divided roughly into three categories: the executive-legislative relationship in the field of war powers; the use of concurrent resolution; and congressional decision-making through inaction (i.e. automatically, due to an expiration time on the authorization). In addition, the Senate and the House had different views on the mechanisms of the bill, the period of time in which the president is allowed to act without congressional consent, and how specific the language of the bill should be. These disagreements between the bill versions were finally settled in the conference committee.

During the debate on the Conference Report, Representative Clarence E. Miller (R-OH) broke down the WPR bill debates to four questions: "*What independent authority does the President have to commit forces to foreign hostilities? Can Congress place restrictions on a President's conduct of constitutionally authorized conflicts or terminate them? When congressional authorization of a commitment of forces is required, what form should it take? What authority does Congress have to define the limits of the President's power as Commander in Chief?*" (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33873.) The issue to be mentioned here is also: To what extent does the original language of the Constitution provide justification for the restoration the congressional powers? For example, when viewed in the light of the historical precedents, what does it mean - if anything – to say that "Congress shall have Power … to declare war"?

The war powers are often considered as a "twilight zone" area of the Constitution in terms of the separation between the executive and the legislative branches of government. Representative Don H. Clausen (R-CA) indeed described the problem as a gray area that both of these branches of government have failed to define in detail:

> Ever since the "police action" in Korea and more recently the "conflict" in Vietnam and throughout Indochina, the people of this country have been concerned about the question of legality of our commitments. I have described it as a "gray area" of authority that has never been properly evaluated, considered or addressed by the Congress and the executive branches of our Government. Both the Congress and the executive administrations of the past 23 years have, in my judgment, been derelict in not resolving this problem associated with the "gray area" of legal authority as expressed above. (Warmaking powers of the Congress and the President (H.J.Res.542), July 18, 1973, 24658)

Clausen's argument gives the impression that these branches of government are both included in war-making. If we turn to the Constitution, the affirmative role of the Congress in war-making seems obvious. The right of the Congress to declare war was briefly discussed in the Constitutional Convention. The original proposal submitted by the Committee of Detail gave the Congress authority "to make war". The wording was, however, changed to "to declare war" by a motion introduced by James Madison and Elbridge Gerry. During the Fulbright Hearings of the WPR bill, Secretary of State William P. Rogers argued,

> [T]he "change in wording" from "make" to "declare" "was not intended to detract from Congress' role in decisions to engage the country in war. Rather it was a recognition of the need to preserve in the President an emergency power – as Madison explained it – 'to repel sudden attacks' and also avoid the confusion of 'making' war with 'conducting' war, which is the prerogative of the President" as commander in chief. (Quoted in War Powers hearings before the subcommittee on National Security Policy and Scientific Developments, House of Representatives 1973, 212)

The change of wording was necessary because the Founding Fathers wanted to preserve the emergency powers of the president to repel sudden attacks. The scope and interpretation of the war powers have changed in the course of United States history. Secretary of State Rogers (1971, 1194) noted that considerable attention had been paid to the issue of war powers. But he also referred to the polemical approach often taken to the topic, where one side typically calls for a restoration of congressional authority and the other side for the president's constitutional authority as Commander-in-Chief.[61] Rogers (ibid.) stressed that these powers are not, however, necessarily incompatible: "[C]*ooperation and consultation between the executive and legislative branches is the heart of the political process as conceived by the framers of the Constitution. In the absence of such cooperation, no legislation which seeks to define constitutional powers more rigidly can be effective*." Rogers' argument tackles the fundamental question in all of the debates of WPR. Because the Constitution already provides a framework for war powers and an expectation of cooperation, Congress has no "legitimate" reason or need to create a new statutory framework for war-making.

Many witnesses whose statements were received during the war powers legislative hearings of the 91st, 92nd, and 93rd Congresses implied that, in modern times, the constitutional balance of powers on war powers had tipped

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61 In 1792 Congress passed a statute that the president must have a "judicial validation" before introducing armed forces to end an internal uprising. According to Fisher (2011, 70) the measure was repealed three years later, but it showed that Congress has constitutional authority to impose conditions on the use of troops.

in favor of the president. In order to restore the balance Congress had to affirm its constitutional rights and authorities. (See H.Rept. 93-287 by Committee on Foreign Affairs to accompany H.J.Res.542.)[62] The War Powers Resolution was not unique insofar as the matter had been on the agenda of Congress before. For instance, in 1941 Congressmen Louis Ludlow (D-IN) proposed the Ludlow amendment, which intention was to keep the United States out of World War II by proposing that a national referendum must be held any deployment of the armed forces (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21217).

The failure of Congress to enact war powers legislation in the past was used to oppose the WPR bill. For instance, during the Senate debate on S.440, Senator Peter H. Dominick (R-CO) argued that the reason Congress had not been able to pass war powers legislation previously was because the issue includes several problematic constitutional questions:

> There are countless historical precedents in the attempt of Congress to put statutory limits on and codify the President's powers to deploy American forces. However, each case in the past was so rampant with variables, constitutional question marks and "what if's" that passage of specific guidelines became virtually impossible, and statutory limitations of this nature have never materialized. (War Powers Act, July 18, 1973, 24591)

For proponents of the WPR bill, enactment of it would be a benefit for Congress. The Senate Foreign Relations Committee Report to accompany the Senate bill of war powers (S.440), for instance, argued that the "necessary and proper" clause of the Constitution authorizes Congress not only to execute its own constitutional war powers, but also when necessary, to codify and define explicitly the powers of the government altogether (S.Rept. 93-220, 13-14).

War-making powers have been a central issue for the president, not only because of various political circumstances, but also because of institutional changes. *The National Security Act of 1947* concentrated the power to decide on military issues in the executive branch of the government. The law placed "*decisions regarding warmaking, intelligence, covert operations, military sales and military aid*" under the regulation of the national security "system" located in the executive branch. (For details, see Koh 1988, 1280-1281.)

Because the bill was considered important, some members of Congress indeed criticized the timing as well as the quality of the debate. Representative William Mailliard (R-CA), for example, criticized the House for debating the House Joint Resolution with only a few members on the floor (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21212). During the same debate Representative David Dennis (R-IN) argued that the time for the debate was not the most appropriate.

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62 The Supreme Court in the Prize Cases (1862) implied that power to initiate war belongs solely to Congress: "By the Constitution, Congress alone has the power to declare a national or foreign war […] The Constitution confers on the President the whole Executive power […] He is Commander-in-Chief of the Army and Navy of the United States […] He has no power to initiate or declare a war either against a foreign nation or a domestic state." (Quoted in S.Rept. 93-220, 11)

Dennis did not, however, refer to the political context: "*Madam Chairman, we are debating here this evening probably the most fateful and important matter that either this Congress or any other Congress is likely to debate. The fact that we are forced to do it at 9 o´clock in the evening and to largely empty benches is not merely unfortunate, it is outrageous*." (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21229.)

Earlier in the debate Representative Frelinghuysen also claimed that many of the members were taking the debate "too casually". Frelinghuysen continued that even though there were relatively few congressmen on the floor, he hoped the House could have "*a discussion, pro and con, of some of the unwise provisions of this bill before the debate concludes*" (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21215). The lack of members on the floor seemed to Frelinghuysen to be secondary issue compared to the quality of the debate.

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It is essential to introduce the content of the WPR bill in order to understand the nature and the controversiality of the debates and to recognize how the bill developed over time. It starts by stating that the aim of the legislation is to "fulfill the intent of the framers of the United States Constitution" and to make sure that the decision-making process concerning the introduction of US armed forces into war includes both Congress and the president. The bill also reasserts the constitutional power of the Congress to make the necessary laws. The purpose of the bill is described as being to ensure that the constitutional Commander-in-Chief powers of the president to introduce US armed forces into hostilities can be 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". (P.L.93-148.)[63]

A significant part of the bill concerns the consultation provision, which requires the president "in every possible instance … [to] consult Congress before introducing United States Armed Forces into hostilities." The bill also requires that, in the absence of a declaration of war, the president must report to Congress within 48 hours after any introduction of the armed forces into hostilities. The president is obliged to terminate the authorization for war within 60 days of submitting the report unless Congress has declared war or provided some other specific authorization, has extended the 60-day period by law or is physically unable to meet to make a decision. The 60-day period can be continued for an additional 30-days if there is an "unavoidable military necessity." When the armed forces are introduced into hostilities without a declaration of war or other statutory authorization, the president shall terminate the use of the armed forces if Congress so directs by concurrent resolution. At the end of the bill, re-

63 For the text of the bill P.L.93-148 (USC 50, Chapter 33 §141-1548) see, http://www.law.cornell.edu/uscode/text/50/chapter-33. More detail on War Powers Resolution, see Library of Congress' overview at: http://www.loc.gov/law/help/war-powers.php

assurances are given that nothing in the bill is intended to change the constitutional powers of the president or should be construed creating more authority for the president. (P.L.93-148; for more detailed analysis of the sections of the bill, see e.g. Spong 1975)

3.2 Presidentialists vs. congressionalists

The war power debates are a large complex that can be viewed from several standpoints. Phelps & Boylan (2002) have distinguished four patterns of constitutional discourse present in the WPR debates, while acknowledging that the positions also include significant variants. The biggest group of opponents to WPR Phelps & Boylan (2002, 647) describe as ”presidentialists”. The presidentialists were mainly Republicans as well as some Democrats opposed to making any changes to the prevailing constitutional practice by the enactment of statutory law. Phelps & Boylan (2002, 648) define Senator Barry Goldwater (R-AZ) as typical presidentialist. To the presidentialists' minds, the balance of powers in war-making has shifted to benefit the powers of the president, while the powers of Congress have been reduced. They do not seem to disagree with the idea that the Founding Fathers intended the Congress to have in war-making powers. But according to the presidentialists the shift was an unavoidable result of the political context and Congress should not try to change that by enacting new legislation. While it may have been better to have had more cooperation between the branches of government over the years, the executive's prerogative in war-making has become historical practice and therefore it should not be simply dismissed.

For the presidentialists, the functionality of the executive-legislative relationship seemed to be secondary to security issues. They also claimed that Congress already had all the powers play a certain role in defense politics. Phelps & Boylan (2002, 648) characterize the argument of the presidentialists as being that Congress lacked the will to act, rather than the powers to act. No legislation or constitutional amendment could change deficiency of that kind. For the presidentialists, the WPR is an infringement on the constitutional powers of the president as Commander-in-Chief.

Contrary to the presidentialists, a group consisting mainly of liberal Democrats, termed “congressionalists” by Phelps & Boylan (2002, 648), opposed the bill because they had a deep distrust of the presidency. The congressionalists' aim was to restore the status of the Congress “as the first branch”. Phelps & Boylan (ibid.) put Representative Bella Abzug (D-NY) in this category. For congressionalists, the Constitution provides Congress alone with the power to make war.[64] The WPR is unconstitutional because it granted powers to the pres-

[64] For Abzug's argument, see e.g. War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24697. In addition, Representatives Drinan and Holtzman considered that the bill could be construed as enlarging the powers of the president. All three Representatives voted against the bill (H.J.Res.542) on July 18, 1973, (24707),

ident to initiate war. According to the congressionalists, the president's powers under the Commander-in-Chief clause are subject to the will of the people, and therefore to the will of Congress. Therefore, the president should consult with the Congress before initiating any use of force outside the "limits of self-defense". (This was something that the WPR did not absolutely require.) Finally, the WPR resolution was questionable for the congressionalists because it authorized powers for the president to carry on military actions for as long as 60 days. According to congressionalists, that power had never before be legitimatized, but was a new power given to the president by the WPR.

Phelps & Boylan write (2002, 649) that the proponents of the bill were not very united, even though "they shared some constitutional language." Phelps & Boylan (ibid.) distinguish two categories of proponents of the bill: the legalists and the realists. For the legalists, the WPR would change and therefore reassert the constitutional framework. The legalists argued that the WPR would set up a framework wherein Congress and the president would be "equal partners in the formulation of military policy." The realists were more skeptical. While they supported the bill, they also felt that the president would continue to dominate military issues even after the WPR bill. The realists thought that the WPR legislation would likely change only a technical issue about how the Congress acts in war-making. (Phelps & Boylan 2002, 649-650.)

Even though the categorization of what Phelps and Boylan (2002) have provided helps to understand the constitutional controversies of the debates, I have chosen a different approach. Rather than grouping the arguments and the members of the Congress under these categories, I find it more analytically useful to approach the debates from a thematic point of view. In the analysis, I have divided the constitutional and other controversies of the WPR bill into different sections in order to distinguish the arguments of the members of Congress and to connect them to different stages of the legislative process. This approach allows the different content of the bill between the Senate and the House versions to be examined and taken into account, and thus the differences in argumentation to be analyzed as well. The thematic viewpoint also enables me to illustrate why, for example, a proponent of the WPR bill such as Senator Thomas Eagleton (D-MO) chose in the end to vote against the conference bill and to sustain President Nixon's veto. To my mind the categorization of "clusters of constitutional arguments" introduced by Phelps and Boylan (2002) indicates a too simplistic view of the debates.

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but voted to override President Nixon's veto on November 7, 1973. (Congressional Record Nov. 7, 1973, 36221-36222)

3.3 Controversies over the War Powers Resolution in the US Congress debates

3.3.1 "The historic opportunity"

Enacting the WPR bill was considered an "historic opportunity for the Congress." During the discussions it was several times emphasized that Congress must take immediate action: "*A vote for this resolution is a vote for specific congressional action now. The time to act affirmatively is now on this resolution*." (Representative Dante Fascell, D-FL, Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21227.) The political occasion had to be seized in order to restore the powers of the Congress in war-making.

The political context of the time appears regularly in the WPR bill debates. Representative Clement Zablocki (D-WI), for instance, remarked during the discussion on the WPR bill that it was needed to remedy the imbalance of powers: "[*T*]*he resolution* […] *gives this Congress a historic opportunity to correct the imbalance in warmaking powers, which through the practice of recent years have swung too heavily to the President*" (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21209). During the same discussion Representative Robert Tiernan (D-RI) continued, "*If we are to "preserve, protect, and defend the Constitution of the United States," we must act now. Too many times the Congress has shirked its duty and abandoned its authority to declare war through inaction or by underwriting the illegal actions of a President by enacting resolutions which give him a carte blanch in the area of military operations overseas*." (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21233.) Tiernan felt that Congress should now make a break with the historical precedents related to war-making.

Rostow (1986, 38) writes that the trend to the benefit of the executive in foreign policy matters appeared not only because the Congress has been unwilling to act or because the president had dominated the agenda of foreign policy, but because of the changes in world politics. Rostow (ibid. 39) claims that due to the changed role of the US in the world politics, there emerged debates regarding how this change related to the US political system and how foreign policy should be reorganized. Rostow (ibid.), however, also points out that the political context within the US also has a decisive role: "*The bitter and prolonged war in South East Asia dragged on, to the accompaniment of anti-war rioting and disorder of a kind the nation had not experienced since the Draft Riots of the Civil War Period and the troubles of Reconstruction*." The unpopularity of the Vietnam War among the public pressured Congress to act more as a representative of the people.

As discussed above, the events of the Vietnam War were used both to defend and to oppose the war powers legislation. "*The Congress has not been permitted to play the role in these hostilities which the Constitution mandates. Consequently, we must have more concrete guidelines for both the President and the Congress, if we*

are to avoid repetition of past mistakes", stated Representative Lawrence H. Fountain (D-NC) in the debate of the house version of the bill. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21214.) Representative Barry Goldwater Jr. (R-CA) argued the opposite, saying that the experience of Vietnam should not result in enactment of the bill, "*Madam Chairman everyone of us is dismayed over what has happened in Southeast Asia for the past 9 years, but we must not let this experience, no matter how distasteful, lead us into precipitous action that we may later regret*" (War Powers of Congress and the President (H.J.Res.542) July 18, 1973, 24691). Whereas, the Vietnam War served as an impetus for drafting the WPR bill, the experience of the war was seen as providing a political environment in which significant questions such as war and peace should not be decided.

Representative Samuel Stratton (D-NY) accused Congress of trying to repeal the Vietnam War by enacting WPR (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21216). In opposition to Stratton, Representative Pierre du Pont, IV (R-DE), emphasized that the need for the bill could not be tied solely to the war in Vietnam:

> The need for this legislation does not simply arise out of the tragic involvement in Southeast Asia. I think the war in Vietnam represents the culmination of a historical decline in the assertion of congressional prerogatives in warmaking authority. In the early days of the Republic, the executive and the Congress worked in close cooperation with one another, often resulting in the President deferring to the opposition, to an active Congress. By World War II, in Korea, the Dominican Republic and Southeast Asia, the warmaking powers had shifted completely from the Congress to the Executive after the fact. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21222)

For du Pont the Vietnam War was not the only historical precedent, but rather the powers of Congress has been undermined in war-making since the Second World War. Du Pont (ibid. 21223) further emphasized that his colleagues should "*read this bill in the context of the checks and balances embodied in the Constitution*". The Representative (ibid.) referred to the debates on the drafting of the Constitution, noting that the power to initiate the war was given to Congress for the sake of "*avoiding the pattern of broad authority enjoyed by the monarch of that period*." Du Pont (ibid.), however, also mentioned that the records of these debates are not comprehensive, thus allowing different possible interpretations of the intentions of the Founding Fathers.

In arguing for a restoration of the constitutional powers, Congress relied on the original language of the Constitution that "The Congress shall have power … to declare war". During the House debate on H.J.Res.542, Representative Ralph Regula (R-OH) straightforwardly implied the need for a statutory framework for war-making: "*A war powers bill has been necessitated by the growth of powers claimed as inherent in the Executive under article II, section 2, of the Constitution. Congress, by its inaction, can take a good share of the blame for that.*" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24672.) During the Conference Report debate Senator Edmund Muskie (D-ME) noticed that, indeed, the WPR would be unnecessary if the president and Congress had fol-

lowed the constitutional separation of powers in war-making from the beginning (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33551-33552).

If Congress had neglected its oversight duties in the past, it was not keen to ensure that it would perform these duties in the future. The historic opportunity argument was used to encourage Congress to make a U-turn in the executive-legislative relationship related to war powers. Senator Eagleton, however, predicted in the Senate that the bill would not result in "an era of congressional predominance". In the Senator's opinion, the role of the Congress, despite the increasing public support, was still weak, because it had failed to rectify the institutional deficiencies that restrained Congress in its attempt to exercise its constitutional prerogatives. (War Powers Act, July 18, 1973, 24543.) Eagleton (ibid.) also illustrated the problematic legislative process of the bill: "*Even today, at a time when Congress enjoys some small increased measure of public support, we must fight desperately for the legislative majorities we require to take positive action.*" The difficulty in finding a majority relates to the question of avoiding standpoints. Despite the slight increase in the public support, the Senator seems to indicate that the difficulties of finding a congressional majority were due to increased partisanship or to the congressional failure to proceed in general with any matters contrary to the president's will.

The opponents of the bill disagreed with the purpose of the bill and questioned if the legislation was even necessary. Representative Frelinghuysen opposed House bill (H.J.Res.542) very strongly by saying, "*I do not think it is effective. I do not think it is fair. I do not think it is equitable. Above all I do not think it is workable. I do not think it is sensitive to the President's constitutional war powers*." (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President June 25, 1973, 21214.) Frelinghuysen further commented that he did not understand the purpose of the bill or what the Congress was trying to achieve by enacting it:

> And I doubt very much, though, I wish it were the case, that the gentleman from Wisconsin is correct in saying that declared war is something for the pages of history. Time alone will tell, but I assume if we are to prove anything by this exercise, it is to remind us that we have the inescapable obligation of declaring war if circumstances so indicate. So why is there now need to reassert this particular power of declaring war? And just what are the other powers which must be reasserted to restore balance? And why must these unspecified powers be reasserted at this particular time? (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21214)

Frelinghuysen seems to question whether the original reading of the Constitution is politically wise or not. In the above argument, Frelinghuysen shares a sort of Schmittian insight that certain situations are just so unambiguous that there is nothing really to debate on. The real issue is whether these situations are "picked out" or not. Since Congress can always find things to debate, would it not be better to quietly agree that the president is more capable of dealing with issues such as war?

In opposition to the views of many in Congress, Representative Kemp argued that Congress does have the power to control war-making, and in the last years it had started to use that power. Kemp noted, for instance, that Congress can cut off the funding, as it did for the US bombing of Cambodia. Kemp also argued that Congress does not have to approve the choices of the president for military officers or ambassadors. Further, Congress can "*investigate, filibuster, and delay legislation to force the President to do what we want.*" In addition, the American people have the right to hold the president and the majority party accountable of their actions at the end of the electoral mandate. (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33866.)

During the House debate on H.J.Res.542, Representative Frelinghuysen also noted that Congress could rely on measures other than statutory law in order to secure the congressional role in war-making:

> We have approved on several occasions a variety of resolutions, not only with respect to the Tonkin gulf but with respect to the Mideast and with respect to Quemoy and Matsu, to mention just three. I feel in many cases such resolutions, if offered in the future, may be more specific than they have been in the past. But we have had the capacity, and we have faced up to our responsibilities in the past. I believe our reaction in the future should be dependent upon what the nature of the future crisis is rather than try to write legislation which will cover all future situations. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24663)

Congress has not lacked the tools but the willingness to act. Frelinghuysen refers to the difficulty to respond to any future exigency through a statutory law. Following the historical precedents, Congress should respond to crises when they occur. Frelinghuysen, however, also admits that future resolutions granting authority should be more specific. In opposition, Senator Eagleton, stated that in order to restore its constitutional prerogatives, Congress should rely primarily on its "ultimate" power, that is, the power to legislate (War Powers Act 19873, July 18, 24543). In the Senator's view it was not only the executive that was to blame, but also Congress for acting too hastily when granting war powers to the president, for instance, in the case of Tonkin Gulf resolution.[65]

Congress has not been completely conscious of its own constitutional prerogatives: "*The recent decision to grant the President authority to bomb in Cambodia until August 15 demonstrated that, despite the rhetoric, some in Congress still believe that the President has the primary role in the decisions to go to war. But Congress has an exclusive responsibility to authorize war – a responsibility that should never be subjected to compromise*." (War Powers Act, July 18, 1973, 24543.) Senator Eagleton's argument indicates that the rhetoric and the practice of war-making do not necessarily coincide in Congress. The Senator's reference to the example of the president's authority to bomb Cambodia indicated that, to many members of Congress, the president still had the decisive role in war-making. He reminds his colleagues that Congress' power in war-making is the power to authorize war, and that this authority should not be compromised. When the Senator de-

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65 Congress managed to repeal the Tonkin Gulf Resolution on January 12, 1971.

cided to vote against the Conference Report, the reason seemed to be that the WPR, in his view, compromised the right of Congress to authorize war.

Other fundamental questions concerning the bill related to the degree of partisanship and the role of President Nixon. The aim of the bill was to reassess the constitutional powers of the Congress. But as the members of the Congress supporting the bill insisted several times, it was not against President Nixon in particular (this is discussed more fully in the chapter). Regarding this, Representative Howard W. Robison (R-NY) put forward the following argument: "*It must be emphasized, however, that these provisions are intended to right the checks and balances between the two branches of government, and not to reverse the dominance of one branch over the other*" (War Power of Congress and the President (H.J.Res.542), July 18, 1973, 24687). The bill was considered a return to the constitutional framework in war-making.

3.3.2 Constitutional questions raised

The present political situation was characterized as a constitutional crisis in the WPR debates: "*The issue before us today rests at the heart of the constitutional crisis facing the United States today. For years, the Congress of the United States has, in essence, abdicated its powers to the executive and judicial branches of government. A long and sad history of this abdication through the years is very obvious and, in such areas as Vietnam and school busing, tragic*." Therefore, according to Stewart McKinney (R-CT) Congress had to act immediately or else stop talking seriously about responsibility, equality and the separation of powers. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24683.)

The constitutional setting was often referred to by Congress in order to legitimate its efforts to reassert its war-making powers. The arguments and opinions of the Founding Fathers who framed the Constitution were brought into the discussions as an exercise to clarify their intentions regarding the division of war powers. The historical precedents were, however, also used to question the role of Congress in war-making. According to Representative Kemp there had been altogether 201 foreign hostilities in United States history, but only five of them were declared wars.[66] More importantly, Congress had never tried by law to prevent or to terminate any of the 196 actions executed through the president's authority. (See the House debate on the Conference Report on H.J.Res.542, October 12, 1973, 33864.) Senator Goldwater also distinguished at least 24 instances both before and after the Tonkin Gulf Resolution when Congress had supported the use of the armed forces in Vietnam (Emerson 1971, 85).

The drafters of the WPR bill had to take into account the constitutional right of the president to deal with sudden emergency situations. Representative

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66 England 1812, Mexico 1846, Spain 1898, First World War (1914), Second World War (1941). In all five, the president sought a declaration from Congress. The Congress has also refused to declare war, for instance, with Madison in 1815 (the Second Barbary War) when Congress granted a limited naval action instead of a declaration of war. (See Dean 2002; S.HRG.107-892, 27.) The list of hostilities through the 1970s is included in Emerson 1971.

Tiernan noted in the House that while the president has the constitutional duty to defend the US, there should be a difference between defensive and offensive attacks:

> As written, House Joint Resolution 452 would allow the President to preserve the security of the United States in case of a national emergency. I agree that the President must have the power to defend the United States in case of an attack. But I believe that no single man should have the power to commit our lives and resources to the future Vietnams of the world. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21233)

It was not possible to change the Constitution or the constitutional prerogatives of the president by enacting statutory law. Representative Herbert Burke (R-FL), for instance, opposed the House bill (H.J.Res.542) because he did not consider it wise "*to attempt to draw rigid lines between the President and the Congress in the area of warmaking.*" He also noted that the right mechanism to carry out the legislative action, if it was desirable in the first place, was by a constitutional amendment. Burke based his claim by an interpretation of the Constitution that leaves some room for flexibility and joint control for the execution of war powers. The Representative also argued that not only Congress, but also the president is subject to public opinion. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21235.)[67]

Similarly, during the House debate on war powers, Representative Goldwater argued that the president is subject to the public, the media, and the voters. Presidents can also be impeached, noted Goldwater. (War Powers of Congress and the president (H.J.Res.542), July 18, 1973, 24691.) Goldwater's suggestion was that if Congress wanted to reassert its powers, the focus should be turned to domestic issues rather than foreign policy issues. He continued that Congress, in reasserting its constitutional prerogatives, should not endanger US national security. For Goldwater, while Congress should play a role in foreign policy, it "must do it as a deliberative body". Though he did not specify his meaning further, he noted that Congress "should control the Executive within constitutional limits", thus suggesting that the WPR in its current form did not fulfill the requirement. (War Powers of Congress and the president (H.J.Res.542), July 18, 1973, 24692.)

It should be pointed out that despite the framework created in the Constitution for executive-legislative powers, there is room for considerable change. The relationship between the branches of government is not static, but always evolving. Political issues and events, personalities, public opinion and partisan circumstances all have an influence how the relationship is considered (Davidson et al. 2012, 310). There are, however, some constitutional principles that should not be bypassed, such as collective judgment in war-making. Senator

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67 Public opinion applies to both the executive and legislative branches of government. Secretary of State Rogers wrote in 1971 (1208-1209) that a critical element of presidential authority is ability to gain public support for national policy, and for this reason the president needs the cooperation of Congress. Rogers continues that the electorate is the "ultimate restraint" on the use of war powers, whether congressional or presidential.

Walter Huddleston (D-KY) thought the forthcoming WPR bill one way to ensure that decision-making related to the introduction of US armed forces into hostilities would be a joint effort between Congress and the president:

> Thus, the war powers legislation represents one method by which we can strengthen our democratic process – one means of bringing the collective judgment of the Congress and the executive branch to bear on the use of our Nation's Armed Forces outside our borders. It represents a means by which we may, hopefully have decisions resulting from deliberations by two heads in our Government rather than one and from additional input from those elected officials closest to the people. It represents a means by which we may seek to restore a constitutional balance, as well as a balance among the views, opinions, and options. (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33566)

In this regard, Senator Dominick remarked during the debate in the Senate that "*collective judgment, in my mind, is one thing, while collective decision-making in a hostile confrontation requiring rapid response is quite another*" (War Powers Act, July 18, 1973, 24591).

The question of constitutionalism was considered from several perspectives during the war powers debate. In the Senate, Javits (War Powers Act, July 18, 1973, 24537) defended Senate bill S.440 by referring to the constitutional crisis regarding war powers. According to Javits the prevailing question is "*What will the Congress – and the President – do about this crisis*?" The Senator continued by emphasizing that the principle of constitutional separation of powers should not be undermined in times of crisis: "*The deep wounds of the Vietnam experience inescapably remind us that the de facto concentration of plenipotentiary war powers in the hands of the President has subverted the letter and the spirit of the Constitution and has placed an almost intolerable strain on our national life.*" The Senate bill would restore the constitutional balance. The Senator also referred to the increase since WWII of arguments based on the inherent, Commander-in-Chief powers of the president. According to Javits (ibid.), the executive branch is not the only institution to blame for the imbalance of powers, but Congress had given away its powers. He went on to say that this has happened not only by enacting vague authorizations of power to the executive, as in the Tonkin Gulf Resolution, but also because Congress had neglected its constitutional duties to oversee the executive branch and hold it accountable. (War Powers Act, July 18, 1973, 24537.)

The other major concern for some of the members was the ambiguous language of the bill and therefore the possibility that the bill would actually grant new authority for the president. Representative Robert Drinan (D-MA) considered H.J.Res.542 as equivalent to "an unconstitutional delegation" of power to the executive (War Powers of Congress and the President 1973 (H.J.Res.542), July 18, 1973, 24704). According to Drinan the constitutional role of Congress is to declare war and that power cannot be delegated away:

> The only exception to this constitutional requirement has been carved out pursuant to the "sudden attack doctrine." This doctrine recognizes that the Executive can respond to an unannounced, belligerent attack or other grave emergency pending congressional authorization where the failure of the Executive to act unilaterally would

> paralyze the country. (War Powers of Congress and the President 1973 (H.J.Res.542), July 18, 1973, 24705)

During the House debate, it was considered whether the Committee measure should grant a 120-day period in which the president could act without seeking congressional approval. This, according to Representative John Buchanan Jr.'s (R-AL), conflicted with the section 8 of the bill, which stated the bill did not grant any new powers that the president did not have before (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24671). Representative James Howard (D-NJ), however, thought that the president should have some emergency powers, but that the president's capability to introduce armed forces into hostilities for 120-days meant something else than emergency powers: "*There is a 120-day time limit set up, and certainly in 120 days we are not engaging in an emergency situation; we are waging a war. I believe that the President's right to wage a war should be able to be declared illegal without the Congress doing anything at all, because he has no power to wage war. I believe that if we do force action on the Congress, then the Congress is giving something up to the Executive which the Executive should not have, so I am forced to oppose the gentleman's* [Whalen's] *amendment.*" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24688.).[68] The 120-day period was too long, Howard felt, to be compared to the emergency powers of the president to respond to sudden attacks; the question thus was whether the bill granted new authority to the president.

Depending on the speaker, the bill went either too far or not far enough in creating possibilities for Congress to check the executive's war powers. Representative Mailliard described the complexity of the language of the bill during the House debate concerning the president's veto as follows:

> I am also concerned over the apparent ambiguity of this legislation. The point has been made in the debate that this resolution would, in fact, give the President statutory authority – that he does not now have – to take the country to war for at least 60 days without congressional approval. If this is correct, then the legislation is a definite expansion of the President's warmaking authority. Yet, others have emphasized the restriction the resolution would place upon the President. Obviously, the legislation is inconsistent and ambiguous. Who knows what it really means? (War Powers Resolution – Veto, November 7, 1973, 36203)

In the course of the House debate on H.J.Res.542, Representative Abzug also warned that in the aftermath of Tonkin Gulf Resolution Congress should avoid enacting any legislation that could be read as enlarging presidential powers regarding war (War powers of Congress and the President (H.J.Res.542), July 18, 1973, 24697).

The correct interpretation of the Constitution was clearly a disputed topic during the WPR debates. The following topics can be distinguished in the WPR debates regarding to the Constitution: the original language of the Constitution; historical precedents and the intention of the Founding Fathers; the constitutional amendments; and the question of how to interpret flexibility of the 200-

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68 About the Whalen amendment, see fn. 80, p. 91.

year-old document. Several congressmen referred to the "intention of the Founding Fathers" as well as "leading" constitutional scholars and court cases to legitimatize their own arguments or to reinforce the "correct interpretation" of the Constitution. For instance, Representative Frelinghuysen tackled the question of intention of the Founding Fathers as follows: "*In any event, the framers of the Constitution, as I was saying, had flexibility in mind when they deliberately refrained from closely defining the responsibilities of the legislative and the executive branches with respect to the power to make the war*" (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21215). Representative du Pont remarked during the same debate that the WPR bill debates includes several differing interpretations about the language of the Constitution: "*Much will be heard in debate today about the Constitution, about what that Constitution says or does not say about the war powers of the Congress*" (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21222).

Not only the actual constitutional language or the intention of the drafters was discussed, but also to what extent the Constitution can respond to contemporary threats and unforeseen situations in general. The possibility for constitutional amendment was mentioned many times, but not seriously taken up or discussed at length. It seems that the possibility of constitutional amendment was not opposed because of the difficulty of enactment, but rather due to an acknowledgment that the Constitution already addresses war-making powers. Statutory law in the end seem to be the more appropriate option to restore the constitutional balance of power related to war-making. The possibility of constitutional amendment is discussed more fully later in this chapter (section 3.3.3).

The question of accurately reading the Constitution referred to the language of the document itself and also the historical precedents and the "traditional" interpretations. The Constitution clearly provides the power to declare war to the Congress; however, most of the time there has not been a congressional war declaration when US armed forces have been introduced into hostilities. Representative Stratton, for instance, emphasized that there is a certain gray area and therefore drawing a definitive line between the war-making authorities of the executive and legislative branch is difficult:

> Oh, there has been a lot of talk in this session about the need for Congress reasserting its control and taking away some of the powers the White House have stolen from us. Well, the one area where there is no question about our authority to control is in appropriations, in the budgetmaking process. We have got the purse strings, all right, and no constitutional lawyer would ever dispute that fact. But there are a lot of constitutional lawyers who have trouble in trying to decide exactly where the President's powers as Commander in Chief end and the congressional powers to declare war begins. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21216)

To what extent should the specific language of the Constitution be taken into account as opposed to the tradition of interpretation? The tradition is naturally also a substantive question. The Constitution authorizes presidential war powers rather laconically. Whereas, the powers are not extensively specified, no lim-

itations are described either. For instance, the constitutional concept of the Commander-in-Chief has gained many controversial interpretations over the years depending on whether the commentator is favoring or opposing strong executive powers. The vagueness of the Constitution causes controversies, but enables the flexibility needed to respond to changing circumstances.

Central to the debates was the question of to what extent the Constitution as such or the opinions of Founding Fathers can serve as the legitimatization for policy decisions made a couple hundred years later. Representative Paul Findley's (R-IL) following argument shows the problematic between the theory and practice:

> If we were to adopt a very strict reading of the Constitution and the minutes of the debates of the Constitutional Convention as kept by James Madison, we would probably be considering here a bill which would prohibit the President from doing anything with military forces beyond the borders of the United States unless he had advance approval of the Congress. That would be pretty close to what I deem to be the intent of at least the majority of those who took part in the formation of the Constitution. But it is obvious that that procedure has not been regarded as proper by most of the Presidents throughout history, and in my view it does not accord with modern day necessities. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21218)

That something had become a practice or that public opinion was behind the president should not, however, mean that Congress has to take the situation as a given.

The dialogue between Representatives Lester Wolff (D-NY) and Stratton further illustrates the problematic between the constitutional theory and practice. Wolff argued that when Stratton was speaking on behalf of his (Stratton's) substitute amendment to that proposed by Representative Charles Whalen Jr. (R-OH), Stratton had dissented with the Founding Fathers and with Alexander Hamilton's conception of Commander-in-Chief in particular. In response, Stratton noted that he was not disagreeing with the Constitution. What Alexander Hamilton said was not the Constitution. Rather, the Constitution is both the written words and how the words have been read through the years. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24693.)

According to Representative Findley, the only matter that counts is the constitutional authority of Congress to declare war. The Commander-in-Chief authority of the president can hardly be considered "a mandate for Presidential warmaking". (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21220.) Representative du Pont shared a similar point of view,

> All Members of this body have heard the arguments in support of expanded Executive power. I think most of the arguments are based on Executive practice rather than on the letter and spirit of the Constitution itself. Both the Constitution and the notes taken at the Constitutional Convention add great weight to the argument that Congress, not the President, was to be vested with the dominant role in warmaking powers. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21222)

Du Pont (ibid.) further emphasized that in the first Article of the Constitution, the authorities enumerated as granted to Congress include the authority for war-making, in contrast to the Commander-in-Chief authorization for the president, which appears only later in the second Article of the Constitution.

Historical precedents were used to oppose the bill; these referred mainly to the traditional predominance of the executive branch in war-making. However, as the following argument by du Pont shows, the historical precedent arguments were also used to support the WPR legislation:

> In the first 125 years of the Republic, there was genuine cooperation between the President and the Congress, often resulting in deference to the legislative will regarding the initiation of foreign conflicts. At one point Jefferson refused to permit the American naval commanders to do more than disarm and release enemy ships guilty of attacks on the United States until he had received congressional approval for the First Barbary War. Congress took an active role in opposing executive action – Pierce in Cuba, Seward in Alaska, and Grant in Santo Domingo, and the Executive acquiesced. Between 1900 and 1945, close cooperation between the Executive and the Congress became the exception rather than the rule. […] We entered a period of almost total acquiescence by the Congress in the 1950's and 1960's. The broad blanket of national security interest provided the basis for bipartisanship support which led us through the cold war. Formosa, Korea, Lebanon, Cuba, the Dominican Republic, and the initiation of the war in Southeast Asia were all presidential decisions. Understandably, the shift to Presidential hegemony in warmaking authority did not occur without reason. The executive branch proved to be institutionally superior to the Congress for conducting wars and even for initiating them. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21224)

In the course of the Conference Report deliberations in the House, Representative Abzug agreed to the argument that the world had changed and therefore it was appropriate to consider to what extent the constitutional clause "The Congress shall have power … to declare war" is applicable to the contemporary situations; however, that does not necessarily mean that the role of the Congress in war-making should be weakened. Abzug also reminded her colleagues that the unilateral use of war powers by the president began only in the mid-20th century:

> During the course of American history, Congress has been called upon repeatedly to initiate war; that is, the Congress provides the President with the authority to commit US forces. It has not been until mid-20th century that our Presidents have used military force more freely, moving troops in support of foreign policy decisions and in reply to particular situations. This is no doubt because the world has changed. The pace of events has quickened so that response time is shortened. This cannot be used as justification, however, for negating the central concept of our Government that requires a balance of powers within a system of checks and balances. (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33870)

According to Representative Wolff, the basic principle in the discussions of the war powers bill in the House of Representatives and in the Constitutional Convention's discussions was the same: "*Again, as though guiding our own deliberations, the founders denied the authority of the Commander in Chief to bring the Nation into a war, but rather looked only to his power to guide the Nation once the Congress had so directed*" (Providing for Consideration of House Joint Resolution 542, War

Powers of Congress and the President, June 25, 1973, 21232). According to Wolff (ibid.) this historical situation was, however, different from the contemporary situation that had developed over the previous three decades, in which the defenders of the presidency had tended to argue that the authority of Commander-in-Chief can only be determined by the president himself. For Wolff (ibid.), "*This is simply not the intent or the content of the Constitution under which we operate*." Wolff further argued that, though historical precedents of the executive's dominance in war powers exist, that does not make them constitutional:

> The accretion of power beyond the strict confines of constitutional definition does not change the Constitution and does not alter our form of government. Mere repetition does not make a mode of procedure proper and acceptable, nor, most emphatically, does it male that procedure part of the Constitution. Ours is not an elective dictatorship. It is a government in which all elected officials have carefully limited powers. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21232)

The conception of Commander-in-Chief has remained vague. During the Senate debate on S.440 Javits argued that the "*drafters of the Constitution had the experience of the Continental Congress with George Washington in mind when they designated the President as the "Commander in Chief" in article II, section 2"* (War Powers Act, July 18, 1973, 24538). For Javits (ibid.), "*the 'legislative history' of the constitutional concept of a commander-in-chief was the relationship of George Washington as colonial commander in chief to the Continental Congress*." Javits (ibid.) further quoted the clause concerning the Commander in Chief's commissioned duties, which was given to Washington on 19 June 1775 and which Washington returned to the Continental Congress on 23 Dec. 1783: "*And you are regulate your conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future Congress of the said United Colonies or a committee of Congress for that purpose appointed*." For Javits, the president had to be authorized by the Congress in order to take action. This corresponds to the view of Representative du Pont mentioned earlier in this chapter when he emphasized that the Congress and the president are supposed to be "partners" (See p. 69, 78).

According to Barron & Lederman (2008a, 800) the Founding Fathers' conception of the Commander-in-Chief was rather different to Senator Javits' view. By removing the powers of Congress to appoint or remove the top military commander, which had been possible according to the Articles of Confederation, the conception of the Commander-in-Chief changed. Barron & Lederman (2008a, 767) write as follows: "*This change, in and of itself, ensured that the new Commander in Chief would not be under the yoke of the legislature in the same manner that General Washington had been early in the Revolutionary War*." According to the new system the Commander-in-Chief would be elected by the people, and thus, with the exception of impeachment, only the people could remove the Commander-in-Chief from office.

It seems that the Commander-in-Chief clause did not raise many debates in the Constitutional Convention (Barron & Lederman 2008a, 786).[69] As the examples above illustrate, the conception of the Commander-in-Chief has given rise to many differing interpretations on the basis of historical precedents and the original language of the Constitution. Because the Constitution did not grant the power to "direct" war either to Congress or to the president, there is no definite substantive basis for the Commander-in-Chief powers of the president. The historical-legal context of the conception of the Commander-in-Chief seems to support two lines of arguments. Not only does the president have some inherent powers under the Commander-in-Chief conception, but also Congress has, at least in some instances, the authority to impose limitations on the powers of the president. The degree and quality of the war powers as divided between the president and Congress are, of course contingent, on what is meant by "war powers" and in which context they are used. (For more on this discussion, see Barron & Lederman 2008a & 2008b.)

The nature of the president's emergency and war powers has changed in the course of US constitutional history. Without going into the details on the debates about the inherent or executive powers of the president, it should be noticed that because the Commander-in-Chief power are not detailed in the Constitution, details of the concept have expanded considerably since the early years of the Republic.

In the Senate, Javits criticized the dominant interpretation by saying that "[*O*]*ut of the sparse and cryptic language of article II, section 2 of the Constitution there has grown up an extraordinary overblown doctrine of so-called Commander in Chief powers. The outer limits of this doctrine is cited as a barrier against even the exercise by Congress of its own clearly enumerated war powers*." (War Powers Act, July 18, 1973, 24538.) During the same debate, Senator Eagleton also emphasized that it is crucial that the American people, Congress, and the president share a similar view of the legitimate duties of the Commander-in-Chief and that the role does not cover unilateral war-making authority in the absence of emergency situations threatening the United States, its citizens or forces (War Powers Act, July 18, 1973, 24544). Therefore, it seems that by providing new legislation, Congress wanted to (clarify and) elaborate the Commander-in-Chief powers provided by the Constitution.[70]

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69 Hamilton contrasted the powers of president to the powers of a monarch: "His authority would be nominally the same with that of the king of Great Britain but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature." (Federalist Papers 1788, No. 69)

70 Compare to the purpose and policy section 2 (c) of the WPR bill: "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

The question of constitutional flexibility and accountability was appraised in the debates. While the Constitution has served well for 200 years, Senator Dominick (War Powers Act, July 18, 1973, 24591, 24592) pointed out that declaring war and its consequences have changed since the Founding Fathers. Is it realistic that such threats can be responded to from the floor of Congress? In Dominick's (ibid.) view, "*There is only room for one Commander in Chief, not 535.*" War-making requires national unity and therefore Congress should rely on presidential discretion rather than trying to combine 535 views of how to proceed.

Senator Dominick wanted to remind the other Senators that Congress had opposed the presidential deployment of troops in the past when it was done without prior congressional approval. For instance, a great debate emerged in 1951 over President Truman's introduction of US Armed Forces in Korea. (War Powers Act, July 18, 1973, 24591.) The Senator continued, however, by saying that the president does not necessarily need prior congressional approval in order to use the military force:

> If history and precedent are relevant, it appears that there is a strong case to be made for the power of the President to commit American forces abroad without the explicit permission of Congress, even though that commitment may lead to war. This power is not unlimited, but it cannot be easily circumscribed or easily dismissed just because those of us in Congress are bitter about the times over the last 7 years in which we were taken by surprise or were confronted with mounting public and personal opposition to the Vietnam war. (War Powers Act, July 18, 1973, 24591)

When discussing the constitutional powers of the executive and the legislative branches of government in the field of war powers, the question of judicial review has to be taken into account. It seems that the Court has tended to avoid tackling the political questions involved, and therefore there are only a few precedents concerning war-making. Fisher (2005, 467) writes that it was with the Vietnam War that courts started to systematically refrain from addressing questions of war powers. During the House debate on war powers, Representative Whalen asked whether the fact that the troops has been introduced regularly into hostilities without a declaration of war had ever been tested in the courts? Representative du Pont answered that "*The Vietnam situation was tested in the courts a number of times; yes.*" Whalen further commented "*And determined that this was constitutional.*" Neither Whalen nor du Pont, however, give any examples of the court cases referred to above. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24667.)

The then Senator William B. Spong Jr. (D-VA) argued in the *University of Richmond Law Review* in the early 1970s that the Supreme Court has seldom taken an opportunity to limit or define war powers. In fact, when the Court has ruled on war-making, the decisions are not entirely consistent. For instance in *Penhallow* v. *Doane* (1795) the Court put forward for consideration that the war power was not reliant on a particular clause in the Constitution. Further, in *Bas*

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by attack upon the United States, its territories or possessions, or its armed forces." (P.L.93-148)

v. *Tingy* (1800) the Court ruled that Congress could "declare war as a public or perfect or as a limited or imperfect", to use Spong's words. (Spong 1971, 12-13.)[71] These cases seem to rest on a view of the intention of the framers of the Constitution by emphasizing the role of Congress in initiating war.[72] Later on, the Court, however, moved particularly in the direction of enlarging the powers of the president in war-making. Spong (1971, 14) mentions in this regard *Durand* v. *Hollins* (1860) and *Slaughter-House* cases (1873).

The lack of judicial precedents to provide guidance for Congress was taken into account by Representative du Pont during the House debate on the war powers bill (H.J.Res.542). He wanted to remind his colleagues that the members of Congress "are sworn to uphold the Constitution" and therefore Congress has to create statutory guidance:

> We ourselves have the ability to make precedent. While I have heard objections that this bill contains provisions of dubious constitutionality, I do not see how a return to the letter and spirit of the Constitution could be considered questionable. We are not creating any new policies here; we are simply trying to reverse the persistent erosion of our constitutional obligations. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21223)

During the same debate, Representative Findley also mentioned the lack of judicial review in the area of war-making:

> Almost every President in this century has seen at least one situation in which he felt a necessity to act, without in advance getting policy approval of the Congress. Was he acting in an unconstitutional and unlawful manner when he did this? How can anyone really decide, because the Supreme Court traditionally shies away from any ruling which settles issues of war powers between the Congress and the President. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21218)

In contrast to the arguments by du Pont and Findley, Representative Bill Young (R-FL) argued that the Court decides the constitutional authority of the president. The president has certain authority to act as Commander-in-Chief, but also as the "Chief Executive Officer of the United States." According to Young's interpretation, the Court had determined already in the *Prize Cases* (1863) and more recently in *Mitchell* v. *Laird* (1973) that the executive branch has a certain constitutional authority to introduce US armed forces into battle. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24667.)

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71 For details on the debates over Supreme Court decisions related to congressional versus presidential war powers, see Barron & Lederman 2008a & 2008b; Emerson 1971; Fisher 2005; Fisher 2011; Spong 1971. On historical precedents and the court action in regard to the use of war powers, see also Senator Dole's speech (War Powers Act, July 20, 1973, 25112-25116).

72 The right of the president to respond to a sudden attack without the separate approval of Congress has always been considered legitimate (Spong 1971, 15).

3.3.3 Statutory law vs. constitutional amendment

One of the topics discussed in the Congress during the WPR bill was whether statutory law would serve the purpose of reasserting the powers of Congress. Representative Buchanan's argument illustrates the issue: "*I would further suggest in my own humble opinion it is not very easy to spell out the war powers of the President or what they may or may not be except by amendment to the Constitution, which this body and the people together could do if we saw fit to do it and could agree on the spelling out of the powers*" (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21228). Representative Dennis acknowledged that the issue is indeed difficult to legislate because it entails constitutional questions (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21230).

The need to have legislation providing war powers for the president and Congress was disputed by Representative Charles E. Wiggins (R-CA), based on his view that the Constitution already grants Congress, and only Congress, the power to "declare war":

> Historically, Congress has been a willing partner in military operations which may have been initiated by Presidential action, with or without the concurrence of the Congress. Vietnam was no exception to this historical pattern. Why, then the need for this legislation? Its proponents urge that it is necessary to reassert the proper role of the Congress under the warmaking power. I have always felt that this assertion is more rhetoric than substance. In my view, the ultimate power is vested in Congress. It always has been, and no statutory support is needed to buttress the plain command of the Constitution. (War Power of Congress and the President (H.J.Res.542), July 18, 1973, 24695)

Wiggins considers that the Congress' assertion of its powers is more about "rhetoric than substance". Wiggins further referred to the problem of responding with statutory law to future exigencies. He pointed out that even if there were a "careful statutory scheme", Congress along the public would probably rally around the president and agree to take any action considered appropriate and necessary at the time (War Power of Congress and the President (H.J.Res.542), July 18, 1973, 24695). Representative Findley also pointed out the advantages in having the president respond to different crisis situations, and the problems Congress would have in standing against both the president and public opinion:

> The President has obvious advantages. He has the opportunity for very swift action, even secret action. He has the unified branch of the government. He is the one ultimately who makes the decision. No cumbersome parliamentary procedure is required for the President to reach a decision of policy, whether it applies to war policy or otherwise. He can act with dispatch. He also has vast resources at his disposal which are much greater and much more effective than those available to the Congress *to rally public opinion* behind a course of action. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21218, emphasis added later on)

The above argument by Findley illustrates that, whereas Congress should follow a procedure that is (in Findley's words) "cumbersome", the president can take swift and decisive action. (It could be mentioned here that Findley seems to overlook the possibility that it is precisely the "cumbersome" procedures of Congress that gives legitimacy to the legislative process.)

The institutional differences as illustrated above by Representative Findley brought up the question of to what extent it is relevant to assume Congress can participate effectively in war-making since, as an institution, the executive is more capable of dealing with the situations of war and emergency. The institutional settings include such matters as the number of members of Congress and the possibility for filibuster in the Senate (which could paralyze the government just when quick and decisive action is needed). On the other hand, why shouldn't there be debate on such a significant matter as deploying US armed forces into hostilities? The common problem that Congress aimed to solve was twofold: that the decision-making to introduce the US armed forces into hostilities include Congress, and that Congress be able to terminate the deployment of armed forces.[73] Whereas opponents like Senator Goldwater seemed to think that only the executive as the "single unit" of government was capable of war-making, or Representative Kemp, who referred to the political realities of the time, Senator Edward Brooke (R-MA) emphasized that deliberative decision-making was in fact needed because of the arguments mentioned above: "*I believe, conversely, that the potential magnitude of the disaster of modern constitutional warfare, creates a greater need for deliberative rather than reactive decision-making than has been the case in the past*" (War Powers Act July 18, 1973, 24595). During the House debate on the bill (H.J.Res.542) Representative Bernice Sisk (D-CA) also claimed that Congresses (present and future) are deliberative bodies, not rubberstamps (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24667). For Sisk (ibid.), passing the war powers legislation would be an excellent example of that fact, it would also "*restore at least some degree the public's faith in our form of government.*"

During the House debate on the Conference Report, Representative Abzug illustrated the lack of congressional action in the past, referring to the Tonkin Gulf Resolution, after which Congress had tried for nine years "*to extricate the country from that predicament*." And even after the American forces were out of Vietnam, Congress allowed the president to bomb Cambodia for an additional 45 days because the "*President had decided, on his own, that Cambodia should be bombed*." (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33870.) Later on in the same debate Representative Edward Roybal (D-CA) pointed out that the problem of the imbalance of powers was not necessarily repairable by enacting new legislation:

> I do not believe that the problem is so much one of Executive usurpation as it is one of Congress' reluctance to act firmly in the midst of a crisis. […] Even during the Vietnam era, Congress could have ended the war either by a resolution ordering the

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73 The terminating part is somewhat controversial though, because the Constitution only states that Congress shall have the power to declare war.

> troops home or by cutting off funds for the war. But the disconcerting fact is while we had the power to do this, we did not have the courage to use the power. That power has not diminished – for once this Congress did pass a fund cut off for the bombing in Indochina, the bombing was halted. (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33873)

For Roybal it is not reasonable to pass new legislation if Congress refuses to use the powers it already has in war-making. The problem seemed to be that during the Vietnam War, Congress could have repealed the Tonkin Gulf Resolution and used its power of the purse more efficiently. The question was whether a new statutory law could solve the problem of the unwillingness of Congress to act. Enacting a constitutional amendment instead of statutory law would not solve the basic dilemma of the WPR, that is, how to define the content and scope of the war powers. As discussed more fully in later chapter, the debates between the House and the Senate over their different versions of the bill illustrate the difficulty of creating a language that is flexible as well as binding.

The statutory law on war powers was also opposed by referring to what effect it might have on the stability of the Constitution. Representative Joe Waggonner (D-LA), for example, argued during the House debate on the bill (H.J.Res.542) that Congress was, in effect, trying to amend the Constitution by a legislative act limiting the powers of the Commander-in-Chief (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24691). During the same debate Representative Goldwater strongly opposed the bill by arguing that Congress is "rearranging the Constitution." According to Goldwater the Constitution is a flexible document, but that the bill (H.J.Res.542) was an attempt to get rid of that flexibility: "*It* (H.J.Res.542) *places rigid, almost fatal controls, on the constitutional prerogatives of the President as Commander in Chief*" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24691).

The statutory law seemed to be, however, a natural way to proceed because the Constitution clearly states that Congress has power to "*Make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*" (US Constitution 1787, Article 1, section 8). The members of Congress could have avoided the presidential veto on war powers resolution by enacting a constitutional amendment instead. It seems to me that the members wanted to proceed through statutory law, however, because the outcome was easier to predict.[74]

In a common-law constitutional framework, amending the constitution is a more complicated process than passing statutory law. The US Constitution is no exception in that regard. A US constitutional amendment does not need to be signed by the president, but it must be approved by a two/thirds majority of both houses. Furthermore, three-fourths of the states must ratify the amendment. The amending process is stipulated in Article Five of the US Constitution. Amendments can be proposed by the Congress in the form of a joint resolution

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74 In regard to the Senate bill (S.440) Senator Goldwater, however, claimed that the necessary and proper clause does not give Congress the power to restrict and define the constitutional powers of the president. (War Powers Act, July 18, 1973, 24533)

with a majority vote of two-thirds of both houses or by a constitutional convention, which requires two-thirds of the states. The US Constitution has been amended altogether 27 times; the first ten amendments are called *the Bill of Rights*, which were enacted already in 1791. The other amendments cover, for instance, voting rights and the term limitations for the presidency. An interesting detail is that the US Congress has proposed each of the enacted amendments. The latest amendment was enacted in 1992.[75]

As discussed above, the constitutional controversies were one of the reasons for opposition the bill. Because the legislation included fundamental constitutional questions, the opponents claimed that a constitutional amendment should be passed instead of statutory law. The opponents further argued, especially in regard to the Senate bill, that Congress has no right to infringe on the constitutional powers of the president and there was no need for new legislation (or a constitutional amendment) because the Constitution already grants war powers to Congress and to the president. In opposition to the arguments of Goldwater & Waggoner (p. 85), Representative Fountain, stated during the discussion of H.J.Res.542 that the whole question about whether Congress was circumscribing the constitutional powers of the executive was inconsistent because the Congress cannot change the Constitution by enacting a bill: "*After careful study and consideration of the voluminous testimony before the subcommittee on the issues of war powers, I am convinced that the proposal we are debating today neither takes away from, nor adds to the constitutional rights or powers of the President. In other words, the constitutional authority of both the President and the Congress are left intact. We couldn't change their respective powers, if we tried to, not by legislation*." (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21213. (It should be mentioned, however, that Fountain is referring to the House version of the bill, which did not try to codify the emergency use of the armed forces in detail.)

During the House debate, Representative Buchanan (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24694) argued that Congress is trying to accomplish by statutory law a result that requires constitutional amendment. Buchanan continued that what the committee was doing in order to alter or illuminate the constitutional authorities of the president and Congress through statutory law was "*imaginative, innovative, creative and ambitious,*" that is to say, he added, it was "*as imaginative as Alice in Wonderland, and approximately as rational"* (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24694). Representative Mailliard, for his part, encouraged the House to sustain the presidential veto, because he supported a constitutional amendment instead (War Powers Resolution - Veto, November 7, 1973, 36203).

Representative Findley (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21219) emphasized that passing the House bill was relevant, because for the first time

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75 See details about the amending process at: National Archives - The Constitutional Amendment Process, http://www.archives.gov/federal-register/constitution/. The United States Senate - The Constitution of the United States, http://www.senate.gov/civics/constitution_item/constitution.htm

in the course of the US history, the statutory relationship between Congress and the president was being spelled out regarding to the introduction of US armed forces abroad. Further, it was said that by adopting the WPR bill, the US Congress would finally be clarifying what had remained a "gray area" of the Constitution: "[If the Congress finds support for the WPR bill] *we will have established a guideline in the policy, history, and tradition of this Nation which no President would dare ignore, for he would ignore it at his own risk*" (See Representative Fascell's argument during the House debate on the Conference Report on H.J.Res.542, October 12, 1973, 33868). In this regard, Glennon (1984a, 581) has observed that by enacting the War Powers Resolution, Congress aimed to establish for the first time a systematic means to control the execution of a fundamental presidential authority.

It seems to me that the question of to what extent passing the War Powers Resolution actually had an effect on the constitutional powers of the president and Congress was not clarified in the debates. Senator Spong wrote, a few years after passing the bill, that the aim had been not to define war powers, but rather to create a procedure regulating their use. Spong quotes Senator Muskie, who stated regarding the bill:

> The bill does not undertake to impose on the President a modification of his constitutional powers. It does not undertake to assert a restatement of Congress' view as to the President's role with respect to the warmaking power. What it undertakes to do is to establish a procedure for comity as to different views in the future, so that Congress can be brought in from the periphery of the warmaking power to its center in order to exercise its proper role. (Quoted in Spong 1975, 841)

It seems that Spong is, however, referring to the differences between the House and the Senate versions of the bill (which are discussed in more detail in section 3.4 of this chapter).

In retrospect, a constitutional amendment might have been taken more seriously than was the resolution. However, the members of Congress were surely aware that passing an amendment was very unlikely. Interestingly, during the WPR debates the possibility of Congress to change the legislation in the future was not really discussed in terms of the legitimacy of adopting a statutory law instead of a constitutional amendment.

3.3.4 The constitutionality of concurrent resolutions to avoid presidential veto

The constitutionality of the concurrent resolution mechanism in the WPR bill raised several questions during the debates, mainly in the House. The Senate version of the bill (S.440) referred to "an act or joint resolution" instead of concurrent resolution (e.g Spong 1975, 881). The concurrent resolution was considered one of main faults of the bill. For example Representative Dennis claimed during the discussion on President Nixon's veto that one of the problems of the bill was "*the attempt to bypass the normal constitutional legislative process by the use of a concurrent resolution*" (War Powers Resolution - Veto, November 7, 1973,

36209). The WPR employed concurrent resolution as a devise enabling Congress to terminate the presidential use of the armed forces. According to the bill, Congress can, by enacting a concurrent resolution, terminate a presidential action when US armed forces have been introduced into hostilities if there is no declaration of war or other statutory authorization. (P.L.93-148)[76]

The main question in regard to the concurrent resolution seems to have been whether it has a legislative effect or not? The use of concurrent resolution is problematic because according to the Constitution: "*Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary, except on the question of adjournment, shall be presented to the President of the United States and before the same shall take effect shall be approved by him or being disapproved by him shall be repassed by two-thirds of the Senate and House of Representatives*" (US Constitution 1787, Article 1, section 7). It seems that concurrent resolutions can be used to veto only the action of the executive taken according to a congressional delegation of power. In other words, by using concurrent resolution to terminate the actions of the executive, Congress repeals a power that it had already authorized. In all other situations, the president must have the right to veto the legislative actions of the Congress. (See, for instance, the argument by Representative William Green Jr. (D-PA), War Powers Resolution – Veto, November 7, 1973, 36204.) The argument is related closely to whether the bill grant's new powers for the president or not.

Different views on why the use of concurrent resolution would be unwise appeared during the debates of the WPR bill. In the course of the House debate, Representative Frelinghuysen claimed that the president could simply ignore the concurrent resolution if he disagreed with it. For Frelinghuysen, it would be unwise to provoke the president do that in a time of crisis. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21216.) The use of concurrent resolution has become a custom in Congress. In Representative Findley's point of view there is a nothing new in the concurrent resolution mechanism as such:

> Use of a concurrent resolution to disapprove Presidential action is hardly new. Beginning in the 1930's, Congress regularly incorporated provisions for a legislative veto in legislation authorizing the President to effect a reorganization of agencies in the executive branch of the Government. All of the dozen or so Reorganization Acts of this century have contained a provision that disapproval of the President's plan by either House of Congress would preclude the President from putting his plan to effect. […] The precedents for use of a simple or concurrent resolutions go far beyond reorganization plans. […] Two precedents are particularly significant and relevant to the war powers bill. The Middle East resolution and the Gulf of Tonkin resolution both provided for the commitment of US forces to hostile action, and both provided for the termination of that commitment by concurrent resolution. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21219-21220)

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76 Sec. 5 (c) "Notwithstanding subsection (b) of this section, 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." (P.L.93–148)

As the argument by Findley illustrates, the concurrent resolution mechanism has been used before, for example, in regard to the Gulf of Tonkin resolution and the Middle East resolution.[77]

During the House debate on the war powers of Congress and the president, Representative du Pont referred to the frequent use of concurrent resolution as a "legislative device" to veto executive actions. He also reminded Congress that at the time the Tonkin Gulf Resolution was adopted, there were no debates concerning the legitimate use of the concurrent resolution to terminate presidential authorization and no question or controversies concerning its constitutionality were aroused when President Johnson signed it. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, H.Res.456, June 25, 1973, 21224.) The use of concurrent resolution seemed to be legitimate for du Pont (ibid. 21207) because "the war power rests in the Congress".

The view of the conferees on the concurrent resolution was expressed by Representative Zablocki as follows: "*If the President assumes authority which he does not have, the Congress, therefore, recognizes that he has assumed that authority. Thus the use of the Armed Forces, for a particular period by the executive branch can be terminated by a concurrent resolution of this body*." In contrast, Dennis noticed that the "*only way in which you can make a concurrent resolution which is not presented to the president binding in law as an act of this body would be by first transferring some powers to the Executive and attaching concurrent resolution as a condition subsequent by which it could be regained*." (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33860.) The question therefore is if there was an initial grant of authority or not.

Representative Robert Eckhardt (D-TX) offered a substitute amendment to the House draft of the bill in which he made a distinction between constitutional and unconstitutional presidential war powers.[78] In this proposed amendment, a joint resolution would be needed in order to provide limitations on the president if the president's actions do fall with the president's constitutional powers:

> The reason that has to be done by a bill subject to veto, is because it is dealing with authority that the President has without asking authority from Congress. When we, Congress, direct the President or any other person to do something which he has a right not to do, or when we tell him not to do something that he would otherwise have a right to do, we can only do it by act, which would, of course, be subject to veto. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24679.)

According to Eckhardt, concurrent resolution could be used when the president acts beyond his "constitutional powers" and without congressional authorization. If Congress has not granted authority to the president, enacting a concur-

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77 Rostow writes (1986, 43-44) that the practice to adopt the concurrent resolution began in 1932 during the Great Depression when a Democratic Congress faced a Republican president. Almost 200 concurrent resolutions have been issued since. These give power to one, or both houses, or even to a committee of the Congress to pass "legislative vetoes."

78 Appendix 3 provides more detailed information.

rent resolution could divest the president of this authority. (War Powers of the Congress and the President (H.J.Res.542), July 18, 1973, 24679.) The problem, of course, is what does it mean to say that a president is acting constitutionally? It could mean that the president has the right to respond to national emergencies without prior authorization of the Congress, but also a situation where the troops have been committed under a declaration of war or other authorization from Congress.

Representative Findley noted also during the House debate on the bill that if Congress can by inaction terminate the use of force, it is ironic if it could not require the president to disengage troops by concurrent resolution (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21221). The inaction part of the bill will be discussed in the following section in more detail.

During the House debate on the war powers bill, Representative Dennis proposed a substitute amendment, in which he sought not only to ensure that Congress will within a certain period of time to vote to approve or disapprove a presidential action but also to avoid the concurrent resolution problems by defining the legislative mechanism as a "bill or resolution appropriate to purpose". According to Dennis, the central question is: "C*an you make a concurrent resolution have the binding force and effect of law*?" Dennis continued that it seems to be "*a mistake to lock that constitutional problem into this bill and give yourself no other option*." (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24669.) Including the concurrent resolution mechanism in the bill could raise constitutional controversies in the future and thus undermine the whole meaning of the bill. Dennis also emphasized that Congress had used the concurrent resolutions in the past mainly in order to organize internal congressional 'housekeeping' matters, which did not concern the president and were incidental to the primary legislative purposes of Congress. Dennis' substitute amendment to the House bill would leave room for a future Court decision on whether the concurrent resolution is an appropriate tool to be used for this type of purpose.

Representative Jonathan Bingham (D-NY), commented on Dennis' amendment about how difficult it is to foresee or ensure that future congresses will take action, and therefore, requiring Congress either to approve or reject the actions taken by the president is also difficult:

> First of all we can say we will obligate a future Congress to take action on a matter at a particular time, but we cannot make them do it. There are all kinds of reasons why Congress might be frustrated from taking action. It might be frustrated from action by a filibuster in the other body. It might be frustrated from action because, while a majority voted to disapprove a Presidential war, it might not have the votes to override a veto. We cannot guarantee that action will be taken one way or another in any specified period of time. We simply cannot do that. So we have to provide what the consequences will be if the Congress fails to act. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24662)

Bingham (ibid.) also questioned Dennis' substitute amendment by emphasizing what would happen if Congress cannot make a decision to terminate a use of

armed forces. In the committee bill, a congressional failure to act meant disapproval, in other words president must terminate his actions at the end of specific time period without congressional sanction. Referring to the idea of the committee bill, Representative Abraham Kazen Jr. (D-TX) accused Dennis' amendment of extending the powers of the president, because if Congress fails to obey its own statute nothing happens and the war continues (War Powers of the Congress and the President (H.J.Res.542), July 18, 1973, 24673).

Representative du Pont further questioned Dennis's amendment by putting a general question to the Representative about whether his substitute amendment would "*lead to playing a political game with war powers*?"[79] Du Pont clarified his argument by saying: "*If the Foreign Affairs Committee is controlled by a majority of a different party than the President, there may be a tendency to make the resolution concurrent. If they are the same, there may be the tendency to make it joint.*" According to this, Dennis' substitute amendment could increase the risk that the Foreign Affairs Committee would try to formulate state of affairs in the future "to its own political advantage." Dennis refuted this claim, accusing du Pont of trying to stir up a conflict between the legislative and executive branches of government. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24670.)

During the debate on an amendment proposed by Representative Whalen to the House version of the bill, it was noted that the future political situation could be quite different and therefore Congress should think carefully about the substance of the bill: "*I would say to the gentleman from Delaware that we are not talking about 1973 when we have divided authority - a Congress of one party and a Chief Executive of the other party. We are talking about 10 or 20 or 30 years from now. I certainly would not want to bind the Congress as to what legislative procedure they should follow*." (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24688.)[80] The argument illustrates a central question of the whole war powers debate: To what extent is it possible to prepare for future events through statutory law?

The concurrent resolution was also connected to the question of declaration of war and also thus to the termination of war. It was stated that a simple majority was enough to declare war, and it should therefore be enough also to terminate a war. This suggested that a joint resolution that is subjected to presi-

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79 According to amendment offered by Representative Dennis "Sec. 3. Not later than ninety days after the receipt of the report of the President provided for in the section 2 of this Act, the Congress, by the enactment within such period of a bill or resolution appropriate to the purpose, shall either approve, ratify, confirm, and authorize the continuation of the action taken by the President and reported to the Congress, or shall disapprove and require the discontinuance of the same" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24654). More detailed information is provided in Appendix 3.

80 The Amendment offered by Representative Whalen "amends the section 4(b) of the bill by providing that once the report of the President is received by the Congress, within 120 days the Congress shall vote yes or no on this report" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24685). More detailed information is provided in Appendix 3.

dential veto should not be needed in order to terminate the use of force. References were made to whether a war declaration and termination of war declaration should follow the same procedures. Representative Pete McCloskey (R-CA) wished to clarify whether Congress could declare war if a president vetoes a war declaration and Congress fails to have a two-thirds majority to override the veto. Representative asked if there is "*any precedent or authority as to whether or not a declaration of war as an act of the Congress cannot also be vetoed by the President? We seem to accept this concept of a majority vote to get us into a war but there is not a possibility that the President might veto a declaration of war?*" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24666.) Representative du Pont answered that a simple majority is required to declare war, and thus it should be enough also to terminate a war (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24666).

During debate on the House bill, Representative Fascell illustrated the issue as follows: "*If Congress has the right to declare war by simple majority action, and the country can go to war when the President signs the bill, then Congress should have the right to undeclare war by a simple majority*" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24666). Representative du Pont agreed with Fascell's argument, declaring the Representative's conclusion as sound: "*When the draftsmen of the Constitution gave us that power, they gave us that power by a simple majority, not by a two-thirds vote or the opportunity to override a veto, but by a simple majority. To gain authority under the Constitution to conduct a war, the President must have a majority vote of the Congress. To stop the conduct of a war, a majority vote should also be sufficient.*" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24666.) Approval by simple majority in both houses is needed in order to declare war, and as mentioned above also to terminate war. Therefore, the use of concurrent resolution could be considered a legitimate procedure for terminating a use of force. It was entered, however, into the debates that the last time Congress had declared war, it took the form of a joint resolution, in 1941. Even a congressional declaration of war needs to be signed by the President. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24673, 24689.)

Due to the Supreme Court decision in *INS*. v. *Chadha,* 462 U.S. 919 (1983) the use of concurrent resolution seems to have been ruled unconstitutional. Section 5 (c) of the WPR bill requires the president to withdraw troops if Congress so decides with concurrent resolution. Ely (1988, 1396) writes that 5 (c) cannot be identified as a typical legislative veto in which Congress has conferred certain authorities on the president but then tries to withdraw them by obtaining the power to bar the powers delegated. The argument that Ely is making here differs significantly from those presented in the Congress, which claimed that the concurrent resolution is legitimate due to Congress' initial grant of authority to the president. For Ely (1988, 1396) the concurrent resolution should be read in relation to the reporting 4 (a) (1) and congressional action 5 (b) provisions of the bill: "*as part of a package attempting in concrete terms to approximate the accommodation reached by the Constitution's framers, that the President could act mili-*

tarily in an emergency but was obliged to cease and desist in the event Congress did not approve as soon as it had a reasonable opportunity to do so."

Ely (1988, 1396-1397) writes that because the resolution aims to restore the constitutional power of Congress to declare war, it "is a little bizarre" that the bill would offend the principles of the separation of powers and checks and balances. For Ely the idea behind the concurrent resolution mechanism included in section 5 (c) is to prevent the giving of a blank check to the president to act for 60 or 90 days. As Ely (ibid.), however, notes, the resolution as a whole may be undermined due to the possibility that part of the bill is unconstitutional. There are, however, views claiming that although Congress has, under the Constitution, the power to control and restrict the deployment of US armed forces, Congress can proceed only through constitutionally permitted means. The question, of course, is whether a demand by Congress to terminate a use of force is ordinary legislation that has to be presented for presidential signature. (Carter 1984, 129-130.) However, detailed discussion on that issue is not the topic here.

The Senate proceeded to amend the War Powers bill in 1983 to replace the concurrent resolution mechanism with a joint resolution but the House/Senate Conference decided not to amend the bill, but provided instead a "free standing measure" for the withdrawal of the armed forces (Grimmet 2010, 8).

3.3.5 Congressional decision-making through inaction

One of the main controversies of the resolution concerned the question of how to include Congress in the decision-making process regarding the introduction the US armed forces into hostilities. As referred to in the section above, the possibility for Congress to terminate presidential action by doing nothing raised controversies. If Congress intended to participate in war-making, it should not be able to terminate the authority of the president through inaction. According to WPR, the president could introduce troops only for a certain period of time if Congress did not separately declare war, extend the period or was unable to make a decision. Representative Frelinghuysen questioned the meaning of the house version of the bill (H.J.Res.542) on the basis that it seems to provide the possibility for Congress to participate in war-making through inaction:

> I am not sure what the point of a war powers resolution is. Is it to remind us of our obvious, and inescapable, response so that Congress can worry about the fact that our troops are actually committed to hostilities and, if so, whether we should take appropriate action either to support the commitment or to say that we think it is unwise? Why do we have to spell out a 120-day provision so the Congress of the United States can make up its mind on a matter of this consequence? (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24660)

Frelinghuysen opposed the bill, referring to the 120-day period granted to the president as well as to the time period granted to Congress to come to a decision. Frelinghuysen further pointed out that the time period granted in the House version would allow the president to act without specific authorization

would expire unless Congress acted to give reauthorization (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24661).

The so-called inaction procedure or automatic termination is included in provision 5 (b) of the WPR, requiring the president to withdraw the troops within 60 days after the president has submitted the report (the bill expected detailed report of the president's actions within 48 hours after having introduced armed forces without declaration of war) if Congress; has not declared war or given other statutory authorization; has not extended the 60-day requirement by law; or is unable to meet to make a decision. The 60-day period can be further extended for 30 days because of particular military necessities. (See more in detail P.L.93-148.)

The provision seems simple, but is rather controversial in practice. The emergency powers of the president to respond to sudden attack are important in this regard. One significant question is whether the provision covers situations where the president claims to be acting on constitutional powers or when a president may claim to act beyond the given constitutional powers without a congressional authorization. On what grounds can Congress claim to have justification for limiting the power of the president to a 60-day period? And what about situations when the president is not claiming to act on his constitutional powers or statutory authorization: 1) If the president acts without any lawful authority, why should the president be allowed to have an authorization for 60 or 90 day? and 2) If the introduction of armed forces was made without legal authorization, for what reason would a president follow a statutory obligation to withdraw the troops after the 60 or 90 day period has run out? (National War Powers Commission, appendix one 2008, 14.)

During the Senate debate on the war powers bill (S.440) it was noted that the main idea is to put the burden on the president to justify continuation of the use of force. The Senate's draft granted the president 30 days for the emergency use of the armed forces without prior statutory authorization. Senator Javits argued that the 30-day period is an appropriate time limit for the president to act and Congress to deliberate on whether there should be an be extension of the period. In Javits words the "basic element" of the legislation "*must be that the authority to act in emergencies must be defined and understood and it ends unless Congress gives the authority to continue beyond an emergency period*."(War Powers Act, July 18, 1973, 24542) The Senate version defined the specific "emergency" conditions in which the president can act without statutory authorization (see fn. 121, p. 157). The 30-day period was opposed in the Senate on the basis, for example, that the president would be tempted to make rapid strikes in a hostile situation or to do more than would otherwise be done in order to carry out as much as possible of any operation before the possible expiration (See for example argument by Senator Dominick, War Powers Act, July 18, 1973, 24593).

Senator Eagleton (War Powers Act, July 18, 1973, 24544) remarked that it is possible for presidents to abuse their powers however strictly the Commander-in-Chief powers are defined in the language of the bill, and therefore it is important that Congress have "*legislative mechanism that would enable it to protect its*

own prerogatives." To Eagleton, the power of the purse is not sufficient to this purpose and therefore the 30-day limitation under Senate bill S.440 was appropriate. Eagleton acknowledged the opposing arguments' claim that the time period was too short or too long. He agreed that the time limitation was indeed an "arbitrary" period of time, but what mattered was whether Congress was sending the right message.

The debates surrounded the War Powers Resolution concerned mainly the constitutional power of Congress to declare war. According to Representative Wolff "the failure to declare war" should also be considered an "action", because war-making is included as a power of the Congress, not of the president (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24657). However, the opposing side argued by referring to the Constitution as well. If Congress declares war, it should also take positive action by declaring a termination to it.

The possibility that Congress would not ratify an executive's use of the armed forces after the 60-day period was not really raised in the congressional debates. In this regard, the main point to consider is why the War Powers Resolution failed to require the executive to seek a prior congressional consent whenever the US armed forces are introduced. It appears that Congress followed the idea of the Founding Fathers that the president should have some flexibility and the power to respond to sudden attacks. As noted above, the Senate version of the bill codified in more detail the emergency conditions under which the president may use the armed forces. A similar provision was not included in the House bill. Settling the differences between the Senate and House drafts is discussed later in section 3.4.

Inaction was seen as a mechanism to ensure that the will of the Congress would not be bypassed in the future. As the historical precedents indicate, Congress has usually been more than willing to support the president in times of crisis and war. The inaction provision should not have been considered a problem with this mind, since due to "rally around the flag" phenomenon, Congress would most likely grant authorization for a continuation of the armed forces. For example, everyone in the House voted for the Tonkin Gulf Resolution, and only two Senators opposed. During the House debate on war powers, Representative Stratton noted that Congress had supported the Vietnam War and to claim anything else was simply wrong:

> [T]here are some things that ought to be said in this debate and ought to be in the Record to be read. One of them certainly is the concept that we got into Vietnam because this congress was unable or unwilling to act; that somehow or other the President slipped this war over on us when we were not looking and we are only now getting around to retrieving the "balance of power" between the House and the White House. That, of course, is utter hogwash. Anybody who was here in Congress during the long time of the Vietnam war, under President Kennedy, President Johnson and President Nixon, knows that this House repeatedly supported the action that was taken. There is no question about that. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21216)

Stratton (ibid.) further criticized the quality of the debates by referring to the situation as "a kind of Alice in Wonderland" where the true facts are forgotten or misinterpreted.

Representative Mailliard (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24657) pointed out that the crucial problem during the House debate on the war powers bill related to the inaction provision. For Mailliard the provision, 4 (b), was controversial in saying that the president should terminate the use of the armed forces within 120 days unless Congress declares war or gives other statutory authorization. According to Mailliard, in a situation where the majority of the House wants to support the presidential action by declaring war or authorizing the president in some other way, 50 members of the other body that is the Senate would be enough to prevent the Congress from acting by choosing simply not to vote. Mailliard (ibid.) acknowledged the issues as follows: "*So we could have a situation where 50 out of 535 Members of this Congress could totally thwart the will of the President of the United States and the reminder of the Congress.*" He further criticizes that the members "*do not have to vote on the substance; they can just vote not to vote on it*". The problem seemed, however, to be the same even if Congress should be required a vote up or down regarding continuation.

The inaction provision could lead parliamentary obstructionism, Representative James Martin (R-NC) claimed in the House during the debate on President Nixon's veto:

> My support of this resolution arose rather out of the urgent need that I see to clear up a vague area of constitutional law - the hazy distinctions between the role of the President as Commander in Chief and the role of the Congress in raising the Armed Forces and declaring war. […] Frankly, I would have preferred a resolution requiring the Congress to have to act affirmatively to terminate a Presidentially ordered military commitment. To permit that termination to occur in the event of congressional inaction on the matter does tempt parliamentary obstructionism. Yet, in spite of all the criticism aimed at the Congress – justified allowing itself to act by inaction. (War Powers Resolution – Veto, November 7, 1973, 36205)

The inaction provision would then provide a useful devise in a situation of divided government, where the majority of one of the houses is controlled by a party other than that represented in the White House. Once again, however, the reasonable question to pose was whether Congress would ever fail to vote in line with president in a time of crisis. The inaction provision could, also however, lead to other kinds of parliamentary maneuvering (discussed below).

Similarly to the debate on the use of the concurrent resolution, the inaction provision was supported by referring to its earlier use. In the House debate, Representative Findley argued that the debate was giving a false image of inaction by implying that it was something new and unforeseen. This was not true, Findley claimed: "*Inaction has been a traditional way by which the Congress has rejected unwise policy, not only in the foreign field, but in the domestic field as well*" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24690). It seems that for the proponents, both the inaction and the concurrent resolution

devices employed in the WPR were not controversial, because Congress had applied them regularly before.

Similar to Representative Wolff's argument above (p. 95), Representative Bingham argued during the debate on H.J.Res.542 that the Constitution grants Congress the power to declare war, but does not specify whether Congress should vote for a declaration of war. In Bingham's words: "*What happens if the Congress does nothing? Then there is no declaration of war, so that is action by inaction, if you will, right in the Constitution.*" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24662.) The inaction provision should be read against the background of Constitution, which indeed does not specify whether Congress can end a war by not declaring it ended.

During the WPR debates the automatic termination provision of the bill raised many questions. Opponents of the bill wanted the provision changed to require some congressional action, rather than having national policy changed by inaction on the part of the Congress (See for instance Representative Frelinghuysen's argument during the debate War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24654). The automatic termination clause indeed gave rise to many conflicting arguments and views. With regard to the House bill section (4b) Representative Zablocki called the section the "core of the legislation", while Representative for Frelinghuysen it was a "fatal flaw" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24654). Representative Mailliard's following argument expresses the issue in more detail:

> [T]he resolution as modified in conference, still includes the section that would permit the Congress – through its failure to act – to force the President to halt the use of our Armed Forces. I do not believe we as elected Members of the Congress can meet our responsibility on the issue of war and peace unless we are willing to insist that this legislation provide for the Congress to either approve or disapprove the President's action. (War Powers Resolution - Veto, November 7, 1973, 36203)

In Mailliard's view the members of Congress are not in order to evade responsibility. But again this claim is related to the difficulty of finding majorities in Congress that have ever opposed a president during a time of crisis.

By including the inaction mechanism in the bill, Congress was able to avoid speculation about whether Congress now had the ability to act. In this regard, Representative Frelinghuysen noticed in the House that "*The proponents of this resolution realize that inaction is the strongest weapon Congress has*" (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21215).

But as mentioned earlier, the topical question was the willingness of Congress to authorize presidential uses of force. Representative Green's (D-PA) argument in the course of the veto debate was rather critical in this regard: "*The Congress would, no doubt, be under the pressure of the public's sincere patriotic passions, aroused by the President's announcement of his military action and the "dastardly deeds" justifying it. This is the Gulf of Tonkin and Cambodia revisited – and legitimatized.*" (War Powers Resolution – Veto, November 7, 1973, 36204.) In the past,

Congress had not been very successful in opposing presidential initiatives in war-making. The inaction provision could secure the outcome, without the members of Congress having to publicly take a stand. It seemed problematic to restore the war-making powers of Congress when the bill included the inaction provision. The sponsor of the House bill, Representative Zablocki argued however that only one of the 535 members of Congress was needed to "trigger the mechanism" that would require both houses to "take an up or down vote." This could take the form of a vote of (joint) resolution stating approval or disapproval. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24654.) Such a vote would be subject to presidential veto.

3.3.6 Partisanship, President Nixon and the legitimacy of the War Powers Resolution

Partisanship in Congress has an effect on the executive-legislative relationship. Presidents should be able to convince members of Congress to support the executive's agenda, or in this case to resist a congressional agenda. Naturally, presidents can have better success with their own party. As a presidential term continues, congressional support for the president usually decreases. In his second year of the presidency, President Nixon for instance won 76.9 % of the roll call votes in which the president announced his position. When the president's party controls Congress, the president usually wins at least three out of four votes where he has taken position. During a divided government the rate declines. (Davidson et al. 2012, 273-274.)

To my mind the extraordinary political situation had an effect on how the congressional majorities were formed. It should be noticed that the party cohesion in the United States is not considered as significant as in Britain and Germany, for example (Steiner et. al. 2004, 101). In the words of Steiner et al. (ibid.) the US system is "*a Classical presidential democracy with a competitive two-party system and comparatively low party cohesion*." The lower party cohesion means that it is often assumed that a number of members of Congress will cross party lines. From time to time, however, party cohesion has been considerably high in the US Congress. (Steiner et al. 2004.) The party cohesion or degree of partisanship is significant because it could weaken the role of the Congress in the separation of powers system if the majority unites automatically behind the president.

From my point of view the fact that Congress was able to override President Nixon's veto on the War Powers Resolution demonstrates that the bill was supported by the vast majority of Congress and there was no room for party politics per se; it was rather a matter of congressional members defending the Congress as an institution. The members themselves also acknowledged this. The law was not only about persons or events, but institutions.

However, controversy was raised not only on the substance, but also the legitimacy of the bill. Opponents claimed, especially during the discussion on overriding President Nixon's veto, that the bill was targeted at President Nixon

only. During the debate on the amendment offered by William J. Fulbright (D-AR) to Senate bill S.440, Senator John Tower (R-TX) acknowledged that President Nixon was the first President since Zachary Taylor in 120 years to enter office and face both houses of Congress in the control of the opposing party (War Powers Act, July 20, 1973 25090). Senator Tower (ibid.) continued by questioning the political context in which the legislation was considered as follows: "*The fact is that there is a partisan climate at this moment which augers well, unfortunately, for the passage of this legislation, because this is, I guess we might call it, "Kick the President Season" and there is mood here in Washington that is mot conductive to cool consideration of the merits of legislation of this kind*."

Representative Stratton reminded his colleagues during the House debate that in the future there might be a Democratic president, and therefore they should think carefully before passing the WPR legislation:

> What we would really be doing if we were to pass this legislation is undermining the proper power of the President to speak for the country in foreign affairs. Think, for example, what might have happened during the 1962 Cuban missile crisis had President Kennedy been restricted by this kind of legislation. Would Khrushchev have taken President Kennedy's threats to invade Cuba seriously if this legislation had been on the books? And in that connection, incidentally, let me say to my Democratic friends who are supporting this legislation so strongly that we ought not to overlook the fact that some day we may have a Democratic President in the White House again – in fact that is likely to be the case. I would say, before this legislation would actually make much difference in our foreign affairs. Do you really want to hamstring a new Democratic President as he tries to provide some worldwide leadership in building a peaceful and stable world? (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21217).

Stratton's idea is to think above the party divisions. Congress should not consider only the current political context, but the future. Later on, Stratton encouraged his colleagues to think "*what is best for the country and not what is best under the immediate political circumstances*" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24693). In a similar way Representative Dale Milford (D-TX) (War Power of Congress and the President (H.J.Res.542), July 18, 1973, 24693) argued that enacted bills have an effect on all future situations and presidents. Hence the WPR bill should not be considered as a response to the War in Vietnam or to the Watergate scandal. Milford reminded the members of the Congress that the president is publicly elected as accountable to the people in the same way as Congress: "*He* (the president) *is not a dictator. His powers, like yours, are clearly spelled out in our Constitution. It has served us for nearly 200 years and I still believe in it.*" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24693.) This argument seems to indicate that some of the arguments in the debate exaggerated the president's actions and thus undermined the choice of the public when the president was elected.

Regarding the issue of partisanship, Representative James Hanley (D-NY) argued that consideration of the WPR bill should not rest on partisan politics, "*for in delineating the subject of war powers in respect to the President and the Congress the bill seeks to affect not the parties or the officeholders, but the institutions themselves*" (War powers of Congress and the President (H.J.Res.542), July 18,

1973, 24701). For Hanley (ibid.) the reason for immediate action was because the "*excessive executive action during the last decade has been substantially different in both kind and degree than that which preceded it*". Hanley's argument illustrates that the moment of Congress to act was in the present moment and should be understood not in partisan terms, but rather in terms of the reassertion of the powers of Congress as an institution.

In the House, Findley emphasized that the WPR bill should be thoughtfully considered in Congress on the basis of its own merits without the presumptions of partisanship or the current political context:

> Mr. Speaker, I once heard our esteemed colleague, Richard Bolling of Missouri, observe that fundamental legislation should never be enacted in quick reaction to a particular event or personality. The process which brings this final House step on war powers before us today has been deliberate, thoughtful, and protracted. The bill deserves to be considered on its own merit – separated from the emotionalism surrounding a particular event or a particular personality. (War Powers Resolution – Veto, November 7, 1973, 36206)

Findley continued by stressing that the vote on the WPR bill should not be considered as a vote for or against the president:

> The vote should not be viewed by us, or anyone, as a test of popularity of the President, or of the popularity of the man who has been nominated to be Vice President and whom we all respect and admire so much. Votes for the motion to override, certainly my own, should not be taken as votes of no confidence in either the President or the man we trust will soon be installed as Vice President. Nor is the bill a reaction to a particular event. It has nothing to do with Watergate. Its genesis came during the Vietnam war, but it was actually brought into being by events stretching back through history – and it seeks to influence events that will stretch far into the future. Crises in the Dominican Republic, Cuba, and Korea had as much to do with this measure as Vietnam. (War Powers Resolution – Veto, November 7, 1973, 36206)

The argument by Findley suggests that the legislative process of the bill had been appropriate and comprehensive. The War Powers Resolution was not a hasty response to the current political circumstances. According to members of Congress the idea to adopt the War Powers Resolution originated not only in the Vietnam War, although that certainly had an effect. The origins of the bill were related both to the historical precedents stretching a long way back on the increased power of the executive in relation to war powers and to Congress' efforts to circumscribe these powers through statutory law.

The War Powers Resolution was meant to resolve the dilemma of who had the final authority in war-making, and it attempted to do this by ensuring that the American people, i.e. through Congress, will have the final word on the question of legal responsibility when the US armed forces are involved in war (War Powers Act, July 18, 1973, 24543). According to Senator Eagleton's view both the president and Congress should be held accountable for the consequences of introducing the armed forces. During the Senate debate on the War Powers Act, Eagleton indeed claimed that Congress should accept equal responsibility for the events in Indochina. But rather than understanding Con-

gress as accountable, the members blamed Presidents Johnson and Nixon. (War Powers Act, July 18, 1973, 24543.)

The resolution was supported also by, for example, claiming that it should not be considered "political". In this regard, Representative Willliam Frenzel (R-MN) argued that the bill is not political in the sense that it intended to augment the powers of Congress by curtailing the powers of the president. Rather the bill sought to specify the constitutional powers of the executive and the legislative by law. (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33871.) Frenzel's argument that the WPR bill should not be considered political seems somehow inconsistent when taking into account all of the controversy related to the US politics of war-making in the early 1970s.

3.4 Settling the differences between the House and the Senate bills

The War Powers Resolution proceeded to the Conference Committee as both the House and Senate had their own bills (H.J.Res.542/S.440). The aim of the committee is to bring differing proposals together in a form that is passable in both houses. The conference committee system involves a rhetoric of negotiation, rather than deliberation.

Senate bill S.440 differed from the House proposal in several respects. Common to both was it shifted the burden to the president to justify and find congressional approval for any continuing use of the armed forces. The Senate bill, however, provided that if Congress decided to terminate a presidential action before the end of the 30-day period mentioned in S.440, the method used would be by an act or a joint resolution subject to presidential veto.[81] In the House proposal of the bill (H.J.Res.542) the corresponding method was the concurrent resolution.[82] Another difference worth of mentioning between the bills is also that the House bill included the requirement that the president consult with Congress. (About the differences, see e.g. Spong 1975.)

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81 As passed in the Senate on July 20, 1973, S.440 Sec. 6 "The use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act may be terminated prior to the thirty-day period specified in section 5 of this Act by an Act or joint resolution of Congress, except in a case where the President has determined and certified to the Congress in writing that unavoidable military necessity respecting the safety of Armed Forces of the United States engaged pursuant to section 3(1) or 3(2) of this Act requires the continued use of Such Armed Forces..." (Quoted in Spong 1975, 881)

82 As passed in the House on July 18, 1973, H.J.Res.542 Sec. 4 (c) "Notwithstanding subsection (b), at any time that the 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 other specific authorization of the Congress, such forces shall be disengaged by the President if the Congress so directs by concurrent resolution." (Quoted in Spong 1975, 875)

The Senate bill was more substantial in contrast to the procedural approach of the House bill, i.e. the Senate version defined the emergency use of the armed forces more specifically. The aim of S.440 was to set a framework for undeclared wars. Representative Zablocki commented on the question of codifying and defining war powers in the language of the bill:

> Given that goal of restoring the balance between the executive and the legislative branches intended by the Founding Fathers, the committee was at the same time very sensitive to the President's constitutional war powers. For example, we were determined to avoid any approach defining or codifying the war powers of the President. Such an action would draw rigid lines between the Congress and the President in the area of warmaking powers. (Providing for consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21209)

Codifying the emergency use of the armed forces in the Senate version referred to cases where no official declaration of war had occurred, for example, in repelling an armed attack on the United States, on the armed forces, or the protecting of US citizens abroad. The Senate version provided "prior restraints" that defined circumstances, "in legally binding terms", in which the executive could introduce the armed forces without a prior authorization from Congress (Spong 1975, 841; Glennon 1984b, 657).[83]

It seems that the House bill was meant to ensure the same flexibility that the Founding Fathers envisaged when drafting the Constitution. Representative Findley further illustrated the view of the House Committee bill (H.J.Res.542) as follows:

> In order to preserve the maximum amount of flexibility in the war powers resolution, the Foreign Affairs Committee does not attempt to preclude the President from acting in a circumstance where he determines that the need for action is immediate and precludes prior congressional authorization. Realizing that the standards are vague, the House bill requires the President to explain and justify to Congress why he has assumed the powers to commit troops to hostilities. If Congress approves of the assumption of power, it may ratify it. If it does not approve, it may let the powers lapse after 120 days, or terminate them sooner by concurrent resolution. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21220)

Findley noted that the loose language of the bill is inherently linked to the idea that the president must report and consult with the Congress. In regard to the Senate bill, Senator Javits argued that the overall purpose of the Senate bill on war powers (S.440) was to define the emergency use of the armed forces:

> The overall purposes of the War Powers Act are to codify the "emergency" powers of the Commander in Chief, in the absence of a declaration of war, to introduce the Armed Forces of the United States in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and very importantly, to establish a methodology to assure that Congress is not foreclosed by the practice of undeclared war from exercising its constitutional responsibilities respect-

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83 See the language of the Sec. 3 of S.440, "Emergency use of the armed forces", fn. 121, p. 157.

> ing the awesome decision of putting the Nation at war. (War Powers Act, July 18, 1973, 24542)

Javits' argument indicates that if there is no declaration of war, the president can act only in situations specified by the law. Javits further emphasized that the heart of the Senate legislation indeed was that the powers of the president to act in emergencies must be understood and clearly spelled out, and that the presidential action terminates if Congress does not give additional authorization to carry on the action beyond the specific emergency period (War Powers Act, July 18, 1973, 24542). The House bill, on the contrary, stated that the president can act, but must consult with and submit a report to Congress, whereupon it becomes the duty of Congress to review the presidential actions.

For Senator Muskie the House bill was problematic because if the conditions for the use of "emergency" powers of the president are not defined beforehand, "the legislation loses most its teeth" (War Powers Act, July 18, 1973, 24547). Representative Fascell, however, argued that the Senate bill extended the authority of the president rather than circumscribed it:

> Unlike the legislation passed last year by the Senate and reported again this year by the Foreign Relations Committee, House Joint Resolution 542 does not seek to define those kinds of actions which can be taken absent a declaration of war. To do so, in my mind, would further expand the President's authority as Commander in Chief. Under the House proposal, it is up to the President to justify his action and cite the statutory or constitutional authority under which he acted. To specifically define his authority as S.440 seeks to do, would give the President statutory authority he does not now have. (Providing for consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21228)

During the House debate, Representative Eckhardt provided an amendment in which he tried to clarify that the president does not have the power (inherently or based on the proposed resolution H.J.Res.542) to deploy the troops into hostilities without a prior congressional declaration of war or other authorization. However, the amendment continued, "*other than the power to take such action as may be required by strict necessity, under circumstances making impossible a congressional determination*" (War Power of Congress and the President (H.J.Res.542), July 18, 1973, 24685). Eckhardt's amendment seemed to restrict the powers of the president in making it incumbent on the president to obtain a prior consent of Congress in every case other than cases in which Congress is unable to make a decision.[84] Representative Bingham countered that the amendment showed the difficulty of creating any specific language about the powers of the president in this context: "*The language in the Senate bill, the Javits bill, tried to spell out the situations under which the President can act. It has four categories. One can argue that they are too broad; one can argue that they are too narrow.*" (War Power of Congress and the President (H.J.Res.542), July, 18, 1873, 24685.)

Bingham described the House bill (H.J.Res.542) as "superior" to the Senate version. He based his argument on the often repeated claim about how difficult it is to define the powers of the president:

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84 Appendix 3 includes more detailed information.

> For one thing, S.440 yields to the temptation to try to define future circumstances in which a President can commit US Armed Forces to hostilities without prior congressional authorization. This raises a double-edged problem. If we give a President broad blanket authority to send troops into battle whenever he judges that there is an imminent threat to the United States, or its forces or citizens anywhere, as provided by S.440, we are giving the White House what could become a blank check. On the other hand, if we try to spell out more restricted circumstances in which a President could take action, how do we know that we may not be unduly tying his hands in some unforeseeable future crisis which genuinely threatens our national security? (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21234-21235)

Bingham's conclusion is that when codifying the presidential powers, two lines of results are evident: either the law grants too many powers for the president, or a blank check, as Bingham said or the language of the bill possible endangers the US response to future emergencies. In a similar way Representative Kemp thought that the Founding Fathers' intention was to leave some room for extraordinary powers for the president in order to protect the safety of the nation. To back up his argument, he quoted Hamilton, who wrote in Federalists No. 23: "*The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed*" (Quoted in the House debate on Conference Report on H.J.Res.542, October 12, 1973, 33864). The opponents claimed that contemporary Congress in the 1970s could hardly expect to be "wiser" than the Founding Fathers in delineating the war-making powers of the president and Congress in detail.

The final language of the bill regarding the codification of the circumstances in which the president can act without prior congressional consent represented a compromise between the Senate and the House versions of the bill. Senator Javits described the compromise as follows:

> But the great point of difference was that the Senate bill added a provision in it which delineated the authority of the President and made it law, that his emergency authority to proceed unilaterally extended only to a national emergency defined as an attack on our forces, an attack upon our territory, or a specially defined endangering of the lives of American citizens abroad. The House strongly objected to such delineation so we took a different approach. In its place we made a declaration of what the Constitution says or means as to the constitutional authority of the President as Commander in Chief to act in an emergency. What is an "emergency" in this context? So we declared what we consider the constitutional situation to be. (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33550-33551)

Javits' argument refers to the purpose and policy section of the bill, which defines the constitutional powers of the president to introduce the armed forces into combat, and which can be exercised only when there is a declaration of war, a specific statutory authorization or in a suddenly rising national emergency. The section recognizes that Congress has the duty to declare war, but also that in a situation where swift and decisive action is needed, the president may use forces without first obtaining congressional approval.

The differences between the houses were indicated in the debates related to the war powers of Congress and the president. For instance, the possibility of

filibuster in the Senate worried members of Congress. Some thought that Congress should be able to have a vote on the use of the armed forces rather than relying on the automatic termination method. As discussed above, by relying on the inaction method, Congress could avoid speculation about its ability to come to a decision.

The inaction problematic was related not only to the possible threat of filibustering or parliamentary obstructionism in the Senate but also to a possibility of having to avoid a presidential veto by required two-thirds majority. The conference sustained the inaction procedure and it was one of the arguments used to oppose the WPR Conference Report. Representative Dennis tackled the issue of the inaction by claiming:

> When we declare war, when we go from peace to war, we vote it. When we are in a de facto situation or hostilities by reason of Executive action, recognized in this bill, if we want to go back to peace we ought to vote that. It should not be possible to determine that kind of a question simply by sitting here and doing nothing, and that is possible under this conference report. (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33861)

The inaction procedure was, however, supported by saying, for example, that it was a traditional and reasonable way for the Congress to restrain the executive's efforts to formulate public policy (See Representative Findley's argument during the House debate on Conference Report on H.J.Res.542, October 12, 1973, 33861).

Other "controversial questions" between the House and the Senate bills included the period limitation in which that the president could act without congressional authorization. The Senate supported a shorter period, just to give the president the right to respond national emergencies. The longer period that was included in the House bill seemed, from one perspective, to provide more time for Congress to consider thoroughly whether the use of the armed forces should be continued. Representative Fascell seemed to support the longer time period because of the possible effect of the 'heat of the moment', whereas Congress should resist the temptation to make a decision without sufficient debate and deliberation:

> A call by the President to protect the national security, and "rally round the flag," would build strong sentiment and emotion that I can scarcely imagine that the Congress would not quickly act to authorize the action. On the other hand, I believe that a 120-day period may be sufficiently lengthy time to allow emotions to subside and to permit a careful study of all facts in proper perspective. (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21228)

Fascell notes here that by taking the time for the decision Congress has better chances to review the situation properly. As asked earlier in this chapter, to what extent is it likely that Congress would decide anything other than to support the president? Senator Humphrey, for example, during the debate on the Conference Report referred to the ability of the president to enlist public support for his actions:

> I have served in the executive branch, and I want to tell you, it is easy to roll this body, because the executive branch comes in with powers, comes in with information, is able to mobilize public opinion; and this Congress and other Congresses – I speak of the Congress as an institution – willingly and gladly supplies resources to the executive branch so it can exercise its will. (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33553)

Later on in the same debate Senator Goldwater emphasized that there are other ways to increase the amount of consultation between the executive and legislative branches of government in foreign policy other than by means of the WPR bill (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33554). Goldwater was one of the members who consistently opposed the bill. In his speech in the Senate during the debate on the Senate version of the war powers bill Goldwater specified 25 issues that he considered as "constitutional problems" (War Powers Act July 18, 1973, 24532-24536). Goldwater (1973, 24901-24911) also gave a speech in the Senate on war powers and the Founding Fathers in which he claimed that the drafters of the war powers bill have not "*given sufficient study to the true meaning of the declaration of war clause and have based their legislation upon assumptions about this clause which have no historical foundation*." The Senator emphasized the various versus the correct interpretations of the Constitution in the debates. Some of the members, however, referred directly to the gap between the original language of the Constitution and the "contemporary reading" of the Constitution (see Senator McGee's argument p. 116-117).

Former supporter of the bill Senator Eagleton criticized the conference bill for not being able to define the powers of the president:

> The compromise bill represents a near-total abrogation of the Senate position on war powers. The bill in its present form, therefore, is worse than no bill at all. It fails to address directly the questions of just what authority the President has to engage our forces in hostilities without the approval of Congress. (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33556)

Eagleton further criticized the bill for not taking into account the rally- around-the-flag phenomenon:

> In practical terms, we must recognize the incredible powers of persuasion the President has at his command at all times, and especially during periods of crisis. The senate bill dealt with this political reality by establishing clear signposts of authority – signposts which could be readily understood by the American people. (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33556)

For Eagleton (ibid.) the bill was "*an open-ended, blank check for 90 days of warmaking, anywhere in the world, by the President of the United States*." The Senator indeed criticized the bill because it failed to specify the authority of the president to engage the armed forces without prior congressional authorization. In the Senate, the conference bill did gain support, however, and only 20 Senators ended up voting against the Conference Report (See War Powers Resolution of 1973 – Conference report, October 10, 1973, 33569). Senator Eagleton was not

the only sponsor to change sides. For example, Senator James Abourzek (D-SD), original co-sponsor of the bill, voted against the Senate bill (S.440), and against the Conference Report and against to override President Nixon's veto (See the voting results, Congressional Record, July 20, 1973, 25119; Oct. 10, 1973, 33569; Nov. 7, 1973, 36198).

During the conference debate, the concurrent resolution issue attracted again many arguments, mainly in the House of Representatives, although the Senate version of the bill did not even initially include a concurrent resolution provision.[85] During the conference debate in the House, Representative Eckhardt wanted make sure that he had understood correctly that the resolution does not authorize additional authority for the president, but that it was possible for the president to act beyond his authority and therefore the concurrent resolution was the proper tool for Congress to affirm that the president's action "was wrongful in the first place" (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33860). In contrast, Representative Dennis argued that the use of concurrent resolution assumes just the opposite:

> I submit to the distinguished gentleman in the well that the only way in which you can make a concurrent resolution which is not presented to the President binding in law as an act of this body would be by first transferring some power to the executive and attaching the concurrent resolution as a condition subsequent by which it could be regained. Unless we transfer the power, which you say you do not, then your concurrent resolution cannot be effective to bind anyone. (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33860)

The question, of course, was whether the 60-day authorization for the president to act without prior congressional approval would be the authorization that Dennis yearned for. Zablocki replied to this by saying that the bill authorizes the president to introduce US armed forces for a limited period of time in cases where the president acts on the basis of an authority not clearly granted by the Constitution (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33860).

Referring to Zablocki's argument, Dennis further criticized the conference bill by saying that the delegation of war-making powers to the president is a major defect of the bill and that the bill actually gives the impression that it is proper to legislate without following normal legislative processes.

> This bill necessarily delegates a portion of our warmaking power to the Executive. That cannot be escaped, because 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 con-

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85 There were debates on the use of concurrent resolution in the Senate, however. For instance, according to Senator Javits the concurrent resolution could be used to terminate a presidential action within the 60-day period, but not be applied to any extensions of the 60-day period authorized by the Congress or to the 30-day "military necessity extension" that the bill provides for. Senator Muskie interpreted the use of the concurrent resolution differently, saying "if Congress wants the combat activities or deployment stopped before the 60 or 90 days are up, it can order the President to cease by concurrent resolution." (War Powers Resolution of 1973 - Conference Report October 10, 1973, 33550, 33551)

> dition subsequent to a grant of power. […] In this bill you are trying to say that you can legislate without going through legislative process and that you can take power back by a condition subsequent without granting the power in the first place. (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33861)

During the same debate, Milford suggested that the bill should be send back to the Conference Committee because in its current form the bill was "unworkable". It did not contain a proper procedure for the communications between the Congress and the president. Representative Milford suggested the establishment of a "War Oversight Committee", which would observe situations that could lead to war. (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33863.)

Glennon (1984b, 657) writes that the view among the House conferees was that passing no bill would be actually preferable to passing the Senate version. The corresponding view among the Senate conferees was that the House bill was preferable to having no bill.[86] Seventy-five Senators decided to vote on the Conference Report in comparison to 238 members of the House, with 123 opposing and 73 abstaining (See Congressional Record: October 10, 1973, 33569; October 12, 1973, 33873-33874). In summary, it could be said that even though the codification of Commander-in-Chief's emergency powers was considered essential to the members of the Senate, the majority could settle for the conference bill. Since several war power bills had already been introduced, the Senators seemed more concerned about keeping the momentum to restore the Congress' constitutional authority rather than the specifics of the bill itself. This is somewhat surprising since the Senate version of the bill was more detailed than the House version.

The voting record seems quite interesting when correlated to the different legislative stages of the bill. For example, Senator Eagleton supported the Senate bill (S.440) whereas Representative Milford voted nay on the House bill (H.J.Res.542) (See Congressional Record: July 20, 1973, 25119; July 18, 1973 24707). Both Eagleton and Milford chose to vote against the Conference bill in the end (See Congressional Record: Oct. 10, 1973, 33569; Oct. 12, 1973, 33874). Related to the passage of the bill and thus overriding the presidential veto, Milford voted, yes, whereas Eagleton voted nay (See Congressional Record: Nov. 7, 1973, 36198; 36221).[87]

As discussed above, the final version of the bill that came out of the conference is a compromise between the prevailing approaches. According to Phelps and Boylan (2002, 645), the Congressional Record includes approximately 200 hundred pages of War Powers Resolution materials. The Conference Report, however, attracted comments only by a few members of Congress. It seems to me that a few comments are in order regarding the Conference Report in order to illustrate the compromise character of the bill.

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86 It seems that already during the Senate debate on S.440 Senator Fulbright adopted the House approach regarding his proposed amendment to the bill. (War Powers Act, July 20, 1973, 25095-25096)

87 Spong (1975) has discussed the voting record regarding the conference bill and vote to override the veto in more detail.

3.5 Overriding the presidential veto

Despite the opposition of President Nixon, Congress managed to pass the bill. The votes were 284 to 135 in the House and 75 to 18 in the Senate. The executive branch pressured Congress to reconsider the purpose of the bill because of the very specific political context. President Nixon questioned the need to have such a bill and urged Congress to draft a bill that he could actually sign.

During the House debate on the bill (H.J.Res.542), Representative Gerald Ford (R-MI) read for the House a telegraph sent by President Nixon, in which the president showed his clear opposition to the bill, but at the same time said he hoped for increasing cooperation between Congress and the president in the future.

> As the House begins consideration of H.J.Res.542, the war powers bill, I want you to know of my strong opposition to this measure. I am unalterably opposed to and must veto any bill containing the dangerous and unconstitutional restrictions found in sections 4 (B) and 4 (C) of this bill. However, I fully support the desire of Members to assure Congress its proper role in national decisions of war and peace, and I would welcome appropriate legislation providing for an effective contribution by the Congress. I urge you to reject H.J.Res.542 and to work instead for legislation that I can sign and which can enhance the ability of Congress and the Executive to fulfill their historic constitutional roles and do so in a way that reinforces the strength of both. (Quoted in War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24663)

According to Ford, the president thought that with this particular legislation Congress was "trying to go too far" (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24663).

Representative Zablocki (War Powers Resolution – Veto, November 7, 1973, 36202) opened the discussion concerning the veto of the president by stating that "*the House of Representatives has the historic opportunity to reassert its constitutionally mandated obligation in the area of war powers*." According to Zablocki (ibid.) the veto was a disappointment after the president's recent request for "*national leadership that recognizes that we must maintain in this country a balance of power between the legislative and the judicial and the executive branches of the Government*." Zablocki's argument gives the impression that Congress was ready for cooperation in war-making, but the president was not willing to share more of the responsibility.

The political context of the time was apparent during the House debate on overriding the veto. The question was raised whether the WPR would allow the president to commit troops in the recent Middle East crisis, referring it seems, to the Yom Kippur War in October 1973. Representative Zablocki (War Powers Resolution – Veto, November 7, 1973, 36202) responded to the question with the following words: "*The Resolution does not directly or by implication authorize the President to employ, commit, or introduce US Armed Forces into areas of hostilities*."[88]

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88 Representative Zablocki referred to section 8 (d) (2): "Nothing in this joint resolution -- (2) shall be construed as granting any authority to the President with respect to the

But the resolution recognized that the president has certain authorities by virtue of the need to respond swiftly to an emergency – namely the right as Commander-in-Chief to deal with emergency situations to protect the security and safety of the nation (War Powers Resolution – Veto, November 7, 1973, 36202).[89] The War Powers bill does not, therefore, hinder the president's flexibility to act decisively, but Zablocki (ibid.) noted the bill is "*purely and simply a legitimate effort by Congress to restore its rightful and responsible role under the Constitution*."

President Nixon criticized the bill as unconstitutional, maintaining it allowed Congress by dint of a simple legislative measure to assume authorities that had been carried by the president under the Constitution for the last 200 years. Further, Nixon considered it problematic that Congress would be allowed to eliminate some of the authorities by concurrent resolution, a measure that does not even have the force of law. According to President Nixon the only way to change the constitutional authorities of government was to amend the constitution. (See more in detail Message from the President of the United States Vetoing House Joint Resolution 542, A Joint Resolution concerning the War Powers of Congress and the President, October 25, 1973, House Document No. 93-171.) The core of the bill relates to the question whether the bill opposes constitutional powers of the president or whether it is about restoring the constitutional separation of powers.

Representative William Broomfield (R-MI) defended the role of Congress during the debate on President Nixon's veto as follows: [*T*]*his bill brings us back to the Constitution, it brings us back to the basic principles of joint warmaking powers that have stood us in good stead for 200 years* (War Powers Resolution - Veto, November 7, 1973, 36203). The constitutional framework was used in the debates in order to emphasize that Congress should not hesitate to override Nixon's veto and pass the bill.

Critics followed the argument in Nixon's veto statement, which said the bill would reduce the president's flexibility and ability to act in times of crisis. The flexibility argument was considered to be derived from the Constitution that only states that the president should act as the Commander-in-Chief. In the House, Stratton defended the powers of the president by claiming that it is not possible to respond to every future exigency by means of the WPR legislation: "*I think we ought to vote to sustain this veto because this legislation shows how foolish it is to try to write into legislation words that will anticipate every conceivable situation that might happen in the future*" (War Powers Resolution – Veto, November 7, 1973, 36205). Representative Kemp opposed the idea of overriding the veto because he believed the bill threatened the US foreign policy. The bill that was described in Kemp's words as "a short-term legislative victory over the execu-

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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." (P.L.93-148)

89 The WPR bill included the prior consultation requirement: Sec. 3 "The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances." (P.L.93-148)

tive branch" that was not only "unconstitutional" but "extremely dangerous in this still dangerous world". He also referred to historical precedents in order to oppose the bill: "*There are, additionally, a number of constitutional arguments to be made against the war powers resolution. For 200 years the war powers curtailed by the resolution have been an accepted part of government, and they have never been adjudged unconstitutional*." (War Powers Resolution – Veto, November 7, 1973, 36210.) Kemp (ibid.) urged his colleagues to sustain the veto by saying that a firm foreign policy should be more important than the will to cause a setback for President Nixon and his administration.

The above-mentioned arguments are not very convincing when compared to the language of the bill. The constitutional Commander-in-Chief powers are defined in the bill, albeit rather vaguely. The president may also continue to use the armed forces when there is a declaration of war, other statutory authorization (or a national emergency).

As discussed, the need for a bill to regulate the use of war powers was evident because of the political context at the time. During the debates, several members stated that the bill was needed because of the Vietnam War. The debates, however, show that the bill was not meant to be against President Nixon personally, and that the current situation was not the only reason for adopting the bill. Representative Martin, for instance, encouraged his colleagues to enact the legislation over President Nixon's veto "*not in a reaction to the tumult of today*", but to provide a way or "method" of providing for future situations. Representative Hanley also stressed that the bill was not directed against President Nixon personally: "*I must remind that Presidential personality is not at all involved in this consideration, regardless of who the President might be. It is not even a part of the issue*." (War Powers Resolution – Veto, November 7, 1973, 36205.)

It seems that for both the opponents and proponents, the vote should be on the merits of the bill as such. Representative Stratton reminded members that enacting the legislation was not related to what was going on with President Nixon and Watergate. The issues of the incumbent president should not affect how the bill was being discussed because it concerned the question of the authority of future presidents. (War Powers Resolution – Veto, November 7, 1973, 36205.) Representative Green also pointed out that the bill should be considered "value free":

> Unfortunately, many have portrayed the upcoming vote on the President's veto as one part of the ongoing power struggle between the Congress and the President over war powers. In the heat of this confrontation, the merits of the war powers bill have been overshadowed. It has been too easily presumed that, because the intentions were good, the conclusions reached were wise. (War Powers Resolution – Veto, November 7, 1973, 36204)

During the veto discussion in the House it was again emphasized that Congress does not need to enact new legislation in order to control the use of war powers. Representative Green proposed that Congress has several other options to act rather than enacting new legislation:

> If the Congress cannot define the President's constitutional war powers, and it cannot; and if it is unwise to grant congressional warmaking power to the President, and it is, then what can Congress do? First, it can defeat Gulf of Tonkin resolutions. Second, it can muster the courage to cut all funding for military action taken by the President with which it disagrees. Third, it can impeach a President who usurps congressional warmaking power. (War Powers Resolution – Veto, November 7, 1973, 36204)

Because Congress could not delineate the constitutional war powers of the president, it should concentrate instead on measures that it actually can use to control the presidential actions, explained Green.

During the veto debate in the House, Representative Claude Pepper (D-FL) related the problems to already existing congressional controls of war powers. For example, when Congress threatened to cut off military funding, the opponents usually claimed that Congress was letting the US armed forces down and was unwilling to take up the baton. (War Powers Resolution – Veto, November 7, 1973, 36206.) Representative Bingham further argued that cutting funding was "a clumsy instrument". The appropriations already granted presumably could enable the continuation of the armed forces for a relatively long time. Congress could pass a bill in order to prevent the armed forces from using funding that had already been granted, but such a bill would normally be subject to a presidential veto. The only exception was when a clause to prohibit funding was attached to a bill of the kind that the president must sign. Bingham gives an example of this kind of legislation, a bill that had become in effective on August 15, 1973. Bingham highlights the bill by means of which "*the president was forced to accept a congressional cutoff of funds for the war in Indochina.*" (War Powers Resolution – Veto, November 7, 1973, 36208.)

During the debate on the Conference Report, Senator Eagleton wanted to remind members that the role of Congress was not to make history, but reasonable laws: "*We are not here to make history. We are here to make law. We are here to make important law, the most important law that can be made by man on this earth; namely, when to go to war – how, why, and when to go to war.*" (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33559.) In the course of the veto debate, he further criticized the quality of the debate by saying that while the topics of this importance were scheduled to be for only two hours; about senatorial pay raises members could have debate for a week (War Powers of Congress and the President – Veto, November 7, 1973, 36177). Senator Javits further addressed the content of the debate on overriding the veto by saying that the Senate had carried out a debate, "*which is interesting and highly rhetorical, but does not go to the terms of the bill*" (War Powers of Congress and the President – Veto, November 7, 1973, 36187). The problem seemed to be that the terms of the bill attracted such various interpretations that it was not necessarily beneficial to discuss them as such.

In the course of the veto debate Bingham put into the words a view that had been expressed several times on the floor: "*The vetoed bill is not perfect. Moreover, if enacted into law, it will be of no use unless future congressional majorities have the will to say no to Presidential military adventures. But it does represent an unprecedented and historic congressional effort to close a loophole in the Constitution, the*

loophole of the undeclared war." (War Powers Resolution – Veto, November 7, 1973, 36209.) Bingham argues while the bill is not perfect, Congress should not waste the chance to restore its powers. Representative Hugh Carey (D-NY) further suggested that by passing the bill Congress could put an end to the problems and ambiguities that have been allowed to develop due to the lack of proper understanding of the constitutional powers of Congress (War Powers Resolution – Veto, November 7, 1973, 36209).

When reading President Nixon's veto statement, it seems that the bill would not have enlarged the powers of the president, but quite the opposite (See for instance Representative Findley's argument in War Powers Resolution – Veto, November 7, 1973, 36207). Representative Vernon Thomson (R-WI), however, interpreted the substance of the bill differently:

> Mr. Speaker, contrary to the views of many of its proponents, in its present form House Joint Resolution 542 is likely to enhance the war powers of the President and to encourage their freer use, rather than to reassert the exercise of collective judgment of the Congress and the executive branch as intended by the drafters of our Constitution. (War Powers Resolution – Veto, November 7, 1973, 36207)

Thomson's argument is based on the language of the Constitution, which clearly states that it is the Congress that declares war. Therefore, he indicated that the president must consult with Congress before introducing US forces into hostilities: "*Article 1 of the US Constitution gives Congress alone the power to declare war. If that power is not to be considered meaningless, it surely must require congressional consent before the American people can be committed to bear the burdens and risk the dangers of war.*" (War Powers Resolution – Veto, November 7, 1973, 36207.) The legislation was problematic for Thomson (ibid.), because it authorized the president to introduce the armed forces without prior congressional consent. The only requirement for the use of force was that president report within 48 hours on the measure taken: "*In one sense House Joint Resolution 542 could be viewed as a standing if conditional declaration of war to be used by the President in whatever instances and against whatever party he sees fit.*" According to Thomson the bill (H.J.Res.542) could be read either as undermining the constitutional power of Congress to declare war, or as granting that power to the president for use whenever the president deemed necessary (War Powers Resolution – Veto, November 7, 1973, 36207). For Thomson (ibid.) the Constitution does not grant that power to the president, and Congress should certainly not provide that authority by bill designed to restore the constitutional balance.

Representative Bingham's reading of the language of the bill was quite different to Thomson:

> The view that the bill somehow gives respectability to the Presidential capacity to make war seems to me to reflect a mistaken misunderstanding of the objective of this legislation. The objective is not to delimit the Presidential power to make war or to reduce – or expand – the possible excuses that a President may make for engaging in hostilities on his own – Presidents have never lacked for such excuses - rather, recognizing that Presidential wars have occurred in the past and no doubt will again, the objective is to provide the Congress with effective ways of calling a halt by majority vote. (War Powers Resolution – Veto, November 7, 1973, 36209)

Bingham indeed claims that the main point is not whether the bill grants new powers to the president or circumscribes already existing ones, but that in the future the Congress can have effective means of seeking a termination to US war or military actions by a majority vote.

Representative Harold Froehlich (R-WI) supported the constitutional separation of powers and stated that overriding the veto was essential to terminate the one-man rule in the US:

> The key to our constitutional system is its separation of powers. The duties and responsibilities of each branch of Government are clearly delineated, so that our Government officials know what they can and cannot do. The entire Indochina situation was a prime example of lawlessness by the Executive, and acquiescence by the Congress. We must never allow this to happen again. […] If we fail to override this veto, we may be viewed as granting the Executive an unlimited license to wage undeclared war. This would be a total abrogation of our responsibilities, and we will have failed our people by default. (War Powers Resolution – Veto, November 7, 1973, 36213)

Froehlich's argument indicates that there was now clear pressure on Congress to act. If Congress failed the veto vote, it would lose its chance to define the war-making powers of the executive and Congress. This argument seems to illustrate the idea of momentum present in the debates, the thought that passing the WPR bill was the "last chance" for Congress to act.

It seems that members of Congress and the president had rather different views about the constitutional war powers. Representative Robert Legget (D-CA) criticized President Nixon's veto statement by saying that everything that the president prefers is automatically constitutional and everything he disagrees with is interpreted as unconstitutional (War Powers Resolution – Veto, November 7, 1973, 36215). In a similar manner, Representative Elizabeth Holtzman (D-NY) contested the president's veto message by saying that the president was intentionally misinterpreting the Constitution:

> First, in vetoing the bill, President Nixon stated that it was unconstitutional, claiming essentially that he has unlimited power to commence a war. The President's analysis of his constitutional powers is completely and categorically inaccurate. […] Second, this is a time during which our country is undergoing an extraordinary crisis of confidence in our Government. It is clear that Presidential abuse of powers must be corrected and limited if we are to restore the people's faith in our democratic system. (War Powers Resolution – Veto, November 7, 1973, 36220)

Interestingly, she describes the current situation as "an extraordinary crisis of confidence in our government", giving the impression that the crisis had just arisen. Holtzman's argument seems to refer to President Nixon specifically rather than to executive dominance in foreign policy matters since President Roosevelt's time as a continuing trend.

Representative John Rarick (D-AL) criticized the Congress for giving members only prearranged alternatives to vote on:

> Mr. Speaker, Members are being told in debate here on the floor that we have only two alternatives: By voting to sustain the veto, we are supporting the President's in-

> terpretation that by implication he has unlimited war powers; or, by voting to override, we are supporting the argument that this legislation is necessary to limit the President's "war powers" by establishing a specific time limitation on his "powers". […] There is another alternative. A member can vote to sustain the President's veto and in so doing uphold the Constitution, which gives to the Congress – and only to the Congress – the power to declare war. The President has no war powers, express or implied, which are not ratified or sanctioned by an act of Congress. […] There is no mention whatsoever in the Constitution about any "war powers" of the President. (War Powers Resolution – Veto, November 7, 1973, 36219)

Even though restoring the constitutional balance of powers between the executive and the legislative branches of government was considered mainly to be a bipartisan effort, the party divisions were still relevant in the debates. Representative Bingham expressed the issue in the following words during the debate on the veto:

> Mr. Speaker, President Nixon does not want a majority of both Houses of the Congress to be able to stop him from making war on his own. He insists that he must be free to act so long as one-third plus one of either House agrees with him. Such is the essence of Mr. Nixon's veto message rejecting the war powers bill, a bill which was agreed to by large majorities in both Houses after months of labor. Most of the members who will vote today to sustain the President's veto are Republicans or conservative Democrats who agree with Mr. Nixon's position that the bill represents a dangerous and improper interference with the President's authority. Ironically, however, if the veto is sustained, the margin of his victory may be supplied by a few liberal Democrats who are convinced that the bill somehow gives a kind of theoretical sanction to Presidential warmaking. (War Powers Resolution – Veto, November 7, 1973, 36208)

Bingham continued by emphasizing the controversies of the bill in relation to the party affiliations:

> In view of the strong feelings of the President and of many Members of Congress that the bill unduly restricts the President's warmaking authority, how is it that a group of liberal Democrats have voted against it on an opposite ground? The essence of their objection seems to be that the 60-day-90-day-provision implies that the President has authority to make war during this period, even though the bill expressly states that it shall not be so construed; the bill specifies that it is not intended to alter the President's constitutional authority in any way and that it does not grant the President any authority with respect to the use of the Armed Forces that he does not already have. (War Powers Resolution – Veto, November 7, 1973, 36209)

The argument made by Bingham illustrates the controversy of the bill that divided members across the party lines, thus calling into question the whole idea of partisan voting with regard to overriding President Nixon's veto.

Representative Ashbrook noted during the debate in the House that a few Republicans may vote to sustain the veto because of the recent problems the President Nixon was facing (War Powers Resolution – Veto, November 7, 1973, 36220). Representative James Broyhill (R-NC) indeed criticized the vote on the veto as being labeled as a vote of confidence for the president or against the president:

> I would like to end my remarks with a brief but stern warning to those in the press and the Democratic Party who have tried to make this vote a pro-President or anti-

> President vote. It is not. My decision and the decision of many of my Republican colleagues to vote to override the Presidential veto of this legislation is in no way a criticism of the President or of his handling of the Middle East crisis. (War Powers Resolution – Veto, November 7, 1973, 36221)

Broyhill emphasized in support of the president that the Republicans were not voting to override the veto because of the recent allegations concerning him. Representative Ronald Dellums (D-CA) also addressed the question of partisanship by stating that the heavy skirmishes around the bill were part of a "symbolic" effort of Congress to restore its constitutional prerogatives:

> I believe those liberal Congressmen who are switching their vote today are a victim of symbolic politics, where a symbol of accomplishment is preferred to the reality. Richard Nixon is not going to be President forever. Although many people will regard this as a victory against the incumbent President, because of his opposition, I am convinced it will actually strengthen the position of future Presidents. (War Powers Resolution – Veto, November 7, 1973, 36220)

The controversial substance of the bill, related, for example, to the concurrent resolution and to the possibility for congressional inaction, was used in arguments supporting President Nixon's veto. For instance, Representative Buchanan insisted on sustaining Nixon's veto because in times of crisis the Congress should act and not avoid action (War Powers Resolution – Veto, November 7, 1973, 36212). During the Senate debate on overriding the veto, Strom Thurmond (R-SC) questioned the use of concurrent resolution device in the bill, saying that Congress may limit a president's powers only by passing a joint resolution: "*A concurrent resolution is one that merely takes the sense of the bodies. How can a concurrent resolution have the force and effect of law? How could the President of the United States be denied the right to veto a resolution that would carry such tremendous power as this concurrent resolution would apparently do*?" (War Powers of Congress and the President – Veto, November 7, 1973, 36190.) The Senator (ibid.) further emphasized that there were no corresponding historical precedents legitimatizing the use of concurrent resolution for this kind of purpose.[90]

The arguments in the Senate to override or sustain the veto were in part similar to arguments in the House. There were, however, difference of emphasis. Senator Gale McGee (D-WY) stated that rather than enacting new statutory law the Congress should consider to what extent the Constitution is relevant to the contemporary political context:

> I simply think that with this resolution as we have debated and debated the question of what our decision-making structure really ought to be in a time of crisis, we have still ducked the gut issue. And the gut issue is what do we have to do with our Constitution to update it to now, 1973, to meet the real crisis of tomorrow, not yesterday. (War Powers of Congress and the President – Veto, November 7, 1973, 36192)

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90 Both Representative Buchanan and Senator Thurmond voted nay on the question of "shall the joint resolution pass, the objections of the President of the United States to the contrary notwithstanding?" (Congressional Record: Nov. 7, 1973, 36198; 36221-36222).

McGee further emphasized that the ideas of the Founding Fathers are not always simply adaptable to the political circumstances of 1973:

> During the debate on this bill, much was said regarding the intent of our Founding Fathers as they sat down to draft the Constitution in Philadelphia in 1787 – their intent in framing a workable relationship between the executive and legislative branches of Government in the area of war powers. However, the world our Founding Fathers confronted as they drafted the Constitution was not the world that Members of this body are compelled to face in 1973 and succeeding years. (War Powers of Congress and the President – Veto, November 7, 1973, 36192)

Senator Dole also tackled the question of constitutional interpretation related to war-making and supported enactment of the statutory law in order to have a decisive framework for the president and Congress to follow:

> The Language of the Constitution makes it very difficult to determine the lines between the power of Congress to declare war and the duty of the President to act as Chief Executive and Commander in Chief. This difficulty has led to a great deal of uncertainty, concern and dispute over the proper roles of Congress and the President in exercising what has come to be the awesome and sobering power of committing this Nation's armed forces to war. By bringing some clarify and basic guidelines to play in this field I believe this bill will contribute in a major way to the better functioning of our Government. (War Powers of Congress and the President – Veto, November 7, 1973, 36197)

Dole did not share the view of the opponents who claimed that Congress cannot delineate the war powers more in detail because the Constitution does not draw any rigid lines. Senator Goldwater, for example, opposed the WPR bill because he considered Congress to lack the authority to legislate in this area. The Senator called attention to a number of scholarly interpretations according to which the Founding Fathers intentionally left undefined the war powers in more detail when drafting the Constitution (Statement by Senator Goldwater, War Powers of Congress and the President – Veto, November 7, 1973, 36179). Goldwater (ibid. 36180) further encouraged the president to test the (un)constitutionality of the WPR in the court system if the Senate decided to override the veto, as the House already had.

During the Senate debate Senator McGee stated that he would be introducing completely new legislation that "*would call upon the President and the Congress to commission a high-level panel comprised of our best minds of diverse background and philosophy to undertake an intensive and in-depth study of the decision-making processes of our Government as they relate to the formulation of foreign policy, national commitments, and the war powers*" (War Powers of Congress and the President – Veto, November 7, 1973, 36192). As discussed, the establishment of a joint committee appeared in the Congress at different stages of the legislative process. Already in 1971, Representative Frank Horton (R-NY) proposed legislation to establish "a joint committee on national security". The new committee would be nominated by the Congress as a panel commissioned to consult with national security advisors and the president in circumstances where congres-

sional powers are concerned and where the authorization of Congress for military actions was needed. (Spong 1971, 20.)[91]

3.6 Did the War Powers Resolution make a difference?

To shortly sum up the WPR bill debates: The president's Commander-in-Chief powers to use the armed forces could only be employed when there was a declaration of war, other statutory authorization, or a national emergency. The intention was to require the president to consult with Congress before deploying US armed forces into hostilities and to submit a report within 48 hours after committing troops in the absence of a declaration war. If Congress did not declare war or extend the 60-day period or was unable to be in a session to make a decision, the president was obliged to withdraw the troops within 60 days after submission of the report. Congress could terminate the presidential use of force without a declaration of war at any time by enacting a concurrent resolution.

Even though the bill was passed, not all members of Congress were really convinced that the WPR would change how war-making was decided in the US.[92] For situations like the one presented during the Tonkin Gulf incident, Congress would most likely unite behind the president (See for instance Representative Joel Broyhill's (R-VA) argument during the debate on War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24706). In a similar way Representative Stratton reminded Congress during the debate on the house bill (H.J.Res.542) that Congress would willingly support the presidential actions in Vietnam (exact argument Chapter 3, p. 95).

Representative Green was also critical, stating that even though the intention behind the legislation was good, it did not secure the outcome, and therefore Congress should consider whether the new legislation serves the intended purpose:

> It should be noted first, that the Congress, in the language of its definition of the President's powers, is interpreting the Constitution. Of course, the Executive could interpret the Constitution differently. Indeed, the bill's expressed intent not to alter constitutional authorities could be read to invite a broader Presidential interpretation of his war making power. Thus, the net result could be absolutely no legislative constraint on the President's claims to constitutional warmaking authority. (War Powers Resolution - Veto, November 7, 1973, 36204)

Many members thought that by enacting the bill Congress would actually be enlarging rather than limiting the president's powers.

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[91] Representative Anderson proposed a bill on May 23, 1973, H.R.8066, the Defense Emergency Procedures Act of 1973, in which the establishment of a new "Joint Committee on National Security" was included in order to provide a forum for the president and Congress to consult together on whether US armed forces should be committed. (Providing for Consideration of House Joint Resolution 542, war powers of Congress and the President, June 25, 1973, H. Res. 456, 21207)

[92] See Representative Legget's argument in Chapter 4, p. 148.

Representative Green's argument indicates that the need for the WPR legislation was by no means unanimously agreed on. Several arguments illustrate the view of how there was no need for Congress to pass the bill because the Constitution already granted the war powers, and moreover, Congress had other means to regulate war powers, such as its budget authority.[93] The decisive question was to what extent the members believed that Congress would be able to participate in the decision-making process during a time of war. Filibustering or the otherwise slow pace of legislative processes raised doubts among members of Congress.[94] The filibuster problem related to the actual mechanisms of the bill. To what extent can we assume that Congress will come to a decision, and in how much time? Apart from the current Congress, will future Congresses be willing and able to take decisive actions in war-making? Senator Javits (1985, 134) wrote an article in *Foreign Affairs,* after enactment of the War Powers Resolution, in which he argued that by enacting the bill Congress did not end the possibility for a "presidential war", but the WPR bill at least provided Congress with the possibility to terminate presidential wars if it has the "will to act".

As discussed above, during the debates of the WPR bill the possibility to limit the powers of the president through a mechanism of congressional inaction raised many doubts. It was clear that members of Congress had future Congresses in mind when considering what would be the most effective way to secure congressional participation in war-making. Senator Huddleston (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33566), for instance, said that the current Congress could only provide certain tools for future decision-makers and therefore the WPR should be considered "*as a first step - a first move toward a reassertion by Congress of its constitutional powers.*" It was up to future Congresses to see how effective the bill would be in practice.

It seems that even after enacting the new legislation Congress could not solve the fundamental question: how to secure congressional oversight? Senator Claiborne Pell (D-RI), the Chair of the Senate Foreign Relations Committee, argued in 1988 on the War Powers Resolution as follows: "*If we chose to make it work, it will work, but we do not have within ourselves the gumption to make it work. It is workable if we choose to, but we do not choose to*." (Quoted in Ely 1988, 1379) The Congress had put itself in a difficult bind. By enacting the War Powers Resolution the aim of Congress had been to reassert its powers. The constitutional duty of Congress to make decisions on the use of the US armed forces had been undermined. However, even after passing the WPR, Congress continued to struggle with the same problematic of how to find the "will to act."

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93 As discussed above, the use of budget authority to impose restrictions on presidential authority is not that simple. As Representative Michael Harrington (D-MA) noted on the House floor in June 1973, Congress failed to overcome President Nixon's veto of an appropriations bill that would have ended funding for the bombing of Cambodia at once. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24701)

94 The final version of the WPR bill includes some time requirements within which Congress should take action by approving a joint resolution, approving a bill to declare war, or otherwise authorizing the presidential action before the 60 day time expires.

It seems that Congress could have gone much further. The bill, for example, does not stipulate as a condition that the president can use war powers only if there has been a formal declaration of war or other congressional sanction. Neither does the bill specify that only in sudden "emergency" case may a president use the armed forces without prior congressional consent. Rostow (1986, 40) writes that the bill takes into account "*what history and common sense make obvious – that in the nature of world politics there will be many occasions when the United States, like other nations, will have to use force quickly and decisively in order to protect its security, and that the President is the only possible representative of the nation capable of carrying out such actions*." This seems to be for Rostow (1986, 40) the core of the "energetic president" argument found in the Federalist Papers. The argument advanced by Rostow to some extent contradicts with the view expressed in the congressional debates. The general idea that was that the bill would not necessarily prevent the unilateral use of the armed forces by the president, but it would support the system of checks and balances by giving Congress the power to review and terminate a presidential use of the armed forces.

Because subsection 2 (c) of the resolution referred rather vaguely to what kinds of situations would warrant presidential deployment of armed forces, the political debate continued on this question. The problem was how to predict all of the imaginable situations, in which a president would need to act immediately in order to protect the national security without having time to obtain congressional authorization first. The bill itself does not define "hostilities" in more detail.

The War Power Resolution resolved, however, some of the tensions between the arguments i.e. the need for swift, efficient action versus the need for thorough deliberation and decision-making. The president is permitted to take immediate action, but time is also secured for Congress to convene and reach a decision on continuing the action. The efficiency argument in general is rather curious. There is no guarantee that the action of the president is, in fact, more efficient or effectual in the long term. The Congress could be in a better position to evaluate the risks through debate than the president.

To Ely (1988, 1381) the reason why the War Powers Resolution has not worked as planned can be traced to three different factors: the refusal of the president to abide by the resolution; judicial unwillingness to take up the matter and review the issue; and congressional hesitation.[95] According to Ely (1998, 1385) the supporters of the resolution would have preferred the measure to be titled as an act rather than a resolution. It seems that the resolution form was chosen because it was considered more meaningful and substantive by the House leadership at the time than a simple "Act" would have been. Ely (ibid. 1386), however, writes that whereas in the early 1970s this may have been the case, the later connotations have been quite the opposite.

The consultation requirement of the bill is vague, as presidents have claimed the bill does not provide instructions as to what "consultation" means,

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95 For more about the use of the Resolution in practice, see Ely 1988.

for example, when and with how many members of Congress is the president supposed to consult? What does it mean in practice to say that a president should consult "in every possible instance"? Is the consultation merely reporting or a real dialogue? Is it enough if the president consults after armed forces have been used or should the consultation happen within a certain period of time before the actual deployment? (See more details, Ely 1988; Koh 1988; Rostow 1986.)

A major defect in the bill is the requirement to withdraw troops within 60-days only if the president has filed one of the three types of reports described in the bill. The president should report under section 4 (a) (1) by referring to the formulation given but usually presidents have reported using the expression "consistent with ["instead of pursuant to" section 4 (c)] the War Powers Resolution" therefore avoiding to an activation of the 60-day period. (For more detail, see Fisher & Adler 1998, 11).[96] The 60-day period granted for the president to act without congressional approval should be removed, because it has proved to be "unworkable". Senator Robert Byrd (D-WV) in the Senate as well as Congressmen Lee Hamilton (D-IN) in the House have introduced bills to amend the War Powers Resolution to withdraw the "operative provisions" of the bill (Ely 1988, 1383, 1404; Koh 1988, 1299). It seems that that the sponsors failed to explain how the War Powers Resolution is a matter of constitutional, and therefore failed to convince the executive to respect its full legal weight (Glennon 1984b, 660).

According to research carried out by the Congressional Research Service, consultation does happen frequently after troops have been introduced, but not beforehand. In addition to the problems outlined above, the particular failure of the consultation provision is that it is not compulsory. The bill fails to include a definition of consultation and thus has led to the situations in which Congress and the president disagree as to whether the consultation provision was complied with. (National War Powers Commission, appendix one 2008, 8.)

Senator Javits remarked during the Senate debate on the conference bill, "*The consultation requirement is not discretionary for the President; he is obliged by law to consult before the introduction of forces into hostilities and to continue consultations so long as the troops are engaged*" (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33550). Javits' argument is to some extent, however, meaningless since the resolution does not include any sanctions if the president decides not to consult the Congress.

Although the main idea of the bill was to increase the role of the Congress in the decision-making process, the bill contains many provisions leaving the outcomes to the discretion of the president only. One of the substantive problems of the bill seems to be whether subsection 2 (c) of the bill is legally binding.

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[96] According to section 5 (c) of the bill the president should withdraw the use of the armed forces within 60 days after the report is submitted or is *required to be submitted* pursuant to section 4 (a) (1) if there has not been a declaration of war or an extension of the period, or if Congress is not able to make a decision due to the national emergencies. The section seems to indicate that the 60-day requirement is valid even if the report is not submitted. (Emphasis added later on, see P.L.93-148)

The Court has not ruled on the issue and therefore the question remains if the subsection really imposes some limitations on the presidential power to introduce US armed forces. It has been argued that this section of the bill should become legally binding. For example, in 2007, Rep. Walter Jones (R-NC), presented a proposal the main purpose of which was require the executive to seek an official declaration of war or other statutory authorization from Congress before "the initiation of hostilities", with the exception of three emergency situations concerning a need to evacuate citizens, an armed attack on the US armed forces, or an armed attack to the United States. (National War Powers Commission, appendix one 2008, 5, 7.)

In the words of Davidson et al. (2012, 465) "*The WPR is an awkward compromise of executive and legislative authority, and presidents still intervene as they see fit*." Every president holding office after the resolution was adopted has questioned its lawfulness. Neither Congress nor the president has, however, wanted to test its legality in the Supreme Court. The WPR bill has not been completely without effect, however. As of the end of 2010, more than 130 reports have been submitted to Congress concerning the use and deployment of US armed forces abroad. (Davidson et al. 2012, 464, 469.) However, as Lobel (1989, 1415) highlights, the submitted reports have never triggered the provision concerning a withdrawal of troops within 60-days. Congress has contested the president only once on this, according to Lobel (ibid. fn. 159), who refers to the Lebanon crisis and the Reagan administration and Congress coming to an agreement to allow US troops to stay in Lebanon for 18 months.

Despite WPR's problems, Congress has not been willing to amend or repeal the law, though the pressure to do so has been evident since the time it was passed 1973. Senator Barry Goldwater together with Senator Jeremiah Denton (R-AL) proposed a bill to revoke the War Powers Resolution (Javits 1985, 138),[97] and the House of Representatives was close to repealing the bill in 1995 (Fisher & Adler 1998, 15). The War Power Resolution is still, however, valid legislation. It is often referred to in contemporary discussions; one of the most recent examples, for instance, was the debate on possible War Powers Resolution violations in regard to the use of force in Libya.[98]

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97 There have been several other measures to either improve the substance of the War Powers Resolution or to repeal it. See in details about proposed amendments e.g. Fisher & Adler 1998; Grimmet 2010. The National War Powers Commissions (2008) overview of proposals to reform the War Powers Resolution introduces some of the main efforts to "re-conceptualize" the bill. See appendix one, "An Overview of the Proposals to Reform the War Powers Resolution of 1973", http://millercenter.org/policy/commissions/

98 See "Letter from the President on the War Powers Resolution", http://www.whitehouse.gov/the-press-office/2011/06/15/letter-president-war-powers-resolution. Also an article of the New York Times (June 15, 2011) "White House Defends Continuing US Role in Libya Operation" provides details on the debates of the War Powers Resolution in regard to Libya in 2011. The CRS Report for Congress: *The War Powers Resolution: After Thirty-Six Years* (Grimmet 2010) also provides useful insights into how the War Powers Resolution has been applied since its enactment.

During the 1980s members of the Congress took the issue to the court (United States district court), to challenge President Reagan on bypassing the War Powers Resolution. All four cases were unsuccessful. In the Court's view seemed to be that it would not consider the cases as they were "political matters". According to Fisher & Adler (1998, 12) the Court gave a clear message: Congress should defend its own prerogatives and not rely on the courts. Political matters should be resolved by enacting new legislation or by relying on existing powers, such as the power of the purse. (See discussions in Fisher & Adler 1998, 12-13.)

Koh (1988, 1290) writes that the Iran-Contra affair is one example of how the effort of Congress to restore the constitutional balance of powers in foreign policymaking has been only partly successful. Even if a president signs most of the statutes imposing restrictions on the executive powers, this does not mean that the "fundamental" premises of the statutory restrictions will be accepted. Indeed, presidents have afterwards bypassed the statutes completely or exploited loopholes in the statutes. (Koh 1988, 1290-1291.)

Koh (1988, 1291) in his article "*Why the President Always Almost Wins in Foreign Affairs*" provides three explanations of why the executive branch has become so dominant in foreign policy issues: the executive has seized the initiative; Congress has usually gone along with what the president has done due insufficient legislative tools, short-sightedness, poorly drafted laws, or lack of political will (i.e. the "rally around the flag" effect); and federal court or Supreme Court review has either been lacking or benefited mainly the president. Rostow (1986, 51) takes a rather different view in analyzing the "real lesson" of the WPR legislation. Interrelating WPR and the experience of the Vietnam War, he states that procedure has come to dominate over substance. Because there was no consensus on foreign policy or national security affairs in this particular political context, the way out was to define the procedural settlement to solve the situations such as the Vietnam War. It seems to me that Rostow makes an important point, as the bills considered in this study enacted in the early 1970s were seen as more procedural than substantive. In this regard, Senator Javits emphasized in consideration of S.440 that the bill should be considered as a "methodology": "*this bill has been properly put before the Senate previously and again now, not as changing this body's constitutional authority, not indeed, as chancing substantive law, but as a methodology in an area where no methodology has existed before...*" (War Powers Act, July 20, 1973, 25081).

Fisher and Adler (1998, 1) feel that Congress should repeal the War Powers Resolution and rely on the principle of checks and balances in other ways, for instance Congress's right to impeachment and normal political processes like the budgetary powers. According to Fisher and Adler (1998, 1) repealing the resolution could be interpreted in a way that undermines the role of the Congress; however that may not really matter because the War Powers Resolution has already had that effect. Fisher & Adler (ibid.) and others mentioned above, look at the issue only from the viewpoint of foreign policy realities. When we consider the War Powers Resolution debates from the viewpoint as

practiced in this study, it is possible to say that Congress at least partly succeeded in defining a parliamentary means of controlling the executive power.

3.7 "There is only room for one Commander in Chief, not 535"

Two different approaches to the war powers implicit in the US Constitution can be distinguished. The proponents of congressional power believed that the right to initiate war belongs solely to Congress, but they agreed to the right of the president to respond to sudden attacks. The proponents of the executive prerogatives, on the other hand, viewed the Article Two of the Constitution and especially the Commander-in-Chief clause grant the executive powers to the president and therefore the president should have the primary authority in war-making.[99] The division of opinions between these two sides became evident in War Powers Resolution debates.

It seems that no definite agreement on the actual meaning of "war powers" was reached in the debates. War powers were divided roughly into powers meant to be used in two different situations: offensive and defensive wars. Senator Eagleton provided the following description during the Senate debate on overriding President Nixon's veto: "*The term "war powers" is a generic term dealing with the authority of the President and Congress to commit American Armed Forces into hostilities or into a theater of the world where there is the imminent threat of hostilities*" (War Powers of Congress and the President – Veto, November 7, 1973, 36176-36177).

Interestingly, the debates also use the term of "war-making". The idea to make war can be traced back to the debates on drafting the Constitution. The Constitutional Convention's language referred originally to the right of the Congress to "make" war and only later changed the language to "declare" the war. The president's authority to respond to national emergencies without prior congressional approval was generally agreed on. The problem rather seemed to be to what extent the procedure of Congress for declaring war was suitable for contemporary situations. Another topical question was whether the constitutional power of Congress to declare war, also implies that Congress has the power to terminate war.

Several concepts in the War Powers Resolution debates serve my purpose of analyzing the controversies over the constitutional balance of powers and how successfully these could be resolved by enacting statutory law. Central to the debate was the concept of the Constitution. To what extent does the "original reading" of the 200-year-old Constitution serve the contemporary situation? The Constitution is not "static" and therefore capable of responding to every political time and exigency. During the veto debate in the Senate, Senator McGee requested that Congress should think in broad terms about of how the

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99 For general information about the divisions, see the National War Powers Commission report 2008, appendix one.

Constitution can respond to contemporary challenges in foreign policy (See p. 116-117). According to McGee the members of the Congress should give thought to "*what the Constitution should say in 1973.*" For McGee Congress has "*put off far too long the process of updating our Constitution and updating the mechanisms of a representative Republic in the field of foreign policy*" (War Powers of Congress and the President – Veto, November 7, 1973, 36192). Updating the Constitution seems to refer here to the enactment of constitutional amendment. The possibility to amend the Constitution was brought up in the debates, but not seriously discussed. Some considered the resolution unnecessary since the Constitution already grants the power to declare war to the Congress. Rather than amending the Constitution, Congress decided to update the mechanisms of foreign policy through the statutory law.

Related to the constitutional provision of war-making, the central conflict is between the enumerated war powers of Congress and the Commander-in-Chief powers of the executive. The Commander-in-Chief concept attracted rather polarized interpretations during the debates. Instead of a very limited conception, for instance, corresponding to a chief officer in the army, the Commander-in-Chief corresponds to the powers of the president in general and more importantly to the "inherent" powers of the president. The supporters of the executive prerogatives tended to rely more extensively on a robust interpretation of the Commander-in-Chief clause of the Constitution.

During the Senate debate on the Conference Report, Dole illustrated the scope of the president's Commander-in-Chief powers by distinguishing three different authorities that presidents have exercised under the Commander-in-Chief powers: "*First, authority to commit military forces of the United States to armed conflict, at least in response to enemy attack or to protect the lives of American troops in the field. Second, authority to deploy US troops throughout the world, both to fulfill US treaty obligations and to protect American interests. Third, authority to conduct or carry on armed conflict once it is instituted, by making and carrying out the necessary strategic and tactical decisions in connection with such conflict.*" (War Powers Resolution of 1973, Conference Report, October 10, 1973, 33563.)

As mentioned above, the Commander-in-Chief power in US political discourse means something more than just the head of an army. The "correct" interpretation of the Constitution in this regard was relevant also during the debates regarding the duties and prerogatives of the Commander-in-Chief. Senator Javits argued that the Commander-in-Chief clause, in the minds of the drafters of the Constitution, referred to "*George Washington as colonial commander in chief to the Continental Congress*" (War Powers Act, July 18, 1973, 24538). The present trend, however, has been to emphasize that the Commander-in-Chief powers are whatever the president decides in any given situation (See argument by Javits, p. 80).

The popular sovereignty concept was used to legitimate the role of the Congress in the decision-making process. However, some members emphasized that the president, too, is elected by the people, although less directly. Representative Burke, for instance, argued that the Congress, by debating the WPR legislation, was undermining the confidence of the American people that

they, as voters, are ultimately the decision-makers: "*We must give the American voter and the American system of elections full credit for selecting in most instances able men to be our Presidents. Madame Chairman, the President must have the confidence and support of the American people in order for him to be elected to office. His actions as President are similarly subject to public opinion*." (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21235.)

Representative Parren Mitchell (D-MD) contributed to the issue during the debate by stating that the executive is accountable to the people in the same way as are the members of the Congress: "*It was decided several hundred years ago in the constitutional conventions, which formed this government that each branch of Government and every elected official within each branch, was to be directly accountable to the people*" (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, H.Res. 456, June 25, 1973, 21208). Popular sovereignty refers to the idea that power is derived from the people, and is further executed or put into practice because of the people. The popular sovereignty expression here refers mainly to the national level. In the US system, the popular sovereignty is particularly significant at the state level.

The idea of collective judgment was a central figure in the WPR debates. Phelps & Boylan (2002, 643) write that the enactment of WPR meant (at least for some) that, "I*n the constitutional discourse of war-making, Congress would become a part of the colloquy rather than part of the audience*." Expressed in the debates was the idea that future war-making should not be a unilateral action of the president. Senator Humphrey presented his view on the issue during the veto debate:

> Mr. President, I am prepared to work with the President on matters relating to the security of this Nation and on the other matters. However, I am also prepared to say that this is not an empire. This is not a kingdom. We do not have an imperial domain. We have a republic. And the way to preserve a republic is to make it possible for the representatives of this republic to act responsibly. And the way to do that is to put the responsibility right here. (War Powers of Congress and the President – Veto, November 7, 1973, 36191)

The WPR bill does not really address the possibility of president acting against the will of Congress. The option was not seriously debated either. It was, however, acknowledged that the concurrent resolution is not necessarily the most effective mechanism in the bill, because presidents could just ignore it. A situation in which the two branches of government disagreed was also not really discussed. For example, what if Congress declares war, but the president is not willing to introduce the armed forces?

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Two-types of arguments can be distinguished in the WPR debates: an idealist type and a realist type, and either could be used to support or oppose the legislation. The ideal type here refers to arguments that were based on constitutional ideas and formulations, e.g. the idea of Congress being the branch "closest to the people". The ideal type also refers to the overall idea of the momentum to

restore the Congress' powers. The ideal type of arguments included a vision of how things should be according to an original reading of the Constitution and the intentions of the Founding Fathers. Representative Hamilton Fish Jr.'s (R-NY) argument illustrated the question: "*Mr. Speaker, today we are debating not only a piece of legislation but a principle. We are called upon to determine whether or not the institution of the Congress has the will to recapture its proper constitutional role with respect to warmaking*." (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, H.Res.456, June 25, 1973, 21207.)

The ideal type of arguments can be grouped into categories such as: restoring the constitutional prerogatives of the Congress; the constitutional framework; Congress as an institution representing the people; the political context of the time and the historical opportunity of the Congress. The ideal arguments tended to support the War Powers Resolution, though opponents relied on similar arguments as well.

The opponents claimed that the executive branch was better suited to act in times of war and emergency. Congress should not infringe on the constitutional powers of the president and thus endanger the flexibility of the executive branch to act at such times. The historical precedents, the Constitution and the writings of the Founding Fathers were used both to oppose and to support the WPR legislation in the arguments. As has been discussed, for opponents the law seemed unnecessary since the Constitution already granted war powers to Congress. The authority of Congress to legislate in this area was not unanimously agreed upon. In this regard, some members suggested that Congress should pass a constitutional amendment instead of statutory law.

The realistic arguments covered mainly the timing, the political context of the aftermath of the Vietnam War, and the substance of the bill. Was the timing right for the legislation? The opponents of the bill referred, for instance, to the current Middle East crisis (Yom Kippur War), the experience of the Vietnam War, the Watergate scandal and the Nixon presidency. Senator Dominick (War Powers Act, July 18, 1973, 24591), for instance, criticized the enactment of WPR as helping the Senate in "bolstering its ego", rather than thinking about what was in the best interest of the country. When opposing the bill during the veto debate, Senator James Buckley (Conservative-NY) reminded his fellow Senators that the WPR would not have forestalled US intervention in Vietnam. Indeed the Tonkin Gulf Resolution authorized the intervention, not to mention that the military action enjoyed the widespread support of the people and the members of the Congress at least in the early years of the war. (War Powers of Congress and the President – Veto 1973, 36191.)

To former sponsor of the Senate version of the bill Senator Eagleton, passing the War Powers Resolution was not a "*historic 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 future, a predated 60-day unilateral warmaking authority*." (War Powers of Congress and the President – Veto, November 7, 1973, 31690.) Eagleton's argument seems to emphasize that Congress had failed in its historical moment. He criticized the law for giving a

blank check to future presidents in war-making. The language of the bill indeed raised differing interpretations among the members.

Then there is the issue of the purpose of the bill. Senator Thurmond stated during the veto debate that the bill would undermine the role of the United States in world politics: "*Is Congress at this time going to put a limitation on the President of the United States that might be construed by the nations of the world as handicapping him, not showing faith in him, and not having confidence in him, so as to weaken his hand in carrying out his constitutional duties in foreign affairs?*" (War Powers of Congress and the President – Veto, November 7, 1973, 31690). Senator Humphrey responded to this by insisting that the result of the bill would be quite the opposite (War Powers of Congress and the President – Veto, November 7, 1973, 31690). By overriding the veto Congress was showing the rest of the world that the members of the Congress were prepared "*as the duly elected representatives of the American people from the sovereign states of the union, to share in the responsibility for national security decisions*" (ibid.). When enacting the War Powers Resolution the idea was to ensure that Congress would be an equal branch of government in regard to national security issues.

For the opponents, the momentum to reassert the constitutional powers of Congress was not legitimate because of the tumultuous political context. The opponents argued that Congress should not endanger the role of the US in the world politics in the way illustrated in argument by Senator Thurmond. For the proponents, however, the timing was right because of the large bipartisan support ensuring the possibility to override a presidential veto. The large bipartisan support resulted partly from the political context of the time; the debates show that some members considered the bill particularly important because of the 20th century trend of what they called a presidential "monopoly" in foreign policy issues and the experiences in Southeast Asia. Several members emphasized that the bill was not targeted against President Nixon personally, and that the War Power Resolution should be considered only on its own merits.

The bill was not perfect, but "passable", and the overall idea seemed to be that it was important to get some form of the bill passed. However, the fact that Congress had failed to enact similar legislation before was a reason for opposing the bill. For instance, Senator Dominick argued that because the legislation concerned such fundamental, but controversial questions, similar legislation had never been enacted before (War Powers Act, July 18, 1973, 24591).

The War Powers Resolution created a procedure for how war-making should be dealt with in the future. The law granted authority for the president to act, but at the same time instituted methods and possibilities for congressional review and termination of presidential military action. The purpose of the bill was to ensure that the president can respond to national emergencies, but in order to continue to use the armed forces, the president would need to seek authorization from Congress.

In Weimar Germany, according to Art. 48 of the Weimar 1919 Constitution, the president could use the armed forces domestically for the purposes of public security and order. The War Powers Resolution did not include any similar

requirement but included a provision that the Commander-in-Chief powers could be used only pursuant to a declaration of war, specific statutory authorization or in a national emergency. The constitutional Commander-in-Chief powers were delineated in detail for the first time.

Where, then, does the novelty of the War Powers Resolution lies? The historical precedents indicate that the president could respond to national emergencies, and Congress could declare war or give other statutory authorization. One item that was "new" was the automatic termination of authorization provision that secured its desired outcome through inaction, as well as the concurrent resolution that gave Congress the possibility to terminate the use of the armed forces by the president. According to Constitution, Congress declares war. By passing the War Powers Resolution, Congress provided tools for controlling the use of the armed force by the president. The power of Congress to declare war was interpreted in a way that provided Congress with the power not only to authorize, but also to terminate the use of the armed forces.

4 CONGRESSIONAL OVERSIGHT OVER NATIONAL EMERGENCIES

The WPR debates and later NEA debates illustrate means of providing parliamentary control to diminish the discretionary powers of the executive in the field of war and emergency powers and therefore to reduce the threat of arbitrary use of power in the future. Skinner (1998, 119) writes, "*The state has a duty not merely to liberate its citizens from such a personal exploitation and dependence, but to prevent its own agents, dressed in a little brief authority, from behaving arbitrarily in the course of imposing the rules that govern our common life.*" National emergency declarations with their conferring of powers upon the president have been considered "awesome and potentially dangerous" (e.g. Representative Drinan, House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 257).

The momentum of Congress established by enacting the War Powers Resolution in 1973 was continued in 1976 when Congress passed the National Emergencies Act.[100] The NEA discussions continued the idea of congressional momentum in responding to the executive's usurpation of powers. The momentum is explicitly present in the language of the members of Congress. Representative Anderson, for example, encouraged members to continue the momentum that had begun when Congress enacted the War Powers Resolution and the budget reform (See quotation p. 24). Anderson highlighted the importance of continuing the momentum with the National Emergencies Act. The argument also implies that Congress had the power to reestablish the constitutional balance of powers and therefore Congress should make use of opportune situations when they occur.

The ideas are not only important in themselves, but also for their formulations. The NEA legislation was considered to be a methodological bill, or a

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100 The use of the armed forces during the national emergencies was already discussed during the War Powers Resolution debates. As Representative Howard, for example, remarked, there is a certain difference between the use of war powers versus emergency powers (see Howard's exact argument on p. 75).

methodology. According to the Senate Special Committee the bill was meant to avoid the possibility of the arbitrary authoritarian power by the executive in the future. Representative Anderson used the expression "checking the potential abuse of presidential power." This particular idea of freedom could be interpreted in terms of the neo-Roman conception of freedom, where freedom is seen as non-domination (Pettit 2002). In other words, freedom is "an escape from the arbitrary", or as Skinner has formulated it, an "absence from dependence (on arbitrary power)" (Pettit 2002, 6; Skinner 1998, 53, 70).

The members of the Congress followed Justice Jackson's concurring opinion in the *Youngstown* v. *Sawyer*, 343 US 579 (1952) case, emphasizing that "*when the president acts pursuant to an express or implied authorization of Congress, his authority is at maximum*." The Constitution's separation of powers was done in order to secure liberty. The idea of the NEA legislation was to place national emergencies on a statutory footing and thus to avoid arbitrary use of powers. The Constitution and its bedrock principles framed NEA and the WPR debates. Woodrow Wilson in his book *Constitutional Government* indeed describes the idea of constitutional government as follows: "*A constitutional government is one whose powers have been adapted to the interests of its people and to the maintenance of individual liberty*" (Wilson 1961, 2). Wilson (ibid. 4) continues to emphasize the role of the people in securing their liberty by saying: "*In brief, political liberty is the right of those who are governed to adjust government to their own needs and interests.*"

The National Emergency Act of 1976 applied provisions to the processes of declaring, executing, and terminating a state of emergency and established new procedures for dealing with emergencies. According to the Special Committee Chairmen "*The bill should end the disarray that has characterized emergency laws and procedures in the United States*" (NEA Source Book 1976, VII). The main arguments behind the legislation specified the future division of emergency powers. Another question of concern to the members was: How it is possible to define the powers of the president within a statutory framework and to secure the participation of Congress in times of crisis?

Chapter 4 examines, through the debates of the Congress, the question of to what extent presidential war/emergency powers are contingent on Congress utilization or nonutilization of its own constitutional powers. The problem of dealing with the emergency powers through the framework of a statutory delegation of power is also considered. Section 4.1 introduces the emergency powers as practiced in the United States since the 1930s until 1970s by introducing the arguments behind the need to enact new legislation. The legislative history of the NEA bill is provided in section 4.2. The experience of the Weimar Republic as a historical reference is considered in section 4.3. The question of regularizing the use of emergency powers through statutory law is discussed in sections 4.4 and 4.5 and problems of the content of the bill in section 4.6. Finally, the concepts and arguments used in the debates are analyzed in more detail in section 4.7.

4.1 Forty-years of emergency government in the United States

The need to define presidential emergency powers emerged in the US Congress debates of the early 1970s, by which time the United States had been formally under a national emergency government since the 1930s. According to Senator Frank Church (D-ID), it was a result of an episode during a Senate Foreign Relations Committee hearing on the involvement of US forces in Cambodia that Congress became aware of the scope of the president's emergency powers and their potential for undermining constitutional government (The National Emergencies Act, September 29, 1976, 33416).[101]

A Senate Special Committee was formed in early 1970s to study existing emergencies and the use of emergency powers in the United States. The Senate Special Committee asked Harold Relyea from the Library of Congress to write a brief history of emergency powers in the United States, because no studies on the use of emergency powers had been undertaken from the time of the Philadelphia Convention to the 1970s (see Relyea 1974, A Brief History of Emergency Powers in the United States, A Working Paper).[102]

While the Senate Special Committee was chaired by Senator Church, Senator Mathias (R-MD) acted as co-chair, and for that reason it could be said that emergency powers was considered a bipartisan matter by Congress in the early 1970s. Mathias emphasized in 1972 that the process of considering the bill should avoid partisanship, despite the fact that it was an election year:

> In the effort to restore the constitutional balance between the Executive and Legislative branches of our Government, the War Powers bill and now the emergency powers resolution, represents a good start. We must press forward to see them passed this year. And we must repel any effort to bring them into the arena of partisan politics in this election year. Restoring to Congress its constitutional responsibility is an effort which must be joined by Republicans and Democrats, liberals and conservatives. (Initial Authorizing Resolution of the Special Committee, Remarks of Senator Mathias, quoted in the NEA Source Book 1976, 14)

The NEA debates did not give rise to as many polarized opinions and views as the WPR bill had earlier. The bill was prepared in close cooperation with the executive branch and thus avoided the presidential veto, even though President Ford referred to part of the bill as unconstitutional in his signing statement (See more in detail NEA Source Book 1976, 343). The National Emergencies Act was preceded by three years of legislative and investigative activity of the Senate Special Committee on National Emergencies and Delegated Emergency Powers

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101 Foreign Assistance Act of 1973: Hearing before a Subcommittee of the Senate Committee on Appropriations, 92nd Congress, 2nd Session (see Fuller 1979, 1454).

102 President Woodrow Wilson issued the first explicit national emergency proclamation on February 5, 1917. The proclamation related to water transportation policy, and its authority was derived from legislation establishing the United States Shipping Board. In 1921 the proclamation was terminated together with other wartime measures. (For more about the evolution of the National Emergencies Act, see NEA Source Book 1976, 1-12)

and, by the Senate Committee on Government Operations as well as the House Committee on the Judiciary (See more in detail NEA Source Book 1976).

The Senate Special Committee on National Emergencies and Delegated Emergency Powers discovered that the emergencies proclaimed by President Franklin D. Roosevelt to deal with the banking crisis in 1933, by Harry S. Truman to respond to the Korean conflict in 1950, by Richard M. Nixon to deal with the Post Office strike in 1970, and by Nixon again to implement currency restrictions and to enforce control on foreign trade in 1971 had never been terminated. The national emergency proclamations had become a part of the normal governmental activity. (NEA Source Book 1976.)[103]

The existing national emergencies were seen as a problem for a democratic system of government. Senator Church indeed noted during the Senate Special Committee hearings (Part 1 'constitutional questions' 1973, 1) on national emergencies that the fundamental questions was "*whether it is possible for a democratic government such as ours to exist under its present Constitution and system of three separate branches equal in power under a continued state of emergency.*"

In addition to the existing emergencies, the Senate Special Committee on National Emergencies and Delegated Emergency Powers concluded that there were over 470 emergency power statutes granting extra ordinary powers to the president (NEA Source Book 1976).[104] The Senate Special Committee related to these statutes as follows: "*This body of potentially authoritarian power remains a hazard to democratic government*" (S.Rept. 93-1170, 3). The interim report of the Senate (ibid.) points out, however, that in the 1970s only a small amount of the available powers were in use. There seemed to be no "emergency" anymore and therefore no need for the authorizations for extraordinary powers to continue.

That the powers existed was not the real question, but that the powers existed without any possibilities for the Congress to control their use. Congress had delegated the emergency powers without fully taking into account their cumulative effect over time. Senator James Pearson (R-KS) noted that the problem was not only the number of statutes or that they had been enacted in a very specific political context without much deliberation, but that their wording was vague: "*a large number of these – in fact, most – are in the broadest terms, almost casual in expression, which give rise to any interpretation any President wants to put upon them*" (Senate Special Committee hearings, Part 1 'constitutional questions'

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103 After President Roosevelt declared 39 emergencies within six years, Congressman Bruce Barton (R-NY) declared: "Any national administration is entitled to one or two emergencies in a term of 6 years. But an emergency every six weeks means plain bad management." (Quoted in Fisher 2007, 264) The quote from Barton could be also interpreted as questioning the real meaning of the emergencies, although there cannot really be an "objective" definition.

104 The Congress' delegation of emergency powers to the president through enacting statutory authorization became a dominant trend in the United States only after the wars, writes Lobel (1989, 1408-1409).

1973, 72).[105] The Senator criticism is that Congress had no possibility to control how the statutes could be used.

Senator Church's following argument explains the continued use of the emergency powers in more detail:

> [T]he emergency powers made available to the President have steadily expanded. Foreign war and domestic crisis during the past 40 years, in addition to the inexorable growth of the executive bureaucracy under the leadership of aggressive Presidents, and the diminished role of the Congress in the making of policy – these factors have all contributed to the erosion of normal constitutional government. (Termination of National emergency, August 26, 1976, 28226)

The problem with the granted emergency powers was that Congress never seemed to return to analyze the possible defects of the bills that had been adopted in times of crisis. The Senate Special Committee report indeed specified that in the future when authorizing the powers for the executive Congress should be more careful in specifying the conditions in which the authorizations may be used. According to the final report of the Special Committee, the challenge was to formulate procedures in such a way that Congress could oversee not only the exercise of granted powers, but also how to control the powers if they came to be regarded as detrimental or unnecessary. (S.Rept. 94-922, 15.)

The members of the Congress generally seem to have approved centralization of authorities during times of crisis. The augmentation of presidential power should not, however, happen at the expense of congressional authority. Representative Pete Rodino (D-NJ) argued in Congress:

> The [NEA] bill does not take any emergency powers away from the President. Rather, it insures that such powers are exercised only during an actual emergency and that both Congress and the public are kept informed of the exercise of such emergency powers. (Bill to End Unterminated National Emergencies, September 16, 1974, 31133)

The president may claim special powers on the basis of emergency situations, or by authorization from Congress. When Congress authorizes emergency powers for the president it does so by passing new laws. In August 1974, during a debate on the introduction of S.3957, Senator Clifford Hansen (R-WY) noted, "*The source of national emergency power is derived mainly from delegation of Congressional power to 'make all laws'*" (quoted in the NEA Source Book 1976, 89). The Senator (ibid.) continues that there has not been "*an usurpation by the Executive of Congress' powers but rather there has been an authorized delegation*." When the president wants to establish his own jurisdictional powers for confronting emergen-

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105 Some of the statutes, however, included termination methods, and participation of Congress. The Emergency Detention Act of 1951 (EDA) stated that Congress can by concurrent resolution "declare the existence of an internal security emergency" and also terminate the emergency (Senate Special Committee hearings, Part 1 'constitutional questions' 1973, 25). President Nixon signed a statement in 1971 repealing the EDA. The Act was considered controversial because it "established procedures for the apprehension and detention, during internal security emergencies, of individuals likely to engage in acts of espionage or sabotage". (302, 'Statement on Signing Bill Repealing the Emergency Detention Act of 1950', September 25, 1971). http://www.presidency.ucsb.edu/ws/index.php?pid=3158)

cies, he does so through regulations and executive orders (Balkin & Levinson 2010, 1857). The inherent powers of the presidency are derived from the powers stated in the Constitution, particularly the Commander-in-Chief clause mentioned in Article Two.

In Justice Robt. Jackson's concurring opinion in the *Youngstown* v. *Sawyer*, 343 US 579 (1952) case, three different situations related to the powers of the president and Congress were distinguished. First, when the president acts in accordance with the powers granted him by the Congress, "his authority is at maximum". Second, if the executive acts "in absence of either a congressional grant or denial of authority, he can only rely upon on his own independent powers." Jackson, however, reminds us that there is a certain "twilight zone", meaning that in some areas Congress and the president have joint competence or the "distribution is uncertain." Third, for Jackson, when the president acts against the "expressed or implied" will of the Congress his powers are at "its lowest ebb." In this type of situation the president can only rely on his own constitutional powers, that is what powers remain after taking into account the possible constitutional powers of Congress related to the issue.

In regard to the National Emergencies Act, the Senate Special Committee affirmed that Justice Jackson's opinion guided its actions. The Committee's final report cited Justice Jackson's reference in his opinion to the experiences of the Weimar Germany where the president could constitutionally suspend basic rights, and to the experience of France and Great Britain, where the parliamentary assemblies had managed to uphold their emergency powers oversight. Justice Jackson concluded:

> This contemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the "inherent powers" formula". Nothing in my experience convinces me that such risks are warranted by any real necessity, although such powers would, of course, be an Executive convenience. (Quoted in the S.Rept. 94-922, 7)

According to Fuller (1979, 1501-1502) Congress has mainly two methods to control the use of executive emergency powers. First, Congress can rely on congressional oversight committees, which has become a common practice since the Civil War. The idea behind these committees is to require presidents and their administrations to report to Congress in order that congressional scrutiny over the actions taken be provided for.[106] Second, Congress may rely on resolutions that have been introduced in Congress on numerous occasions, for example, during the Second World War, in order "to control presidential use of statutory emergency powers that contained concurrent resolution provisions". (Ibid.) Notwithstanding, Congress can also enact new law, like the National Emergencies Act of 1976.

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106 According to Fuller (1979, 1501) the congressional oversight "Joint Committee on the Conduct of the War" was first established in 1861.

The use of emergency powers in the United States is evaluated by the courts, as well as by citizens when they vote at the end of an electoral mandate. But in the 1970s the then Secretary of State William P. Rogers, referred to the idea of establishing a joint congressional committee that would act as a consultative body with the executive in emergency situations (Department of State Publications 8591, 1971, 8; Rogers 1971, 1213). However, already after Pearl Harbor in 1941, Republican Senator Arthur H. Vandenberg from Michigan suggested establishing a joint congressional committee on war cooperation for President Roosevelt. Senator Vandenberg argued that the committee would be "*highly useful to both the executive and the legislature if a more intimate connecting link should be created between us for the duration*" (quoted in Schlesinger 2004, 118).

There have been some congressional oversight committees that expect the president to report on the executive department's actions to Congress. According to Fuller (1979, 1501) this type of procedure appeared during the Civil War and has become a permanent supplementary tool for Congress during times of crisis. Fuller (ibid. 1502), however, acknowledges that these committees rarely function as real oversight institutions because the officials and the departments are fully aware beforehand that they are expected to provide reports to Congress, and therefore the quality of the information they provide raises questions.

4.2 The legislative history of the National Emergencies Act of 1976

The Senate Special Committee's concluding effort was the National Emergencies Act. The Committee issued an interim report on August 22, 1974, stating:

> In our view, Congress should provide statutory guidelines to assure the full operation of constitutional processes in time of war and emergency. This is the best prescription to avoid any future exercise of arbitrary authoritarian power. For as the Youngstown Case decided where there is a statute, the Executive is obliged to use the statutory remedy; where there are now lawful statutory guidelines is to invite so-called inherent powers to come into play. There is without question a need, in the view of the Special Committee, to provide the executive branch with an effective, workable method for dealing with future emergencies in accord with constitutional processes. The Special Committee has sought to do this in fulfillment of its mandate. (S.Rept. 93-1170, 6)

The report stresses that the Constitutional framework should be maintained also during wartime and crisis. The report suggests that Congress examine the use of past emergency powers and consider whether or to what extent Congress has been shortsighted in its management of "war and other emergencies." The report concludes, "*Our sobering experience with the undeclared Korean and Vietnam wars heightens the necessity to understand the means available within the Constitution, to meet crisis situations affecting our national security*." (S.Rept. 93-1170, 3.)

The bill (S.3957) that the Senate Special Committee recommended was introduced in the Senate on August 2, 1974 by Senator Church and other sponsors.

The Senate Committee on Government Operations, to which the bill was referred, reported back on September 30, 1974 and proposed no amendments or public hearings. The bill was debated and passed in the Senate in October 7, 1974 with some amendments offered by Senator Mathias. Representative Rodino introduced a "version of the Special Committee's recommended legislation" in the House (H.R.16668), and it was referred to the House Committee on Judiciary, which, however, failed to take any further action. Since the House Committee and its chairman Rodino were at the time engaged in the Watergate hearings, consideration of the measure was not completed before the expiration of the 93rd Congress. (Klieman 1979a, 64; NEA Source Book 1976.)

Senator Mathias together with Senator Church introduced a similar bill (S.977) in March 1975. At the same time Representative Rodino introduced H.R.3884, a bill identical to S.977. The House bill (H.R.3884) was referred to the House Judiciary Committee. The Committee reported on the bill with some technical amendments. During the House debate the Committee's amendments were adopted in addition to one floor amendment. The bill was passed in the House on September 4, 1975 by a vote of 388-5 (with 40 abstentions).[107] The bill was sent to the Senate, where it was again referred to committee (the Committee on Government Operations). This committee reported on the bill with recommendations for several technical and one substantive amendment. The bill (H.R.3884) was debated in the Senate on August 27, 1976. The Senate approved all of the Committee's amendments and passed the bill. The House agreed to the Senate amendments on August 31, 1976. The National Emergencies Act was finally enacted on September 14, 1976 with President Ford's signature. (Klieman 1979a, 64; NEA Source Book 1976.)[108]

The purpose of the national emergency legislation was to determine procedures for future national emergency proclamations and to secure regular congressional oversight for actions taken by the executive. The need for the new kind of legislation was described as follows: "*The aim of the National Emergencies Act is to insure that the exercise of national emergency authority is responsible, appropriate, and timely*" (quoted in the NEA Source Book 1976, 1). As noted above, the question of emergency powers should be explored during the time of normal political conditions (Senate Special Committee hearings, Part 1 'constitutional questions' 1973, 5).

The members of the Congress, however, decided that the NEA bill could not terminate the formally continuing emergencies, because they had been declared by presidents pursuant to their constitutional prerogatives. However, Congress by enacting the NEA bill defined that the authorities activated therein would become inoperative after two years pending a new proclamation to reactivate the emergency authority (Relyea 2007, 12). Senator Mathias also noted that repealing the powers and terminating all the existing national emergencies

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107 Appendices 2 and 4 provide more details.

108 Also other emergency powers action occurred during the course of passing the National Emergencies Act that are not, however, considered here more in detail. (See NEA Source Book 1976, 9-10)

was not the simplest solution, because some of governmental departments and agencies had relied on emergency authority part of their normal procedures (National Emergencies Act, October 7, 1974, 34012-34013). The normalization of emergency powers implies a failure to draw a clear line between normal and exceptional conditions.

The NEA legislation was enacted without much public or scholarly notice. One explanation for the mute response was that the bill became at the height of a presidential election year and in the midst of the bicentennial celebration. Even later on the bill has never attracted attention similar to that of the War Powers Resolution, which had been enacted three years earlier. (Klieman 1979a, 47-48.) Senator Church, however, argued that Congress considered the Act highly important:

> Emergency powers make up a relatively small but important body of statutes out of the total of thousands that have been passed or recodified since 1933. But emergency powers laws are of such importance to civil liberties, to the operation of domestic and foreign commerce, and the normal functioning of the US government, that Congress should delay no longer in regularizing their use. (Introduction of S.3957, August 22, 1974, Quoted in the NEA Source Book 1976, 71)

It seems to me that the members of Congress understood the importance of continuing their momentum and the overall importance of the issue of preventing the arbitrary use of powers better than has been later appreciated. Representative Anderson emphasized that the bill should be considered seriously as he acknowledged that Congress had tended to resort too easily to the concept of emergency in the past: "*Mr. Chairman, this Congress has often been chided for tacking the word "emergency" onto the title of nearly every major bill we have considered this year.* [...] *Although H.R. 3884 also contains the word "emergencies," being entitled the "National Emergencies Act," I think it is significant to note that for once we are not declaring yet another emergency, but instead are attempting to terminate some past emergencies, one of which dates back some 42 years.*" (House debate and adoption of H.R.3384, August 27, 1976, quoted in the NEA Source Book 1979, 258-259.)

While national emergency proclamations had never resulted in any severe violation of the Bill of Rights or been a serious threat to constitutional government, the members of the Congress agreed that this was a potential threat in the future. During the Senate debate on the NEA legislation, Senator Mathias noted that, though Congress may have neglected its constitutional responsibilities in this regard, it had resulted in any significantly negative effects on freedoms (A National Emergencies Act, August 22, 1974, 29979). The emergency proclamations may have been political, but they were not ideological per se. To some extent it is unrealistic to assume that in the US a president could use national emergency proclamations for only politically gain. I have not discovered any debates related to the question of whether a national emergency proclamation had ever been made before an actual crisis occurred.

It should be mentioned, however, that crisis is one of the key concepts of social and political language. History is particularly articulated through crises. The crisis concept is often used to emphasize or highlight the seriousness of a

situation. (For more detail on the history and use of the concept of crisis, see Richter & Richter 2006.) War is in this regard a parallel concept. In US political language, the conception of war is commonly used in such expressions as "the war on drugs" or "the war on poverty" in order to raise the importance of an issue, as will be detailed in Chapter 5.

4.3 The experience of the Weimar Republic as a historical reference

The example of the Weimar Republic was referred to during the discussions on the National Emergencies Act of 1976. Senator Mathias (A National Emergencies Act, August 22, 1974, 29980) argued on the floor as follows: "*The rolls of history are filled with the stories of the fall of democracies because of long wars or sustained crises. The fall of the Weimar Republic and the rise of Hitler is a memory many of us share. We seek to prevent the possibility of a repetition of that tragic chapter from world history in the United States*." To my mind the Weimar-parallel here refers to the neo-Roman conception of liberty in the sense that it is not about an actual, but rather the possibility of the use of "arbitrary power." Mathias' argument relies not only on the continuation of the crisis but also on the fall of the Weimar Republic itself, implying that the bad historical hindsight view of the Weimar Constitution lies in the failure of the Weimar democratic government to respond to crises.

As discussed above, the use of emergency powers has never meant a full suspension of basic norms or civil liberties in the United States. This, however, does not mean that the possibility of the executive acting without congressional consent or control should be taken lightly:

> This legislation provides a new mechanism to give Congress the ability to oversee the use of these powers, to take action to terminate an emergency proclamation, and to determine if an emergency exists. As elected Representatives of the people, I believe that we have the responsibility to guard against the taking of what essentially could be basic constitutional rights, and to also protect the Nation in times of a legitimate state of emergency. This is an important role which Congress must assume, and H.R.3884 is a step in the right direction. (Representative John Rousselot (R-CA), House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source book 1976, 256)

Representative Rousselot indicates that member of Congress, as the representatives of the people, should be able to review the actions of the president taken pursuant to national emergencies in order to secure the constitutional basic rights while at the same time preserving national security. Though, Rousselot does not directly refer to the Weimar Republic, he does point out that emergency powers could be used to suspend basic rights. What is interesting in Rousselot's argument is the reference to the "legitimate state of emergency". The conception seems to refer to the situation after the passage of the bill, when the issue of national emergencies had been grounded in statutory law. Related

to Rousselot's argument, Remini in his book, *The History of the House of Representatives*, argues, "*The framers of the Constitution were absolutely committed to the belief that a representative body, accountable to its constituents, was the surest means of protecting liberty and individual rights*" (Remini 2006, 24). The popular sovereignty principle should be sufficient to prevent the possibility for arbitrary use of powers.

The *Youngstown* v. *Sawyer Case*, 343 US 579 (1952) and especially Justice Robert H. Jackson's concurring opinion was considered particularly relevant in the debates. In his opinion Justice Jackson refers to the Weimar Republic by emphasizing that in that case, the president could suspend basic constitutional rights without the approval of the parliament.[109] Justice Jackson was acutely aware of this historical reference as he served as a justice at the Nuremberg trials (e.g. Barret 2007).

It seems that the members of Congress were by and large aware about how emergency powers were used in the Weimar Republic. A Senate Special Committee held hearings on national emergency issues in 1973. At these hearings, Professor of Law and Political Science at the University of Chicago, Dr. Gerhard Casper offered his views on the constitutional issues regarding the use of emergency powers by the president and paralleling the experiences of the other democratic states, especially those of the Weimar Republic (NEA Source Book 1976, 5). Dr. Casper referred to the inability of the Reichstag to repeal the presidential use of emergency powers. He seemed to particularly emphasize that only Congress can hold onto its own constitutional prerogatives: "*If anything is to be learned from American history, and from foreign experience, it is, of course that no amount of constitutional law will help unless the Congress pulls itself together and jealously and responsibly guards its legislative prerogative*" (Senate Special Committee hearings, Part 1 'constitutional questions' 1973, 87-88).

Even though emergency powers had not been abused in the US, Senator Robert Taft (R-OH) advised Congress to not take the potential problems too lightly:

> In times of great national stress, when particularly rapid and effective major action is likely to be demanded of governments, it is extremely tempting to allow the delicate balance between liberty and authority to be tipped in the direction of authority. The continuation to the present time of four national emergencies from as early as 1933 and the existence of over 470 provisions of Federal law which delegate extraordinary authority in time of national emergency to the executive should indicate that this is a problem not to be taken lightly. While America's experience with emergency powers has been relatively painless thus far, the experience of Germany after the First World

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109 Justice Jackson indeed argued as follows in his concurring opinion: "Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and, in 13 years, suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenburg to suspend all such rights, and they were never restored."
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0343_0579_ZC2.html

> War should give us all pause. […] While I am attempting to draw no comparisons between that situation and the present state of American emergency powers laws, this legislation does remedy important defects which provide too much leeway for the executive branch upon its declaration that a national emergency exists. (The National Emergencies Act, October 9, 1974, 34557)

Taft refers here to the experience of Weimar Germany by emphasizing that, though the situation was by no means comparable to that in the United States, Congress should take action to limits the executive's possibilities to act inappropriately in such situations.

Because of the possibility for presidential misuse of emergency powers, the enactment of the new statutory framework was considered legitimate. Senators Church and Mathias further argued that the importance of the bill would become apparent when considered in the proper political context of the time:

> To understand the full significance of the National Emergencies Act, one must place it within the context of Congressional efforts to reclaim prerogatives abandoned to the Executive. The Vietnam War and the abuses known collectively as "Watergate" have led Congress to assume a more prominent role, most notably in foreign policy and the budgetary process. It has enacted a War Powers Act, defeated major weapons proposals, investigated the intelligence community, and moved to impeach a President. Congress has insisted upon increased Executive accountability and greater freedom of information. The National Emergencies Act is consistent with these efforts to make the Executive accountable for his actions and to restore Congress as an equal partner in the government. (Quoted in the NEA Source Book 1976, VII)

Senators highlighted Congress' affirmative role in passing the War Powers Resolution. The National Emergency Act should be considered a similar effort to restore not only the powers of the Congress as an equal branch of government, but also to hold the executive branch accountable for its actions.

The above quote from Senators Church and Mathias illustrates the role of Congress in the US system. The Congress should hold the executive accountable, even though there is no cabinet government in the US. There are no rules, however, how this accountability should work in practice, other than e.g. to legislate, propose constitutional amendments and in extreme cases, began an impeachment process. Further, Congress should be an equal partner in government, not a secondary branch.[110] Hamilton and Madison indeed argued in this way in the Federalist Papers (1788, No. 51): "*In republican government, the legislative authority necessarily predominates*". The legislature in the US is divided, and the two chambers have different "principles of action" and "modes of election" (ibid.). The balance of powers system does not secure overall power through a simple majority.

There are several indirect means of parliamentary oversight, particularly Congress' budget authority, but filibustering could also be mentioned in this regard. In distinction from these indirect measures, what the WPR and NEA bills aimed to do was to oblige the president to report and consult directly with

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110 About the separation of powers, see James Madison: "The Particular Structure of the New Government and the Distribution of Power Among its Different Parts". Federalist Papers 1788, No. 47.

Congress and thus provide opportunities for congressional discussion and review of executive branch actions. The War Powers Resolution included consultation and reporting sections. The National Emergencies Act also included a reporting requirement.

According to Representative Anderson (House debate and adoption of H.R. 3884, September 4, 1975, NEA Source Book 1976, 260) the National Emergencies Act "*institutionalize(s) a very careful oversight procedure which shall insure that the Congress responsibly exercises its obligations with respect to any national emergency*." The intent was for Congress to play a more "active, conscientious and continuing oversight role" with respect to future national emergency declarations. The requirement related to affirmative congressional action provoked discussion in the House. Anderson (ibid.) thought it preferable "*to have the Congress take affirmative action in the event the President fails to comply with the reporting provisions, rather than simply permit the state of emergency to lapse without proper consideration and debate*."[111] Anderson seems to refer to the Matsunaga amendment, which was add to the bill and passed, thereby terminating national emergency powers automatically after one year if not separately continued by the president (see Chapter 4, p. 159).

Congress seized the moment to restore, as they saw it, the balance of powers with the executive, rather than increase congressional powers disproportionately in relation to the executive branch. The purpose of the National Emergencies Act of 1976 was to ensure that any use of emergency powers would occur within the framework of constitutional rule. The Committee on the Judiciary of the House of Representatives submitted a report to accompany the bill in 1975. The report stated,

> By providing for a termination of powers and authorities relating to existing emergencies, the bill will make it possible for our Government to function in accordance with regular and normal provisions of law rather than through special exceptions and procedures which were intended to be in effect for limited periods during specific emergency conditions. (H.Rept. 94-238, 2)

In summary, the aim of the NEA bill was to secure that in the future the use of emergency powers would be executed within a framework designed by the Congress. Indeed, there was little historical precedent for how to proclaim, administer, or end a state of national emergency and no proper or extensive statutory record on national emergency situations before the enactment of the NEA bill (NEA Source book 1976, 298). In a Senate Working Paper, Senator Church argued that by enacting the law Congress would provide "*a part for the President to play and a part for the Congress to play*" (Senate committee print 96-780, 13). Church (ibid.) continued, "*This would regularize the way that it is done and to pro-*

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111 According to Anderson: "The President and all Executive agencies must report periodically the Congress on the use of these powers, the orders issued under the authority of the national emergency and the expenditures made in pursuance of these authorities." (Quoted in the NEA Source Book 2976, 260) Anderson's reference seems to be to title IV of the bill "Accountability and Reporting Requirement of the President" (For detail, see NEA Source Book 1976, 340)

vide a method for congressional oversight – something significantly lacking under the present law." The idea to create constitutional emergency powers was not take up seriously during the congressional discussions surrounding the National Emergencies Act of 1976. Rather the idea was to establish emergency powers within the constitutional framework as further elaborated by statutory law.

After enacting the National Emergencies Act, Congress continued to claim that the exercise of emergency power should follow particular procedures. Congress, for example, reconsidered the *Trading with the Enemy Act* in 1977 and restricted the powers to actual wartime circumstances. By triggering the national emergency proclamation, the law had provided wide-ranging powers for presidents to use in wartime, but also in times without pending crises. As a result Congress restricted the authority of the bill to apply to actual wartime situations only. Congress enacted new legislation, the *International Emergency Economic Powers Act* (IIEPA), also in 1977 to limit the emergency powers of the president to emergency situations only. (Koh 1988, 1264; Lobel 1989, 1414.) Doyle (2001, 2) writes that the bill authorizes for the president "emergency economic powers" to be used in extraordinary situations that threatens the nation's economic wellbeing, foreign policy interests, or national security. According to Koh (1988, 1264) the act required that emergency powers be used only "*upon prior congressional consultation, subsequent review, and legislative veto termination provisions*" (For the discussion and substance of the bill, see Koh 1988; Lobel 1989).

In addition to the WPR and NEA bills considered in this thesis, Congress had other initiatives in the post-Vietnam era designed to bring the powers of the president under congressional control and to increase the powers of the Congress in the decision-making process. In this context, Koh (1988, 1300) mentions motions such as "*the Case-Zablocki Act*, [the abovementioned] *IIEEPA*, *the Arms Export Control Act*, *the Hughes-Ryan amendment*, and *the Intelligence Oversight Act*." Regarding congressional momentum, Koh (1988, 1321) describes "the momentum of the Iran-Contra affair", which gave Democrats control of Congress in the end of Reagan presidency and provided Congress "a rare window of opportunity" … "to reassert itself in the foreign policymaking process."

4.4 Providing the need for the NEA legislation

Along with formally continuing emergencies, the Senate Special Committee specified over 470 emergency power statutes granting extraordinary powers for the executive branch in times of crisis. According to Senator Church several conclusions could be drawn from the study of the Special Committee on the emergency laws: Congress had allowed in large part the executive branch "to draft" and thus "to make the laws". This had happened "*despite the constitutional responsibility conferred on Congress by Article I, Section 8 of the Constitution, which states that Congress "makes the laws.*" (A National Emergency, August 22, 1974, 29976.) Church (ibid.) further criticized the lack of opposing or dissenting

views in the legislative processes in times of crisis as follows: "*On occasions, legislative history shows that during the limited debates that did take place, a few but very few, objections were raised by Senators and Congressmen expressing concern about the lack of provision for congressional oversight, as well as the absence of any terminal date for the authorities granted*." For instance, the Tonkin Gulf Resolution, "to promote the maintenance of international peace and security in southeast Asia," was approved in the Congress with only Senators Wayne Morse (D-OR) and Ernest Gruening (D-AL) dissenting.

Senator Roth also commented that the normal legislative procedures are not necessarily followed in regard to authorizing emergency powers: "*In times of emergency, important legislation does not receive the time and attention which it would in normal times"* (National Emergencies Act, October 7, 1974, 34021). Most of the emergency statutes were written by the executive branch and sent to Congress in a crisis atmosphere without including provisions for congressional oversight or specific dates for termination. The emergency powers passed in 1933, for example, as a response to President Roosevelt's proclamation on New Deal were mainly enacted "with the most unseemly haste". The economic measures related to the proclamation by President Roosevelt in 1933 asserting that the state of national emergency existed received only eight hours of debate in both houses. Only one copy of the bill was available and there were no committee reports. (Introduction of S.3957, August 22, 1974, NEA Source Book 1976, 72.)

Emergency statutes were adopted for other purposes as well. For instance, when the president was facing a cut-off of Vietnam War funds by Congress, the administration found a curious way to provide money for the troops by other means, claiming an emergency statute, used during the Civil War. The *Feed and Forage Act of 1861* was originally intended for the cavalry troops to have feed for their horses and other equipment when Congress was out of session. Later on, the law provided authority to "*finance American marines in Lebanon in 1958, to support the Berlin mobilization in 1962, and to maintain troops in Southeast Asia*." (Introduction of S.3957, August 22, 1974, NEA Source book 1976, 87.) In order to terminate already existing statutory emergency powers, Congress needs to have a 2/3 majority in both houses to override the possibility of a presidential veto, and therefore the amount of emergency power statutes seems to have only increased. It should be noted, however, that "emergency" powers legislation is by no means unambiguous.

The paradox of emergency powers legislation is that the laws are usually made in haste without securing possibilities for thoughtful deliberation. Senator Roth tackled the issue when noting during a Senate debate on S.3957 how clearly emergency powers legislation, enacted in times of crisis, was not treated the same way as bills in normal times (NEA Source Book 1976, 170). The proponents of the NEA bill, indeed, emphasized in 1976 that Congress should proceed to provide guidelines for the use of emergency power at the time, since there was no emergency at the moment. Senator Roth (ibid.) further emphasized that in his judgment the "*bill devises a sensible way of insuring that rapid action can be taken to meet an emergency situation while safeguarding against the arbi-*

trary and irresponsible use of such power by a future President." The Senator highlights here the carefully established balance between the use of emergency powers by the president and the congressional requirement of "shared powers and responsibilities".

According to the views exchanged on the floor, the existing emergency statutes were considered extraordinary because Congress had delegated the powers without fully considering the cumulative effects the delegated authorities would have in the future. Senator Church noted during the Senate discussions of the bill that apparently no consideration had been given to their combined effect on the separation of powers or on civil liberties (A National Emergencies Act, August 22, 1974, 29976). As discussed above, the real problem from Congress' viewpoint was that emergency legislation had been enacted without securing enough time for congressional debate and thoughtful consideration. According to Church (ibid.), an "inadequate and hurried way of legislating" had taken place repeatedly, e.g. during the Second World War, the Korean War, and in Tonkin Gulf Resolution of 1964. Senator Church further emphasized that "*emergency powers laws are of such importance to civil liberties, to the operation of domestic and foreign commerce, and the normal functioning of the US Government, that Congress should delay no longer in regularizing their use*" (Introduction of S.3957, August 22, 1974, quoted in the NEA Source Book 1976, 71).

It was argued that Congress should set certain statutory guidelines in order to provide a common groundwork for the use of emergency powers in the future. During the debate in the House of Representatives, Anderson quoted the joint statement of Senators Church and Mathias issued in 1973 that emphasized the need for new legislation: "*Unless Congress takes steps to strengthen its capacity to write the laws through the representative political process as the Constitution intended, then the unmistakable drift towards one-man government continue*" (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 259). The argument by Church and Mathias emphasizes that the oversight of the emergency should not be left to the courts or voters only.

What ought to be noted here is that the 470 existing emergency powers were not considered war-making powers as such. In a Senate working paper (96-780, 7) Senator Church referred to the available emergency powers of the executive by highlighting that the inherent powers of the president under the Commander-in-Chief clause related to sudden foreign military attacks and should therefore be separated from the authority the president "has over the citizenry in domestic affairs." The inherent power of the president refers to the Constitution and therefore cannot be regulated by ordinary legislation.

The emergency powers government that had existed for 43 years in the US in 1976 made crisis government rather the norm than the exception. The problem seemed to be that while the emergency situations themselves had ended, the officially proclaimed states of emergencies continued. Representative Rodino acknowledged on the floor that the emergency legislation has indeed become a part of normal governmental activity:

> As has been discussed, a basic problem with emergency legislation derives from the fact that by continued and customary use of the authority has become the basis for current government activity. Simply to abolish all emergency powers and dispositions on a specified date would not actually solve this problem but would ignore that in some instances this authority is vital to some governmental functions. For years, this committee has been concerned with the identification of emergency statutes and their utilization. (Providing Consideration of H.R.3884, September 4, 1975, National emergencies 1975, 27634)[112]

Rodino's argument illustrates that some of the emergency powers had become a daily governmental routine. The problem seemed to be that the emergency circumstances and their utilization had not been properly identified or understood.

The common view was that in order to restore a constitutional balance of powers, Congress should provide statutory guidelines for future national emergency situations. Representative J. Edward Hutchinson (R-MI) pointed out the legislation was crucially needed because there were no rules or regulations concerning the use of emergency powers:

> The "National Emergencies Act" is an appropriate and prudent response to an important policy question currently facing Congress. That is, how extensive should be the powers granted to the President in a time of national emergency and, further, how should the exercise of these special powers be overseen and controlled? (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 252)

Hutchinson (ibid.) further describes the aim of the bill as follows: "*This measure seeks to remedy the fact that no statutory framework now exists to guide the conduct of our government during a period of national emergency*." As the quote emphasizes, Congress should provide controls on the powers granted to the president, and that the law was in any a case step forward because that was no current statutory framework to guide the government in national emergencies. As with the War Powers Resolution, the National Emergencies Act seems to be a compromise bill. The difference between the two bills is, however, the lack of veto threat by the executive regarding the NEA bill. Indeed, the NEA bill was considered much less controversial than the WPR bill three years earlier. The arguments were in general less polarized in the NEA debates. It was even emphasized that the significance of the bill was not diminished by the fact it enjoyed bipartisan support: "*Mr. President the obscurity and unanimity which surrounds this bill should not disguise its importance*" (Church; See Senate debate and adoption of H.R.3884, August 27, 1976, quoted in the NEA Source Book 1976, 335).

As already noted, the debates illustrate that the problematic use of emergency powers did not result from an executive usurpation of power, but Congress' failure to fulfill its constitutional responsibilities also played a role. Several members of Congress referred to different examples of how the Congress had neglected to adhere the constitutional framework. "*It is important to under-*

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112 This has not been always the case. For instance, in the 1920s Congress enacted legislation that repealed 60 wartime measures granting authority to the president, and many other statutes ceased to function because of the limited duration of authorization. (See details in Klieman 1979b, 241)

stand how the present state of emergency rule has come about. The failure to place emergency rule under firm constitutional guidelines must be considered as a failure by all three branches to carry out their respective constitutional responsibilities." (Senator Mathias; Debate and adoption of S.3957, August 22, 1974, quoted in the NEA Source Book 1976, 151.)

The arguments expressed during the debates of the NEA legislation illustrate that Congress wanted to restore the constitutional checks and balances requirement in the field of war and emergency powers. Several members emphasized that the exercise of national emergency powers are premised on the cooperation between the legislative and executive branches of government: "*This bill represents another effort by Congress to insure that Congress and the President share equally the responsibility for major national policy decisions*" (Senator Roth, Debate and adoption of S.3957, August 22, 1974, quoted in the NEA Source Book 1976, 170). Members also emphasized, however, that Congress could not infringe on the constitutional powers of the president, as Representative Hutchinson argued during the House debate on the NEA bill:

> As a firm believer in a strong Presidency and Executive flexibility, I could not support this bill if it would impair any of the rightful constitutional powers of the President. It will have no impact on his flexibility to declare a national emergency and to quickly respond if the necessity arises. The bill has no impact on the powers of the President in time of war. Rather, what it seeks to assure is that the rule of law prevails in a national emergency situation and that it cannot be bypassed, merely because we find ourselves in a state of national emergency. (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 252-253)

Hutchinson stresses that even in the national emergency situations, the rule of law must be upheld. In regard to war powers, Hutchinson maintains that the bill would have no impact on the president's powers in a time of war.

Despite the concentration of (mainly executive) power in times of crisis, the principle of separation of powers should prevent emergency powers from being used to acquire absolute or unilateral power. Senator Church expressed this idea in the Congress in the following words:

> The Congress should be forewarned that it is inherent in the nature of government that the Executive will seek to enlarge its power. We already have a Presidency the powers of which are unrivaled in our history. The historic redemption of jurisdiction by the Congress which has gone on in this decade - in the form of the War Powers Act, the congressional intervention to circumscribe and finally to end the war in Vietnam, the new budget authority and the regaining of some control over foreign policy – is long overdue and urgently needed. The Congress must not again trade away its responsibilities in the name of national emergency. (Senate debate and adoption of H.R.3884, August 27, 1976, quoted in the NEA Source Book 1976, 338)

Church refers here to the previous examples, such as the War Powers Resolution and how Congress has tried to regain its jurisdiction therein. The National Emergencies Act was considered further example of this trend to restore commensurate constitutional powers between the different branches of government.

The members of Congress seemed to acknowledge that the president does not necessarily represent the collective judgment on emergency powers in the same way as the Congress:

> In accord with President Roosevelt's approach, the President is left to determine by himself when a national emergency exists and when it ends – when the Executive should have access to the near dictatorial authority conveyed in emergency legislation. The President decides when he should share power with Congress as the Constitution prescribes, and when Congress can be made optional by proclamation. (Initial Authorizing Resolution of the Special Committee, Remarks of Senator Mathias, quoted in the NEA Source Book 1976, 15)

In this argument Senator Mathias refers to President Roosevelt's approach to national emergencies as an example of the view that national emergencies are for presidential discretion only.

The powers of the president concerns namely the power to interpret situations, and that is a power that Congress cannot really control.[113] The strength of the president derives from his or her plebiscitary figure. How can Congress impose limitations for the president when the president appeals directly to the people? Crises are by their nature better suited to the executive branch. The plebiscitary presidency figure is ideally suited to debates relating to war and emergency powers. Representative Legget illustrated the power of the president to interpret the political realities during the debates on the War Powers Resolution:

> Under present circumstances, it is the executive branch that controls the mood and scope of any debate of national significance. Presidents Eisenhower, Kennedy, Johnson, and Nixon, with their immense political power and vast access to the media, succeeded in defining for the country and the Congress what Vietnam was all about – what constituted victory and what constituted defeat. The Congress, in Vietnam, was faced with a fait accompli; it was either support the troops or face the extermination of those troops in South Vietnam. Given this state of affairs, it is not surprising that we tended to accede to the President. The situation may not be any different under this measure. (War powers of Congress and the President (H.J.Res.542), July 18, 1973, 24706)

The president may legitimatize his action by referring strictly to the public support. The president's situational analysis and its importance for the exercise and legitimacy of emergency powers were not, however, considered topical in the Congress of the time.

When acting in an emergency situation the president has to acknowledge the status quo. To what extent may a use of emergency powers be seen as a disadvantage to the public? In other words, to successfully use emergency powers the president has to be aware of the current political climate, the congressional attitude and Congress' position relation to the current state of affairs, which usually is closer to the status quo than is the relation between the Congress and the president. What follows if the president is at a great distance from the status

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113 Jeffrey K. Tulis has written a book, *The Rhetorical Presidency* (1987, Princeton: Princeton UP) where the powers of the president to define the political realities are illustrated in several ways.

quo? To what extent can a president take action in the face of opposition from both the public and Congress? It seems that Congress can impose some limitations on a publicly elected president. Both branches of government, however, are similarly accountable to public opinion.

As discussed above, both the courts and the voters can give a verdict on how well a president use his or her power. Senator Mathias aim was to emphasize the role of Congress and the judiciary, but stated specifically that it must be Congress that ultimately is in a position to restore the constitutional separation of powers:

> Unless we accept the principle of an optional Constitution and an optional Congress, we must reject the concept of national emergencies declarable by the President at his discretion in peacetime without termination dates. Since this concept has been upheld in essence by the Courts, it is up to the Congress to recover by legislation the constitutional role that it has allowed the Executive to usurp. We must reassert the principle that emergency powers are available only for brief periods when Congress is unable to act and for purposes directly related to the emergency at hand. (Initial Authorizing Resolution of the Special Committee, Remarks of Senator Mathias, quoted in the NEA Source Book 1976, 16)

Mathias particularly underlined that only Congress can restore an imbalance of powers between the executive and legislative. Emergency powers may be used only for short periods of time, when Congress is unable to act. This idea was not, however, included in the final version of the bill.

Senator Pearson acknowledged a very important fact during the floor debate when he stated that the inherent powers of the president are reviewable by the Supreme Court, but the statutory delegations of powers are given by Congress without any requirement of congressional oversight; and therefore control is the real problem, because the statutes lack the possibility for judicial oversight:

> Unlike inherent Presidential powers which can be reviewed by the Supreme Court, emergency powers are specific legal delegations of authority to a President. The Supreme Court has generally given deference to such delegations of authority. The laws are viewed as persuasive evidence of congressional intent that the President should be permitted special latitude during crises. Thus, unless Congress itself imposes controls, emergency powers may remain largely unchecked. (A National Emergency, August 22, 1974, 29983)

According to Pearson (ibid.) when Congress has authorized powers for the president, the statutes have been interpreted in a way that does signal Congress' intent to grant some measure of extraordinary powers to the executive.[114]

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114 This is a rather interesting point of view since the Supreme Court has, to some extent at least, reviewed emergency legislation concerning both inherent presidential powers as well as statutory authorizations. During the Senate Special Committee hearings, Dr. Cotter argued that the Supreme Court has three approaches to the use of the emergency powers: "The first approach, typified by Ex Parte Merriman (1861) seems to tell the President he may have to assert a Lockean prerogative to act contrary to the law in time of emergency. The second approach, as exemplified in Justice Sutherland's opinion for the Court in United States v. Curtiss-Wright Export Corporation (1936) invites the interpretation – invoked by President Truman's advisors in the

Senator Pearson's argument seems, however, outdated in the contemporary context, because after 9/11 the Supreme Court ruled, for instance, in favor of the president's right to detain terrorists in the 'War on Terror' (*Hamdi* v. *Rumsfeld*, 542 US 507 (2004).[115] It is, of course, essential to consider to what extent legislation after 9/11, such as the authorization to use of military force bill (AUMF), can be considered primarily as emergency legislation? This question is considered in more detail in Chapter 5. It should, however, be pointed out that the Court has often reacted to emergencies and emergency powers as a political question (See Dr. Casper's statement during the Senate Special Committee hearings, Part 1, 'constitutional questions' 1973, 84). Therefore, Congress and the president should be able to ensure that their actions occur within the limits of constitutional rule. Pearson's argument refers to the fact that the Court has not actively given rulings on national emergencies and the use of emergency powers, and therefore Congress should take a more active role in order to avoid any "special latitude" taken by the executive in times of crisis.

4.5 Defining the scope of national emergencies through the statutory framework

Whereas there is a certain historical-legal paradigm of national emergency situations, the conception of emergency has remained vague and problematic.[116] The National Emergencies Act did not really settle the question of what constitutes an emergency. Foreign policy staff member of the Senate Thomas A. Dine argued during the Senate Special Committee discussions of NEA in 1973: "*In my discussions and research, I have yet to come across definition. There is no objective or standard definition* [of national emergency] […] *If the President says so, it is a national emergency*." (See Senate committee print 96-780, 10.) What ought to be noted here, however, is to what extent there can be any "objective" definition of emergency, or whether it is always subjective like Dine argues.

Senator Pell considered the character of national emergency situations as follows:

> I wonder if there are not really three gradations of emergency — national economic emergency, national military emergency, and national survival emergency. The President has the constitutional duty in a survival situation to do everything he can to save the United States. In other words, that is an issue that would involve security

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Steel Seizure Case – that the President has an inherent emergency power stemming from a source beyond the Constitution, and presumably not subject to congressional restraint. The third, which I take to be the sound line on interpretation, and by no means one which makes for Executive powerlessness, stresses the interplay of the President, the Congress and the Courts in responding emergency conditions." (Senate Special Committee hearings, Part 1, 'constitutional questions', 1973, 22)

115 http://www.supremecourt.gov/opinions/03pdf/03-6696.pdf

116 On historical examples of the use of emergency powers in the United States since its foundation, see Relyea 1974.

> within the United States and the very existence of the country. (Senate committee print 96-780, 11)

The survival emergency seems to refer to the constitutional powers of the president to respond to sudden attacks. It appears that Congress was not willing or able to infringe on the emergency powers of the president in terms of the survival of the state. In the War Powers Resolution it was already noted that the president, on the basis of his constitutional Commander-in-Chief duties, could use the armed forces in order to respond to a national emergency "created by attack upon the United States, its territories or possessions, or its armed forces." (P.L.93-148) The question, however, remains whether these emergency powers of the president to respond to sudden attacks are subject to review by Congress?

In the House, Representative Drinan wanted to discuss the vagueness of the conception of emergency powers: "*Unfortunately, no clear definition of the President's emergency powers has emerged from the few Supreme Court cases in the area. In the words of Senator Church*: *[The Court] has invoked three different doctrines*, *and it has wobbled all over the place*." (Amendments needed to improve National Emergencies Act, September 3, 1975, 27480.) As noted above, the National Emergencies Act of 1976 did not specify the concept of state of emergency (or national emergency). The earlier versions of the bill (S.3957; H.R.16668; H.R.3884) included a section (201a) that provided a more specific framework for national emergency proclamations: "*In the event the President finds that the proclamation of a national emergency is essential to the preservation, protection, and defense of the Constitution, and is essential to the common defense, safety, or well-being of the territory and people of the United States, the President is authorized to proclaim the existence of a national emergency*" (quoted in the NEA Source Book 1976, 25). The wording of this provision follows language that is very typical of constitutional emergency power provisions, though it did not specify measures similar to Article 48 of the Weimar 1919 Constitution, for example.

The Government Operations Committee of the Senate adopted one remarkable amendment and several technical amendments to H.R.3884 as enacted in the House of Representatives. The Committee concluded that section 201a, which specified the situations in which a national emergency declaration could be made, was too broad and poorly defined. According to the Committee's view the problem concerned the wording of the section. It could be read as granting still more statutory authority for the president to proclaim national emergency. (See S.Rept. 94-1168, 3.) For example, Representative Holtzman was concerned about how wide-ranging a president's powers could be under such a vaguely worded authorization (House debate and adoption of H.R 3884, September 4, 1975 quoted in the NEA Source Book 1976, 276).

The Government Operations Committee concluded that of what situations permitted the president to declare a national emergency should be left to the numerous statutes. According to the Committee: "*The purpose of this statute is to prescribe the procedures to be followed in the event that the President proclaims a national emergency, as authorized by some other statute*" (See S.Rept. 94-1168, 4).

Hence the bill itself did not try to define beforehand when a national emergency proclamation might be justified. However, by requiring the president to specify what provisions of the law would apply, the law contained an important difference to the previous ways of dealing with national emergencies. Before the NEA legislation, all emergency powers throughout the entire *US code* were automatically activated by presidential emergency proclamation without considering the appropriateness of the statutes to the actual emergency (S.Rept. 94-1168, 5).

No more specific framework for national emergency proclamations was included in the final version of the bill. Without such specification the courts and Congress faced the difficulty of how to uphold any specific standards to justify the use of emergency powers. The final version of the bill states:

> With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register. (Title II, Section 201 (a) P.L.94-412, quoted in the NEA Source Book 1976, 344)

The bill continues by defining the powers of the president in times of national emergency:

> When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act. (Title III, Sec. 301, P.L.94-412, quoted in the NEA Source Book 1976, 346)

In the opinion of the Senate Committee on Government Operations the bill (H.R.3884) did not provide any additional powers to the president. The president was authorized to use only emergency powers pursuant to the national emergency declaration, as drawn from specific previously legislated statutes. (S.Rept. 94-1168, 4.) It seems that by passing the bill the Congress' intention was to secure that both the people and Congress were aware of when emergency powers can actually be used and what powers may be adopted. Therefore, the bill seems to increase the transparency of presidential emergency powers and provides more opportunities for the Congress to exercise its oversight duties. Procedures are needed, but they have to be vague enough because the situations change. Senator Pearson recognized this by arguing in the Senate that even though the law cannot foresee "every eventuality", it does provide possibilities for congressional oversight over the use of emergency powers by the president (Introduction of S.3975, August 22, 1974, NEA Source Book 1976, 85).

The discretionary power to decide whether a national emergency proclamation should be made was granted to the president in the NEA bill. However, the bill also assumed that Congress would review the need for continuing an officially proclaimed state of emergency in every six months and, when necessary, proceed to terminate the national emergency. Senator Pearson (Introduction of S.3975, August 22, 1974, NEA Source Book 1976, 85) described the six months review requirement as follows: "*No emergency is effective beyond six*

months, unless specifically extended by Congress. This Requires Congress to review any declaration of emergency and thereby imposes a degree of responsibility on Congress." Senator Pearson refers to the idea present already in the WPR debates that Congress should equally share the responsibility in decisions related to war and emergencies. Senator Pearson's argument, however, refers to the Senate version of the bill S.3957.[117]

The final version of the bill required Congress to review every six months whether a national emergency should be terminated, but the automatic termination provision, which would come into effect if Congress had not taken affirmative steps, was excluded from the bill: "*Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a concurrent resolution to determine whether that emergency shall be terminated*" (Title II, Section 202. (b), quoted in the NEA Source Book 1976, 339). This provision was considered essential in order for Congress to share the burden in regard to the decision-making of national emergencies. During the house debate on the bill Representative Romano Mazzoli's (D-KY) described the requirement in the following words: "*The blame as well as the glory will be on the shoulders of the Congress in the years ahead. But that is at is supposed to be – that is the responsible course to take*." (House debate and adoption of H.R 3884, September 4, 1975, quoted in the NEA Source Book 1976, 251.)

During the NEA debates, Congress seemed to ignore the problem of partisanship. For instance, during the debates on the War Powers Resolution three years earlier it had been mentioned, that in times of war and crisis, Congress would probably face the "rally around the flag phenomenon", which would make disputing presidential interpretations of the situation difficult (See e.g. Representative Green's argument Chapter 3, p. 97). In the debates, the capability or willingness of the Congress to review at six-month intervals whether a national emergency should be terminated was not debated very extensively. For example, Representative Holtzman referred to the WPR and the inaction provision: "*We said that if the President starts his own war, it has got to terminate automatically after a 90-day period. That was an important provision because sometimes it takes a great deal of effort to get Congress to act affirmatively – even to stop abusive Executive action*." (House debate and adoption of H.R 3884, September 4, 1975 quoted in the NEA Source Book 1976, 276.) What ought to be also noticed is whether Congress is capable of terminating a national emergency in cases where the public comes down on the side of the president.

The question concerned whether the Founding Fathers had intentionally

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117 See Sec. 402 of S.3957, 93rd Congress: "Any national emergency declared by the President in accordance with this title shall terminate at the end of the one hundred and eightieth day after the date the national emergency was declared, and any of the provisions of law referred to in section 401 (a) of this Act shall not be effective after the end of such one hundred and eightieth day unless Congress by concurrent resolution (1) terminates such emergency on an earlier date; or (2) continues such emergency to a day specified in the concurrent resolution, beyond the end of such one hundred and eightieth day". (Title IV, Section 402, quoted in the NEA Source Book 1976, 93)

excluded emergency powers from the Constitution. Was the idea of the Founding Fathers thus to exemplify that the system of checks and balances applies also to war and emergency powers?[118] Congress can declare war, but the president is the Commander-in-Chief. Because the text of the Constitution does not actually specify how to deal with different kinds of emergencies, the American legal system has proceeded through a framework that Keith Whittington has conceptualized as "Constitutional Construction". This constructionism concerns the question of how issues are treated in the face of the Constitution's abstract principles and vague constitutional clauses, e.g. - through utilizing or creating judicial and nonjudicial precedents, administrative regulations, and congressional enactments, or through building appropriate institutions with their own norms and rules (referred in Balkin & Levinson 2010, 1812).

According to Fuller (1979, 1478) there are no constitutional presidential emergency powers equivalent to the power of Congress to declare war or to respond to insurrections or invasions.[119] Fuller (ibid.) writes, "*The only true extraordinary power given the Executive is the power to call Congress into special session, which implies that even during a crisis the President must seek congressional approval before acting*."[120] The authority that Fuller refers to here was not brought up in the debates that I have looked at on the National Emergencies Act.

Interestingly, the NEA bill itself does not make reference to the Constitutional *habeas corpus* clause, which generally is considered one of the only references to emergency powers in the Constitution. The Constitution establishes: "The privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in cases of *Rebellion* or *Invasion* the public safety may require it" (US Constitution 1787, Article 1, section 9, emphasis added later). The other emergency power recognized in the Constitution is arguably the provision granted in the first article of the Constitution: "*To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions*" (US Constitution 1787, Article 1, section 8).

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118 Hamilton tackled the issue, however, in the Federalist Papers (1787, No. 23): "The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national emergencies, or the correspondent extent and variety of the means, which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense."

119 Although Fuller (1979, 1478-1479) mentions that Congress, by enacting emergency statutes, can delegate emergency powers to the president, the president has certain independent "implied" emergency powers that can be traced back to the Constitution, like the 'execution of the laws provision' and the Commander-in-Chief clause.

120 According to the Constitution the president can "on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States." (US Constitution 1787, Article 2, section 3)

Lobel (1989) has distinguished three different approaches to how emergency powers are interpreted in the US, speaking of an absolutist, a relativist and a liberal framework. The normative debates on emergency powers are not the focus of this dissertation, however, these debates should be recognized. Lobel (1989, 1392) writes that the essential elements of each of the three frameworks can be distinguished in US constitutional history. Lobel (ibid.) argues that the liberal tradition was the principal theory at the beginning of the Republic. The relativist framework, for its part, began to shape the view of government towards emergency powers during the twentieth century.

The discussions surrounding the NEA legislation illustrate that there was a felt need to provide a statutory delegation of powers in order to ensure that the constitutional separation of powers would apply in times of crisis as well as times of peace. Regarding Senate's concern to terminate the formally continuing national emergencies, Mathias noted that it is not an easy task to maintain a constitutional balance of powers when the character of the institutions tended to benefit primarily the executive in times of crisis. However, Congress must circumscribe the use of emergency powers in order to restore the balance:

> Under the best of circumstances, the Congress will not find it easy to maintain its historic constitutional role in the modern age. Modern communications, national interdependence, and international involvement coverage to enhance the Presidency; real emergencies continually arise requiring the kind of decisive response the Executive is best equipped to give. But if the Congress allows these national Executive advantages to be expanded by special emergency powers responding to unspecified emergencies without determination or limit, the balance of powers between the branches of our government may be irreparably broken. (Initial Authorizing Resolution of the Special Committee, Remarks of Senator Mathias, quoted in the NEA Source Book 1976, 17)

To my mind this argument illustrates the reason why Congress proceeded in the 1970s to reassert its constitutional powers vis-à-vis the executive branch by enacting the new legislation of the War Powers Resolution and the National Emergencies Act.

4.6 The practical problems of the National Emergencies Act

Most members of Congress responded positively to the legislation. In the following I will present some of the practical problems of the NEA legislation that are related to the substance of the law. During the NEA debates the members of the Congress seemed to adopt Hamilton's idea that it is not possible to foresee all future exigencies (For details, see Federalist Papers 1787, No. 23). The procedural characterization of the NEA bill enables flexible responses to different national emergencies. For my point of view, however, the vagueness and the lack of substance seems to some extent to undermine the meaning and importance of the law.

Distinguishing the normal from the exceptional was the main theme of the NEA discussions. By enacting NEA legislation Congress wanted to get rid of the vagueness surrounding national emergencies. Future presidents should specify in their national emergency proclamations what actions the administration will pursue. Following Justice Jackson's opinion in *Youngstown* v. *Sawyer* case, 343 US 579 (1952), Congress' intention was to create statutory foundations for the use of emergency powers. When statutory guidelines exist, the president is obliged to follow them. Jackson argued, "*We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers*" (See Jackson's concurring opinion Youngstown v. Sawyer, 343 US 579 (1952).

During the introduction of S.3957 in the Senate, Mathias referred to his discussion with Chief Justice Warren over a year earlier: "*In essence, he* [Warren] *believed that Justice Jackson's views were a forceful and convincing definition of constitutional responsibility. Justice Jackson's opinion stressed that each branch has its responsibilities, and if each branch fully meets its responsibilities, there would be no legal doubts concerning who should "make the law" and how the laws should be executed*." (Quoted in the NEA Source Book 1976, 82.) According to Mathias (ibid.), Chief Justice Warren stated "*that while the Constitution provides that only Congress can make the law, the legislature has the obligation through enacting statutes to provide firm policy guidelines for the Executive branch*." While there are no constitutional emergency powers as such, Congress could not refer to the existing constitutional powers in order to legitimate the claim to legislate in this area, similarly to way it had acted in the WPR debates three years earlier. Members of Congress referred thus to the power of Congress to provide statutory guidelines for their oversight of emergency powers.

In the course of the House debate on the National Emergencies Act, Representative Carlos Moorhead (R-CA) noted that the NEA legislation was meant to provide tools for the Congress to exercise oversight. He referred to the British parliament's use of emergency powers during the Second World War where it delegated emergency powers for no longer than 30 days at a time, and emphasized that Congress should also use a similar form of oversight. According to Moorhead: "*There has been a great deal of talk about "oversight" in this House in the recent weeks and months. The legislation we considered today is an effort at genuine congressional oversight.*" (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source book 1976, 254.)

Critical comments were presented in the debates concerning mainly the lack of legislation to specifically impose restrictions on the use of emergency powers. Representative Holtzman stated on the floor during a debate on the National Emergencies Act: "*When we delegate vast powers to a President, we ought to also take into account how to protect the people from an abuse of those powers. Unfortunately this bill fails to do this effectively*." (House debate and adoption of H.R 3884, September 5, 1975, quoted in the NEA Source Book 1976, 276.) The final version of the bill did not include any specification of what would be considered an "abuse" of presidential emergency powers. The president may declare a national emergency whenever deeming it necessary. Such use of national emer-

gency powers by the president was not disputed, but rather the "possible and arbitrary use of emergency powers". In the final report of the Senate Special Committee in National Emergencies and Delegated Emergency Powers (S.Rept. 94-922, 19) the Committee concludes by saying, "*emergency laws and procedures in the United States have been neglected for too long, and that Congress must pass the National Emergencies Act to end a potentially dangerous situation*." The report (ibid.) continues by saying "to fail to act is to invite abuse". Even though emergency powers had not been abused in the past, it could occur in the future if Congress did not proceed to provide a framework for the use of these powers.

It seems that the discussions saw no need to define presidential emergency powers in the legislation. The members of the Congress did not refer to particular emergency powers in the discussions. Representative Rousselot's following argument, however, gives an idea of what presidential emergency powers could mean in practice: "*The use of broad emergency powers by the Executive which include the right to seize property, take over transportation, institute martial laws, and indeed assume control of all aspects of private enterprise must be stopped*" (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source book 1976, 256). As this indicates, the power of the executive to act in national emergencies was covered wide-ranging.

The congressional discussions, however, imply that the NEA bill would concern only the emergency powers enacted by the Congress:

> Congress has given the President certain authority to act under emergency situations, and the President triggers specifically the laws that this Congress itself has passed on when he declares a national emergency. I know that there are other unspecified powers that a President under the Constitution can trigger, but most of the powers we are involved with here come out of Congressional acts. (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 273)

Representative Moorhead seems to refer here to the inherent powers of the president and specifies that the NEA legislation involve mainly the powers that come out of the acts of Congress.

Fuller (1979, 1465) has pointed out that the NEA bill does not provide any possibility for Congress to declare a national emergency if the president is not willing to act. Fuller (ibid.) argues that the Act provided new power for the president to declare a national emergency. That the president has the Constitutional authority to respond to sudden attacks was generally agreed on in the debates. As has been discussed, the idea was included already in the WPR legislation. In the Senate version of the WPR bill (S.440) the situations in which the emergency use of the armed forces would be authorized were clearly spelled out.[121] As discussed in Chapter 3, the final version of the WPR bill was content

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121 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 may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only - (1) to repel an armed attack upon the United States, its territories or possessions… (2) to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions … (3)

merely to note that, by virtue of the president's Commander-in-Chief powers, the president is authorized to deploy US armed forces in a national emergency "created by attack upon the United States, its territories or possessions, or its armed forces".

The members of the Congress had doubts already in the 1970s about the constitutionality of concurrent resolutions (i.e. a resolution passed by both the House and Senate and not subject to presidential veto), as became apparent in the WPR debates (see Chapter 3). The concurrent resolution seemed to be, however, an effective way to control the powers of the executive because the president could not veto them. The members of Congress were aware the possible unconstitutionality of concurrent resolutions. In an appendix to the Senate Report (94-1168, 22) of the NEA bill, Mr. Frey, Assistant Director for Legislative Reference, informs the Committee on Government Operations that the executive has not always accepted the legitimacy of the concurrent resolution: "*As you know, the executive branch, on many previous occasions, has objected to the use of similar concurrent resolutions provisions in legislation on constitutional grounds because such provisions circumvent the President's role in the legislative process as provided in Article I, section 7 of the Constitution*." The topic had been discussed extensively already in connection with the War Powers Resolution.

Due to a later Supreme Court decision, *INS.* v. *Chadha*, 462 US 919 (1983), only joint resolutions which are unlike concurrent resolutions exposed to veto can nowadays be used to terminate declarations of national emergency made by the president. The National Emergencies Act was amended in 1985 to replace the concurrent resolution with the joint resolution as a method of terminating a national emergency (Relyea 2007, 12; Lobel 1989, 1416). By this, Congress seems to have "lost its teeth", however, since previously it could have used its powers to terminate a national emergency by passing a joint resolution and without having to enact a law. The concurrent resolution, in the original language of the bill, was not subject to presidential veto, but neither did it have the force of law. Therefore, to my mind the concurrent provisions were political rather than legal measures as discussed earlier in Chapter 3.

There are other examples of legislative actions that are not subject to presidential approval in order to have an effect. One of the most significant is the right of "Congress to veto executive branch reorganization plans under the Executive Reorganization Act." Other examples that could be mentioned in this regard are amendments to the Constitution, and orders to spend appropriated funds for the use of Congress. The Congress has enacted legislation providing "*that the powers granted to the President would come to an end upon adoption of concurrent resolution*." Examples of this kind of usage include the Middle East Resolution and the Tonkin Gulf Resolution, which provided the possibility for Congress to repeal the authorities granted by the resolutions by passing a concurrent resolution. (H.Rept. 93-287, 13-14.)

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to protect while evacuating citizens and nationals of the United States … (4) pursuant to specific statutory authorization…" (Quoted in Spong 1975, 878-879)

The question of taking affirmative steps was brought up also in the NEA expressed by Representative Mazzoli:

> I think this really goes back to our discussions concerning the War Powers Act. The House was divided on the question in this case here of whether the provisions of the War Powers Act should be brought in upon the action of Congress or upon its inaction. Many of us felt that the inaction of Congress was an inappropriate way to show our displeasure at the pursuit of some international adventure involving American Armed Forces; others felt that was the appropriate way, because of the parliamentary problems involved, that inaction was the proper way to display our opposition. Here in the subcommittee we came to this same philosophical split. We in the subcommittee eventually went along with the view that it should depend upon Congressional action rather than inaction, as the gentleman from Massachusetts (Mr. Drinan) would suggest. (House debate and adoption of H.R. 3884, September 4, 1975, quoted in the NEA Source Book 1976, 272)

The inaction of Congress was a topical question already in the War Powers Resolution debates and was brought up again in the NEA debates. Should the opposing side be able through inaction to prevent the president from acting? The question was raised during the debate on an amendment offered by Representative Drinan, which is discussed more fully later in this chapter. The law, however, included a provision that Congress was to take action every six months period on whether or not to terminate a national emergency. The possibility of inaction of course exists if Congress decides to ignore its own provisions.[122] During the House debate on bill H.R.3884, Representative Spark Matsunaga (D-HI) offered an amendment requiring the automatic termination after one year of national emergencies if the president fails to publicly announce its renewal. According to Representative Moorhead, the Matsunaga amendment (which passed) establishes "extra pressure" on the president and the whole executive branch to justify national emergency proclamations (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 273).

The debate regarding the possibility to terminate through inaction a national emergency declared by the president was considered to be less of a problem than congressional inaction related to the WPR bill. Representative George Danielson (D-CA) for instance supported Matsunaga's amendment by saying that the "*self-destruct provision of the Matsunaga amendment will add a good deal to the bill in that emergencies will not just go on and on because we are too busy to act upon them*" (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 268). Danielson's view was controversial in referring to the possibility of Congress being "too busy" to act upon a national emergency.

As discussed, the emergencies would lapse after one year if not explicitly continued by the president. An emergency could also be terminated by a presidential notice, or by a congressional concurrent resolution (or nowadays, by a

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122 An earlier provision of the law (S.3957) included an inaction section similar to the WPR stating that there will be an automatic termination of the national emergency proclamation after six-months if Congress does not take action (See Chapter 4, p. 152-153).

joint resolution). The question of what happens if the president wants to terminate an emergency and Congress wants to continue it was not really debated in the Congress. Rather the question was what would occur if the branches disagreed on the need to terminate an emergency and whether the emergency would then continue indefinitely.

Not only emergency powers available, but also the time frame in which they could be used was the object of debate in Congress. Representative Drinan emphasized that emergencies should be short-term affairs, and Congress should not allow the president to have any "loose power" in order to continue an emergency, since in that case emergency could continue indefinitely until both houses agreed to end it (or until an automatic termination):

> (W)hy we should have a national emergency at all, where the President unilaterally has exerted a power to do extraordinary things? Should we not state that it is an extraordinary thing when he is exercising unspecified powers? Should we not say that such powers which he assumes, then, should terminate within 30 days unless we, the lawmakers of the nation, specifically and affirmatively give the President a renewal of that power? (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 273)

Drinan seems to question the purpose of the National Emergencies Act if it does not impose proper limitations on the use of emergency powers and national emergency proclamations. He further proposed an amendment to the House bill in which he urged:

> [T]he Congress to adopt an amendment to this very necessary bill that would provide that the emergency proclaimed by the President automatically be terminated within 30 days unless the Congress affirmatively seeks to extend the emergency. (Providing Consideration of H.R.3884, National Emergencies, September 4, 1975, 1975, 27637)

Drinan refers to the burden of Congress to terminate the presidential use of emergency powers. If both houses must agree to the termination, the president can, rather easily, prolong a national emergency, particularly in a situation where the president's party controls the majority in one of the houses. Drinan, however, also noted that after 30-days the president can re-declare the national emergency or Congress can extend the emergency (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 258).

In regard to the termination of national emergencies Fuller (1979, 1507) writes that section 1622 (c) of the bill allows members of Congress who would join the president in delaying a concurrent resolution the opportunity to do so, by use of "procedural gimmickry". The automatic provision is not the most effective way in this context either, because it applies only if the president is willing to let the option lapse.

The final version of the NEA bill established that no later than six months after a national emergency is declared and every six months after that, each house should consider a vote on a concurrent resolution concerning termination

of the state of emergency.[123] In the course of the debate in the House, Representative Conyers (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source book 1976, 280) asked Representative Flowers what would happen if the president vetoed the congressional termination of the bill. Flowers responded that the concurrent resolution does not require presidential signature and therefore it is not possible that the president could veto it (House debate and adoption of H.R.3884, September 4, 1975, NEA Source book 1976, 280).

This automatic revocation requirement has, however, failed and remained in Fisher's (2007, 265) words "a dead letter". Lobel (1989, 1415-1416) writes that presidents have issued pro forma reports to Congress every six months, but the question of whether to terminate the ongoing national emergencies has never been considered in the Congress.

The previous formula presented by the Senate Special Committee during the hearings on the constitutional questions related to national emergencies was rather different: "*In no case could a state of national emergency be extended longer than 6 months; a new and updated declaration would be required at that point* [after 6 months], *and affirmative action by the Congress would be required for any and all extensions*" (Senate Special Committee hearings, Part 1 'Constitutional questions' 1973, 5). Senator Mathias commented on the change, claiming that "*An expedited privileged procedure would assure consideration and a vote should the Congress so decide*" (National Emergencies Act, October 7, 1974, 34012). Like the War Powers Resolution, the National Emergencies Act undermined the affirmative role of the Congress in authorizing and terminating executive actions.

Fuller (1979, 1471) has noted that the reviewing process included in the National Emergencies Act is a particularly blunt instrument because after a congressional termination, the president can simply proclaim a new national emergency, forcing Congress to act again. This was a scenario that was not really debated in Congress. Representative Drinan, however, noted that under the six-month provision emergencies could go on for years if one of the houses failed to act, and therefore Congress had no sure means to terminate a specific emergency (See House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 273-274).

The automatic termination provision is included in both the WPR and the NEA bills. However, in NEA the president may continue the national emergencies annually by his own proclamation whereas in the WPR bill the president is expected to terminate the use of forces after a certain time period unless Congress has declared war or given other statutory authorization, has extended the period of 60 days or is unable to make a decision because of an attack upon the

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123 According to the National Emergencies Act of 1976: "Any national emergency declared by the President in accordance with this subchapter, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary." (P.L.94-412, USC 50, Chapter 34 §1601-1651) For the text of the bill see, http://www.law.cornell.edu/uscode/text/50/chapter-34.

US (P.L.93-148). As opposed to the War Powers Resolution the failure of the Congress to reach a decision results in continuation of the national emergency.

The original idea of the Senate Special Committee was that specific emergency powers could exist only for a period of 30, 45, or 60 days. According to Representative Drinan (Providing Consideration of H.R.3884, National Emergencies, September 4, 1975, 27642) the administration persuaded the Senate Special Committee to change its view. As mentioned above, the 30-day timeframe for national emergencies was reintroduced in the House debate by Drinan.[124] The Drinan's amendment would let the emergency lapse after 30 days if Congress had not extended it by passing a concurrent resolution, approved an extension to it by other legislative means, or was physically incapable of making a decision (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 269). Representative Walter Flowers (D-AL) strongly opposed, however, the 30-day period: "*There are many impediments to the Congress acting on anything within a 30-day period. For instance we have just had a 30-day recess in the month of August. We have many reasons why I think we should not tie the Administration's hands with this sort of provision*." (House debate and adoption of H.R.3884, September 4, 1975 quoted in the NEA Source Book 1976, 271).

Representative John Conyers Jr. (D-MI) referred to Representative Flowers' argument by stating that if the members are not convinced that Congress in recess could make the decision, then it would be best to approve Drinan's amendment related on the automatic termination (House debate and adoption of H.R.3884, September 4, 1975 quoted in the NEA Source Book 1976, 272).

Representative Moorhead opposed the amendment because the bill provided other opportunities for Congress to terminate national emergencies: "*Congress can terminate a declared emergency at any point, in one day, or in 365 days, or at any time they desire to do so by a vote of both Houses of the Congress to terminate a national emergency*" (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 272-273). The amendment was criticized by Moorhead also because of the possibility of filibuster in the Senate. Congress could also be tied up with other legislative measures or in recess. He highlighted the issue as follows: "*It is unrealistic to think that we can run our Government in such a way that one or both Houses of the Congress could terminate a national emergency with absolutely no action whatsoever*" (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 273). Moorhead's argument that there should be positive action by Congress to terminate emergencies contrasts with Drinan's amendment with its proposals for states of emergency to lapse automatically within 30 days if Congress does not specifically act to re-authorize them. The argument is analogous to the inaction argument present in the WPR debates.[125]

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124 Drinan's amendment resembles an earlier version of bill S.3957, 93rd Congress, which states that an emergency would lapse after 6 months if Congress did not act to affirm or reject it.

125 The final version of the bill specified procedures on how the concurrent resolution to terminate a presidential national emergency proclamation should proceed, taking

Drinan's rejected amendment seemed to create a situation similar to that the around Matsunaga's passed amendment, the difference concerning only whether an emergency should last for 30 days or for one year before automatic termination. In final version, the legislation stipulated automatic termination after one year if not continued by the president.

Similarly to Drinan's amendment, the final language of the bill requires congressional action, but only every six months to review the conditions under which the emergency was continuing. The crucial point, however, is that Drinan's amendment recognized congressional power by making continuation of a state of emergency on congressional action or inaction. The problem, however, was not about whether Congress would or would not act in time but rather the fact that Congress had neglected the six months review requirement completely. Drinan seemed to foresee the possibility that Congress would not exercise its oversight duties defined in the bill concerning the appropriateness of the presidential use of emergency powers.

Drinan particularly criticized the six-month provision of the bill, because according to his point of view the president should be required to justify the need of emergency powers rather than give the burden to Congress to prove that the president's use of emergency powers was illegitimate.[126] He claimed that his amendment would place the burden of proof on the president. The amendment would guarantee, "[*I*]*f he* [the President] *exercises these emergency, extraordinary, most unusual powers, then the exercise of those powers terminates automatically after 30 days, unless we in the Congress affirmatively extend them*" (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 273).

As discussed above, under the six-month provision, if one of the houses fails to act the emergencies could go on for years before a congressional termination. The vote to terminate could be passed in both Houses at any time, however, as Representative Moorhead noted during the debate (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 274). Drinan responded promptly to this by reasserting that the burden to terminate emergencies should not be on Congress. Further, he argued that Congress had given short-term emergency powers to the president to respond to emergency situations. During the preceding 40 years, US presidents had not abused the available emergency powers, but the history could have been different. (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 274.)

Representative Flowers opposed the amendment offered by Drinan by referring to the bill (H.R.3884) that already includes a requirement for Congress to

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certain time limitations into account to ensure the issue comes to the floor of Congress (NEA Source Book 1976, 339).

126 During the WPR debates it was emphasized that the president has to convince Congress about the emergent nature of a situation and its seriousness in order to commit troops, otherwise the action terminates automatically. (See Representative William Dickinson's (R-AL) argument during the debate on overriding President Nixon's veto in the House of Representatives, November 7, 1973, 36208)

act every six months to review the use of emergency powers (House debate and adoption of H.R. 3884, quoted in the NEA Source Book 1976, 274). Flowers (ibid.) also emphasized that most in Congress were not happy with the current circumstances of how national emergencies are dealt with, and so passage of the bill by the House would be put in risk by including Drinan's amendment. According to Flowers (ibid.): "*We have in the legislation basically a compromise position which recognizes the Legislative branch's and the Executive branch's peculiar problems, if we want to give it all up in order to have this 30-day period then that is what we should do.*" Flower's argument not only implies that the bill was prepared in cooperation with the executive branch, but also that the compromise bill would most likely to avoid a presidential veto.

During discussions on the NEA bill in the House, Representative Mazzoli asked the Chairman whether the Senate had advised the House to make no changes to bill in order to maintain an agreement made with the executive branch and ensure that the bill would be signed in the future (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 270). Flowers responded that the Senate had done a lot of work on the bill, and that the House should accept the bill in its current form since it was a good compromise:

> A great deal of work was done in the other body on this legislation. We worked, I think, hard and diligently on it, and in a large part we did accept what the other body did. It was not because we were rubberstamping the other body, but because it was good work. The compromise was a good piece of legislation. (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 270-271)

Representative Conyers pursued the matter further by saying that, despite the Senate's view, Drinan's amendment should be considered because not all members necessarily agreed that the burden to terminate the use of emergency powers should reside with Congress:

> I do not know if I understood, by the previous colloquy with the distinguished chairman of the subcommittee, whether or not we have received Senate instructions not to tamper with this legislation. If that is the effect of the discussion, I suppose it is clearly not relevant to the deliberations of 435 Members. But as I see this amendment (Representative Drinan's) – and I would like to raise this question with my colleagues on the subcommittee – the apparent thrust of this amendment is to determine whether an emergency under this legislation is to exist for one year or 30 days. I think that is an important enough question with which some of us might have a different view. I, of course, would be one of those who would like to limit the emergency powers of the Executive Branch to as short a time as is reasonable, and 30 days seems reasonable to me. I suppose that the Congress could, as the chairman of the subcommittee has pointed out, at any time operate within that one-year period, but I think the burden more properly in this instance should rest upon the Executive branch in requesting an emergency situation to exist. (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 271)

Conyers wanted to limit the powers of the president to the briefest time as reasonable. It came down to the fact that there was no objective timeframe for the president to act. Emergency legislation cannot foresee every eventuality. In this

respect, defining specific time limitations for action is problematic. The same question was topical already in the War Powers Resolution debates, in which it was noted that the defined time limitation for (presidential) action is always in some sense arbitrary (See Senator Eagleton's argument in War Powers Act, July 18, 1973, 24544).

During the House debate on H.R.3884, Representative John L. Burton (D-CA) also acknowledged the benefits of the amendment offered by Drinan (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 274). Burton (ibid.) stated that Drinan had a point regarding how national emergencies should be terminated, but that the concerns regarding the 30-day limitation were also relevant. Therefore, Burton (ibid.) made a compromise proposal for a 90-day limitation. Drinan (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 275) responded to this proposition, saying that he was not concerned about the length of the time period but about the basic principle – i.e. "the burden of proof". He went on to say that the president should be able to convince Congress that an extension of national emergency is reasonable (ibid.).

During the House debate, Conyers noted that, though the Senate had already acted on the bill, some kind of compromise might still be possible: "*I think that unless we do this we are extending a definition of emergency to cover a period of time that I think is longer than it should really be under these circumstances and as this bill is written*" (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 275). Conyers' argument refers to the time limitations of the national emergency conception established in the bill. Representative Flowers once again opposed this by emphasizing that the House is not a rubberstamp for the Senate, and that the bill in its contemporary form takes into account the specific concerns of both houses of Congress as well as the executive and legislative branches of government. Flowers further stated that the Congress had no reason to change the "whole thrust" of the emergency powers legislation:

> As the gentleman from Massachusetts says, the reason this is here is because we failed to act over a long period. There has been no real abuse by the Executive branch of the emergency powers. Many of the emergency powers that have been utilized have been utilized for the purpose of carrying on the day-to-day business of the Government. Those powers have been utilized for so long they have become ingrained. They are almost like regular law instead of emergency powers, but we want to change this through this legislation. But to change the whole thrust of it so that we would require some affirmative legislative action in order to continue the emergency, I just could not accept that, regretfully. (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 275)

Flowers agreed that the reason the bill was being considered was because Congress had failed to act over the long term. But to change the bill in order to require Congress to take actions at regular intervals to continue a state of emergency was not acceptable.

Representative Holtzman also highlighted the question of whether Congress should act affirmatively in order to terminate president's emergency

powers. She referred to the WPR bill, in which Congress acknowledged the automatic termination provision: "*If the President starts his own war, it has got to terminate automatically after a 90-day period*" (House debate and adoption of H.R 3884, September 4, 1975, quoted in the NEA Source Book 1976, 276). She questioned why the two bills differed in regard to the automatic termination provision and affirmative action:

> The Gentleman would surely agree that in order to terminate a Presidential declaration of emergency – assuming there is no real emergency – the bill requires the Congress to act affirmatively but that in the War Powers bill in order to prevent the possible abuse of Presidential powers those war-making powers terminate automatically without affirmative congressional action (House debate and adoption of H.R 3884, September 4, 1975, quoted in the NEA Source Book 1976, 277).

Flowers (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 277) again responded by referring to the six months termination requirement in order to convince the other members that amending the bill was not necessary. Holtzman, however, still pressed Flowers to respond to the question of what would happen if Congress failed to act every six months? Would that mean that the state of emergency would continue? She hypothesized that the House might reject a continuation while the Senate could decide otherwise. In that case, the national emergencies could continue if no agreement was reached in conference. (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 277.) In response, Flowers stated simply, "*If Congress fails to act, then Congress has failed to act*" (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 277). Therefore, in a situation in which the houses disagree on the need to terminate a national emergency proclamation, the affirmative action requirement could be met without actually terminating the emergency.

Representative Drinan (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 278-279) offered a second amendment to house bill H.R.3884, in which he urged that the president should not be allowed to proclaim a national emergency unilaterally.[127] For Drinan the language of the bill (Sec. 201, H.R.3884) stating that the president can declare a national emergency when seeing it essential "to preservation, protection and defense of the

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127 The procedure for all emergency proclamations in the future presented by the Senate Special Committee was formulated in 1973 as follows: "That the President alone, or the President and the Congress jointly, can declare a state of national emergency if they perceive that an emergency exists. The President alone or the President with the Congress can declare the following specific statutes – to be cited – are in force. The President, when he alone declares a state of emergency, must inform the Congress in writing immediately of his declaration, the reasons therefore, and the particular statutes he wishes to come into force. The Congress would then consider whether to affirm the state of emergency declared by the President and would act with 30 days on whether the state of emergency in effect or, failing to act, the state of emergency would automatically be terminated. In no case could a state of national emergency be extended longer that 6 months; a new and updated declaration would be required at that point, and affirmative action by the Congress would be required for any and all extensions." (Senate Special Committee hearings, Part 1 'constitutional questions' 1973, 5)

Constitution or to the common defense, safety, or well-being of the territory of the United States" was problematic. Drinan's second amendment emphasized that national emergency proclamations should be possible in three areas only: when there is a declaration of war; when there is an attack on the US, its territories or armed forces; and when Congress has by prior decision (joint resolution) authorized the president to declare a national emergency. Following the example of the WPR bill, the amendment presupposes that the president shall consult with Congress in every possible instance.[128] After a national emergency proclamation has been made, the president should regularly consult with Congress until the emergency has been terminated. (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 278-279.)

During the debate, Drinan defended his amendment by claiming that Congress should not give away its constitutional powers:

> It seems to be, Mr. Chairman, very clear that the Congress was given the lawmaking powers under the Constitution, and that whatever right the President has to declare an emergency should be spelled out by the Congress of the United States. Though the last 40 years, the Congress has been very careless and derelict in not doing this. (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source book 1976, 279)

His declaration against unilateral declarations of the president followed: "*Why should we in the Congress allow the President unilaterally to proclaim an emergency and unilaterally to implement provisions of said emergency? That is an abdication of the power clearly placed in the Congress by the Constitution*." (Ibid.) By referring to the so-called emergency, Drinan emphasizes that the need to have emergency powers should not be left unchallenged.

The amendment was opposed mainly by claiming that it would severely restrict the authority of the executive under the Constitution as well as the flexibility of the president to act in national emergencies, as in the following argument by Moorhead:

> Mr. Chairman, it is important that we give our President some flexibility from time to time. This bill gives the Congress the right to wipe out those emergencies on a moment's notice if we decide it is in the best interest to do so. But let us at least leave the President the constitutional authority he has to protect this country in times of need. (House debate and adoption of H.R.3884, September 4, 1975, quoted in the NEA Source Book 1976, 280)

By referring to President Roosevelt's declaration of a Banking Holiday (1933) Moorhead underscored the idea that the executive should have flexibility to act in times of crisis. Flowers also stated that Drinan's amendment would undermine the separation of powers, since the president would be unable to act without prior congressional authorization. He further emphasized that both branches have certain responsibilities under the Constitution. According to Flowers, Congress cannot infringe on the powers of the president: "*We do not govern by legislative fiat in this country. We are not parliamentary form of government*."(House

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128 See fn. 89, p. 110

debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 279-280.)

The earlier version of the Senate Special Committee proposal suggested that national emergency declarations could be made either by the president or jointly by Congress and the president (see fn. 127, p.166). Previous emergencies had been proclaimed mainly by the president, but in some cases jointly or by Congress alone (Senate Special Committee hearings, Part 1 'constitutional questions' 1973, 5).

The NEA bill was prepared in cooperation with the executive branch, and therefore it avoided the kind of strong opposition from the executive branch that had been seen in connection with the WPR bill three years earlier. The act was expected to ensure the separation of powers if passed. However, the bill could not be passed without the assent of the president. During debate on the Senate bill, it was pointed out that Congress could not really proceed reclaim its constitutional powers without the consent of the president (See for instance Senator Ted Stevenson's (R-AK) argument during the introduction of S.3957, August 22, 1974, NEA Source Book 1976, 89). President Gerald Ford did sign the bill into law, however, in September of 1976, but he opposed it in part claiming that the provision of the bill related to the concurrent resolution was unconstitutional.[129]

Klieman (1979a, 47) wrote in 1979 that there are two reasons for the importance of the NEA legislation. First, the bill illustrates the fact the era of the "imperial presidency" in US politics was becoming to an end, and the WPR was also a good example of how a decisive Congress may respond to the growth of executive powers. Secondly, Klieman (ibid. 47-48) noted, that it was very common for modern liberal democracies to be prepared for dealing with emergency powers. The US Constitution did not provide any explicit answer for how to respond to emergency situations. Instead, the president was expected to have discretionary emergency powers with the support of the public, which usually supports a strong executive in times of crisis.[130] Therefore, the NEA legislation provided a means of ensuring that that the balance of powers would continue to obtain in times of crisis.

In short it seems that Congress was not only overly confident about its own capability and willingness to regularly oversee presidential emergency powers, but also too reliant on the concurrent resolution mechanism. An interesting question that did not actually appear in the debates is: How can Congress strengthen its own institutional resources?

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129 http://www.presidency.ucsb.edu/ws/index.php?pid=633 4#axzz1tWR223gE

130 Balkin and Levinson 2010 have noted the importance of the executive in defining political reality. Related to this we must include the "rally around the flag" phenomenon.

4.7 "Absence from dependence on arbitrary power"

Even though it was clear that the emergencies experienced in the US had never resulted in severe violation of basic US rights or civil liberties, the possibility should be taken seriously, according to the members of Congress. What Skinner calls the neo-Roman conception of freedom, i.e. an absence of dependency on arbitrary power was acknowledged among the members of Congress. The heart of the bill was expressed by Senator Roth, who referred not only to the possibility for rapid response that the bill granted to the executive, but also to the safeguards the bill provided "against the arbitrary and irresponsible use of such power by a future President" (Senate debate and adoption of S.3957, NEA Source Book 1976, 170). Representative Mazzoli claimed that the courts had identified a need for Congressional control and oversight of presidential emergency powers. He further quoted Representative Jackson's opinion in *Youngstown* v. *Sawyer* where Jackson emphasizes the role of Congress in granting, as well as providing oversight over, the emergency powers of the executive. Mazzoli indeed argued, "*In the granting of those "extraordinary" authorities" it is the responsibility of the Congress to see that the powers are properly used and that they do "lie dormant in normal times*" (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 251-252).

Unlike the Weimar debates, the suspension of rights or the content of presidential emergency powers was not considered very topical during the NEA debates in the US Congress. The existing emergency powers were considered, however, a threat to the constitutional separation of powers. Representative Hutchinson argued that, due to states of emergency that formally had been in effect for the last 40 years, the president "*has had a legal right to exercise sweeping, extraconstitutional powers*" (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 252). Senator Church also referred to the 40 years of emergency government: "*The president has had at his disposal virtually dictatorial power, ready for use as he desires*" (Termination of National Emergencies, August 26, 1976, 28226).

The problem was that the president might use this authority without consulting with Congress. Senator Church also warned that there seemed to be a natural tendency whereby "*the executive will seek to enlarge its power*." According to Church, the United States already had a "*Presidency the powers of which are unrivaled in our history.*" (Termination of National Emergencies, August 26, 1976, 28227.) Congress should proceed to provide more ways and opportunities for Congress to control the powers of the executive.

What ought to be noted here is that in the WPR debates the members of Congress referred to the 'original reading' of the Constitution, and of the powers enumerated therein of the Congress and the President as concerns war-making. Because the Constitution is silent on emergency powers, the NEA debates include no references to any particular provisions of the Constitution as such. Rather the NEA debates are based on comprehensive constitutional prin-

ciples. Members referred to the understanding of freedom that existed within the framework of the Constitution and among the Founding Fathers. Madison or Hamilton (Federalist Papers 1788, No. 51) illustrates the tension between the reason of the state and the freedom of people as follows: "*If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*"

Federalist Paper No. 51 (1788) agrees that the primary control of the government is the people, but that experience has taught us to have other supplemental measures as a precaution. During the NEA debates it was indeed emphasized that the president should not be able to use emergency powers unchecked by the people and Congress. Senator Mathias referred to the constitutional framework in the Senate as follows:

> Our founding fathers consciously placed in our Constitution the means to determine the real needs of the republic and laid down methods to provide for genuine national security. They also prescribed tests by which to reject spurious claims of national security which, in truth, have proven to be little more than cloaks for arbitrary rule. Two hundred years ago the authors of the Constitution sought to frame processes by which power could be used effectively for all of the people of the Nation. They also sought to prevent power from falling into the hands of a few to the detriment of the majority of the people. (Introduction of S.3957, August 22, 1974, NEA Source Book 1976, 81)

What is important to notice here is that by enacting the NEA legislation the idea was not to impose limitation on the powers of the president as such, but according to Mathias, "[*T*]*o assure that each of the branches can use its respective powers, and carry out its assigned responsibilities under the Constitution, in order to contribute to a common purpose of national security*" (Introduction of S.3957, August 22, 1974, NEA Source Book 1976, 81). He (ibid. 81-82) went on to say that the framework for the use of emergency powers is already established in the Constitution: "*In my view, our Constitution provides the best means to remain a free people, but we in the Congress must meet our responsibilities to make the law if that hope is to be a lasting reality*."

Powers granted to the president in national emergencies were considered to be "special powers". Senator Mathias said that, when combining all of the 470 existing emergency power statutes together, the president has acquired "potential dictatorial powers" (Introduction of S.977, March 6, 1975, NEA Source Book 1976, 285). The powers of the president in times of crisis should be curbed, because the president could, according to Mathias (ibid.), "*rule the United States outside of normal constitutional processes*." He also noted that the existing powers should no longer be available since there was no actual national emergency: "*In the view of the special committee, permitting this body of potentially authoritarian power to continue in force in the absence of a valid national emergency situation poses a hazard to democratic government*" (National Emergencies Act, October 7, 1974, 34013). The main intention of the NEA legislation indeed was to link the use of the emergency powers to the national emergency proclamation in order

to define the line between emergencies and normal situations, and at the same time to emphasize that, even in times of crisis, the constitutional separation of powers should be maintained.

As discussed above, it is problematic, or even impossible, to define emergency powers more in advance, when there is no definite conception of national emergency. Senator Mathias argued that, according to the reports, inquiries, and hearings of the Special Committee, it was clear that "the full nature and extent of emergency power statutes" had never been realized (Termination of National Emergencies, August 27, 1976, 28225). The problem seemed to be of how to classify the already existing 470 available emergency powers, and therefore, since the number was so large the available emergency powers were not discussed in more detail.

Congress also excluded the constitutional emergency powers from the NEA legislation. The forthcoming NEA bill was meant to make sure that there would be no future need to enact new emergency powers, but rather to activate only those already existing emergency powers that were deemed necessary for an emerging crisis and to activate them through a national emergency proclamation. The NEA legislation revised or repealed only a small number of the existing emergency statutes. The law did not provide more detailed information about what powers the president could activate with the proclamation. So in fact, the president could activate several hundred emergency statutes (Fuller 1979, 1467). Section 201 of the bill obliges the president to state in the proclamation which statutes will be activated.

The debates show that the extent of the emergency powers was not clear to every member of the Congress. During the House debate on the National Emergencies Act, Holtzman (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 276), for example, argued that she had no idea what a president can actually do with all of the emergency powers: "*Is he allowed to have people arbitrarily arrested*? *Can he suspend various civil rights*?" She continued by saying, "*If I saw a complete list of the powers the President could exercise under this bill, perhaps I would be less concerned*" (ibid.). Representative Flowers responded to Holtzman that the issue has been considered in the subcommittee and that "*the gentlewoman knows that this bill does not confer the powers*" (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 276).[131]

Senator Church described the congressional momentum to restore the constitutional balance of powers as follows: "*The historic redemption of jurisdiction by the Congress which has gone on in this decade – in the form of the War Powers Act, the congressional intervention to circumscribe and finally end the war in Vietnam, the new budget authority and the regaining of some control over foreign policy – is long overdue and urgently needed*" (Senate debate and adoption of H.R.3884, August 27, 1976, NEA Source Book 1976, 338). Church (ibid.) encourages here members of

131 Senate Special Committee on the Termination of the National Emergency. Emergency Power Statutes: Provision of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency. Committee Print, 93rd Congress, 1st session.

Congress to continue the trend by emphasizing that national emergencies are by no means a reason for Congress to give away its constitutional responsibilities. Only by providing statutory guideline for the president to follow could the constitutional separation of powers maintained and the possibility for "arbitrary authoritarian power" be circumscribed. The inherent powers of the president are followed only, according to Senator Mathias, in situations where there are no statutory guidelines. (National Emergencies Act, October 7, 1974, 34014.)

The control meant that with the legislation Congress would set "standards" and "guidelines" for future national emergencies. Further, the Congress should "oversee" and "review" the conduct of national emergency situations. The bill provides that Congress can check for possible "arbitrary" and "unnecessary" uses of emergency powers. Representative Moorhead indeed defined that the intention of the bill is to get rid of the "irrational and potentially dangerous practice of government-by-emergency" (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 253). The control was also seen as a possibility for Congress to strengthen its responsibilities, which it had neglected during the 40 year of "emergency government". Despite all the agreement on the need for control and oversight, the law authorized the president to determine unilaterally when a national emergency proclamation is reasonable, what emergency powers should be used, and when the emergencies would be terminated (although Congress did maintain the power to terminate a national emergency at any time by enacting a concurrent resolution). These discretionary powers of the president seem not to have been a problem for Congress, however, if Congress followed its oversight requirement as provided in the NEA legislation.

As noted earlier, the bill lacked a definition of the conception of national emergency. Senator Church, however, emphasized that the NEA legislation covered a wide range of emergencies: "*In the Future*, *every type and class of presidentially declared emergency will be subject to congressional control*" (Termination of National Emergencies, August 27, 1976, 28227). He emphasized that the emergency power authorizations "remain on the shelf", to be used and executed in the future when deemed necessary to respond to national emergency. But Church also noted that the procedures relating to the execution of emergency powers would be subjected to congressional review in the future, and Congress by enacting a concurrent resolution could terminate any emergency proclamation. Thus, according to Church, "*The legislative branch will be in a position to assert its ultimate authority*." (Termination of National Emergencies, August 27, 1976, 28227.) The core of the legislation was to maintain the separation of powers in times of crisis. According to Senator Mathias, the current situation was a result of different kinds of crises which, combined with "aggressive presidents" and "permissive Congresses", threatened the separation of powers that is the "bedrock" of US constitutional government (Senate debate and adoption of S.3957, August 27, 1976, NEA Source Book 1976, 151).[132]

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132 In *Myers* v. *United States*, 272 US 52 (1926), Justice Brandeis indeed noted in his dissenting opinion: "The doctrine of the separation of powers was adopted by the con-

Representative Legget noted in the House of Representatives that Congress should act rather than merely talk about constitutional principles; and therefore, it must enact legislation:

> We in Congress have a tendency to speak trite phrases such as a government of laws and not of men and checks and balances. Unfortunately, some times our talk is inconsistent with our actions. Our present quadruple emergency situation is a case in point. Enactment of this legislation would rectify the situation and backup our words with action. (In Support of the Matsunaga Amendment, September 5, 1975, 27792)

The debates show that the concept of the checks and balances includes the idea that Congress should not waive its constitutional rights and responsibilities in the name of national emergency. Senator Mathias noticed in 1972:

> Unless we accept the principle of an optional Constitution and an optional Congress, we must reject the concept of national emergencies declarable by the President at his discretion in peace time without termination dates. Since this concept has been upheld in essence by the Courts, it is up to the Congress to recover by legislation the constitutional role that it has allowed the Executive to usurp. We must reassert the principle that emergency powers are available only for brief periods when Congress is unable to act and for purposes directly related to the emergency at hand. (Initial Authorizing Resolution of the Special Committee, Remarks of Senator Mathias, quoted in the NEA Source Book 1976, 16)

Mathias' argument sounds peculiar when read together with the language of the passed bill. The final version of the bill upheld the president's discretionary powers to decide on a range of national emergency questions. Congressional review was included in the bill, but this has not been regularly used in practice.

The use of the armed forces in order to respond to sudden attacks does not require a national emergency proclamation (see Chapter 3, p. 65). According to the War Power Resolution the president may employ the US armed forces for a period of 60-days without obtaining the prior consent of the Congress. After that the president has to withdraw the forces unless the Congress has declared war, given other statutory authorization, extended the 60-day period by law or is unable to make a decision. If the President wants to activate some of the 470 emergency powers available, a national emergency proclamation must be made. The emergency power of the Congress seems to comprise the right to declare the war and the right to suspend *habeas corpus*. The Constitution does not authorize any suspension or transferring of its power. But there is no sanctions included either to the branches that delegate or are unwilling to maintain their powers.

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vention of 1787 not to promote efficiency, but to preclude the exercise of arbitrary power."
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0272_0052_ZD1.html

5 THE RHETORIC OF THE EXCEPTION AFTER 9/11

The September 11, 2001 terrorist attacks were the first attacks on United States since the attack on Pearl Harbor in 1941. As mentioned in Chapter 1, President G.W. Bush and his administration responded to the attacks with a national emergency proclamation.[133] Legislatively Congress further authorized the government to respond to this novel threat (S.J.Res.23, 107th Congress 2001).[134] In addition to the granted statutory authorization, President Bush also relied extensively on his constitutional Commander-in-Chief powers to act in the "war on terror". Scheppele (2006, 861) has noted in this regard: "[*The*] *president is guided by no law at all, except the limitless Commander in Chief clause of the Constitution*."

The terrorist attacks spawned a new generation of debates on the use of emergency powers and the application of state of emergency in the United States. Bradley & Goldsmith (2005, 2051) write that decisions on the extent of the constitutional powers of the president as Commander-in-Chief, as distinct from the presidential powers authorized by Congress, constitute some of the most controversial, outstanding and troubled issues in constitutional law. In Ackerman's (2009) words the Bush's presidency could be described as a "unilateral assertion of power" or a period of "presidential lawlessness." Ackerman (ibid.), however, points out that the misuse of the war on terrorism should be considered a "third wave of illegality in a generation", following the Watergate

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133 See fn. 9 , p. 19

134 The AUMF resolution "to use all necessary and appropriate force" was enacted on September 14, 2001. The Resolution was approved in the Senate 98 to 0 and in the House 420 to 1, with only Barbara Lee (D-CA) voting against. http://clerk.house.gov/evs/2001/roll342.xml; http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00281. The Congress responded already on day following the attacks by enacting S.J.Res.22, which included a section that Congress "supports the determination of the President, in close consultation with Congress, to bring to justice and punish the perpetrators of these attacks as well as their sponsors." http://www.gpo.gov/fdsys/pkg/BILLS-107sjres22enr/pdf/BILLS-107sjres22enr.pdf

scandal in the 1970s and the Iran-Contra affair in the 1980s. However, detailed discussion on that issue is not the topic here.

Already during the debates of the WPR and NEA bills in the early 1970s the members of Congress agreed that the president has some constitutional authority to respond to sudden attacks. The focus of Chapter 5 is to explore, through the debates of Congress, the question of to what extent the separation of powers system is functional in times of crisis. This thesis examines the way that Congress interpreted the "parliamentary" means after 9/11 in order to bring the powers of the president under congressional control; in addition, the authority of Congress is interpreted and as it was realized after 9/11 and appears through the debates on the "state of exception".

To shortly say a few words about the legislation under consideration in this chapter. The USA Patriot Act of 2001, enacted only six weeks after the terrorist attacks, granted law enforcement new tools and instruments to detect and prevent terrorism.[135] By enacting the Homeland Security Act, Congress established an executive department in order to enhance the United States capability to respond to terrorism. The establishment of the new department was considered to be the most remarkable organizational change since the establishment of the defence department in 1947. Furthermore, the Patriot Reauthorization Act of 2005 made 14 sections of the Patriot Act permanent legislation in 2006. The Military Commissions Act was enacted as a response to the Supreme Court's decision *Hamdan* v. *Rumsfeld*, 548 US 557 (2006) in order to authorize the president to establish military commissions.[136] Some references in the following chapter are also made to the debates in Congress on September 11, 2001 and September 14, 2001 concerning the attacks.

The focus of the following chapter is on the debates themselves and not on the effects of passing the bills. In short the idea is to examine the rhetoric and conceptions regarding the relations and powers of the president and Congress, rather than whether the bills actually authorized actions that have been considered controversial later on.[137] The first section begins with a review of NEA and WPR legislation in the post-9/11 context. The post-9/11 political situation is examined in section 5.2. Section 5.3 introduces the idea of 9/11 as a limit for the rhetoric. The concepts and arguments used in the debates are considered in detail in section 5.4

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135 A few words should be said the on debates over the "USA Patriot Act" of 2001 (H.R.3162, later P.L. 107-56) under consideration here. I have included debates on S.1510 (the USA Act) and H.R.2975 (the Patriot Act of 2001/The Uniting and Strengthening America Act) as well as H.Res.264 [a resolution providing for consideration of the bill H.R.2975]. Even though they are not included in the legislative history of H.R.3162, to my mind they provide useful insights for considering the executive-legislative relationship. (H.R.3162 incorporated provisions of both abovementioned bills)

136 I refer to (in addition to the debates on S.3930, later P.L.109-366, Military Commissions Act of 2006) debates on the Military Commissions Act of 2006 (H.R.6166), which passed in the House on September 27, 2006.

137 For an analysis of the Bush and his administration's actions after 9/11, see Scheppele 2004; Bradley & Goldsmith 2005.

5.1 NEA and WPR legislation in the post-9/11 context

It seems to me that despite the unprecedented nature of the situation after 9/11, the Constitution and statutory law as well as historical precedents and arguments were adequate for the task of interpreting the situation and legitimatizing the need for the new authority. Several issues that have been debated thoroughly already in the 1970s were present also in the post-9/11 debates. Question concerning the separation of powers, the unilateral powers of the president, and the powers of Congress to oversee and hold accountable have all been newly topical issues during the post-9/11 debates. The increased partisanship and party-line voting in Congress seems to be something that the debates of the 1970s largely failed to take into account when considering the restoring of the powers of Congress in the field of war and emergency powers. Although as discussed in Chapter 3 the members of Congress had acknowledged the difficulty of ensuring that future Congresses will take action, partisanship itself was also a topical issue at the time of the WPR debates.

Why then were debates of the 1970s actualized again in the post-9/11 context? A national emergency proclamation did follow the attacks, but the circumstances required the use of military forces as well in order to respond to the threat of terrorism. In this particular context, the question regarding the relations between the executive and legislative in war and emergency situations reemerged again. It ought to be noted here that my intention is not to suggest, however, that the debates have been re-actualized only in relation to 9/11.

The momentum conception can be found also in the post-9/11 debates. Senator John Warner (R-VA), for instance, argued in the Senate during the debate on an amendment he (Warner) cosponsored to the Homeland Security Act bill, "*We are here on the issue of homeland defense, the issue of a new Department. We have had a good debate. We have our differences of view, but nevertheless, I see the momentum, I hope, in this body, to move forward with this legislation*." (Homeland Security Act of 2001, September 12, 2001, S8527.)[138] The momentum here seems to refer to congressional action, the need to have a vote and pass the bill.

Overall it could be said that 9/11 is better understood in terms of the presidential momentum as opposed to the congressional momentum of the 1970s. The presidential momentum relates to the fact that President Bush enjoyed broad support after 9/11 not only with the Republican Party, but among Democrats too, in terms of his handling of the uniquely dramatic circumstances of 9/11. The Presidential momentum refers here also to the claim that Congress had lost the momentum it had in the 1970s, and but also that the powers Congress had gained in the 1970s were to some extent undermined in the post-9/11

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138 Amendment introduced by Senators Thompson and Warner (to an amendment, in the nature of a substitute, proposed by Lieberman) "to strike title II, establishing the National Office for Combating Terrorism, and title III, developing the National Strategy for Combating Terrorism and Homeland Security Response for detection, prevention, protection, response, and recover to counter terrorist threats." (Homeland Security Act of 2001, September 12, 2001, S8521)

context. The reason that the momentum of the 1970s dwindled in the long run could explain why the debates of the 1970s have attracted relatively little attention among the scholars and politicians of the post-9/11 debates. While the WPR debates are referred to in the AUMF debates, the overall idea of that Congress should be a branch of government equal to the executive in the field of war and emergency powers has been partially lost in the post-9/11 debates.

The novel threat of terrorism had been, however, at least partly dealt with within the statutory framework established by the Congress in the early 1970s. Central to the 9/11 debates seemed to be a question that had been a main issue in the WPR debates: Was the traditional means of initiating war the most convenient way to respond to the changed circumstances? In the 1970s debates, the opponents of the WPR legislation asserted that, in the age of nuclear war, Congress should more carefully consider whether the war-making powers of the executive can be restrained and to what extent the constitutional clause whereby Congress declares war has relevance anymore. Similarly, in the debates after 9/11 the existing framework of powers was questioned because of the demands of the time. Following the debates of the 1970s, the idea of collective decision-making appeared, and it arose again to some extent in the post-9/11 debates. Collective decision-making refers here to joint action between Congress and the president.

By creating a statutory framework for dealing with emergencies, it might seem that the problematic of inherent or presidential emergency powers, or the powers of the president to act in some ways unilaterally, disappears. As was earlier discussed, however, this has not been the case. Indeed, it was several times emphasized in both the NEA and WPR discussions the difficulty of defining the powers of the president and Congress. The law has not affected the way emergency powers are legitimatized. The normal framework for enacting emergency powers in the United States has been congressional granting of extraordinary (short-term) authorities for the president, which can be invoked as the president deems necessary. Justice Jackson noted in *Youngstown* v. *Sawyer,* 343 US 579 (1952) that, by using that form of emergency proceedings, "*We retain Government by law – special, temporary law, perhaps, but law nonetheless*". When responding to emergencies by enacting statutory law, the problem of the possibility of "extra-legal use of emergency powers" remains, and moreover, the bills that Congress enacts in times of crisis often prove anything but short-term or temporary, becoming instead a permanent part of normal governmental activity.

One could cite the *Patriot Act,* for instance, which Congress enacted after 9/11. The law contained some sunset provisions, because sections of it were considered legitimate only for as long as the threats posed by 9/11 were valid. Nevertheless, the *Patriot Improvement and Reauthorization Act* made 14 sections of the bill permanent as of 2006 (Yeh & Doyle 2006, 3). What was originally "emergency legislation" became permanent legislation. Representative Lynn Woolsey (D-CA) criticized the trend during the House debate on reauthorization as follows:

> I believe many of my colleagues voted for the original Patriot Act because of the sunset provisions, because they were assured this was a temporary measure for extraordinary times. Now, all but two of the sunsets have been stripped from the bill, and those come only after 10 years. So we know the truth: the Patriot Act was never intended as an emergency, post-9/11 action; as a matter of fact, it is not limited to terrorism. It appears now that its authors were always interested in a permanent clampdown on civil liberties. (Providing for consideration of H.R.3199, July 21, 2005, H6217)

Woolsey accentuates here that several members of Congress agreed to vote for Patriot Act as a response to the emergency because of the sunset provisions that were included in it.

As has been earlier discussed the open-ended grants of powers, like the Tonkin Gulf Resolution of 1964 or the AUMF of 2001, become problematic because they are difficult to repeal afterwards and because the authorities granted under such resolutions easily extend to other policy areas.[139] The language of the AUMF resolution was necessarily vague because of the "nontraditional" enemy (For detail, see Bradley & Goldsmith 2005). The use of military force provision granted the president the power to determine what "all necessary and appropriate force" actually means. The purpose, however, was to use the power only "against those nations, organizations, or persons he determines, planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons" (S.J.Res.23, 107th Congress 2001).

A further purpose of the AUMF was to avoid "any further acts of international terrorism against the United States" (S.J.Res.23, 107th Congress 2001). According to Bradley and Goldsmith (2005, 2082) the AUMF is from one point of view more constraining and from another point of view more far-reaching than the traditional declarations of war. In early January 2013 Representative Barbara Lee (D-CA) proposed to the House the repeal of P.L.107-40 (AUMF), because of its use to "*justify a broad and open-ended authorization for the use of military force and such an interpretation is inconsistent with the authority of Congress to declare war and make all laws for executing powers vested by the Constitution in the government of the United States."(*H.R.198, 113th Congress) The bill was referred to the House Foreign Affairs Committee.[140]

Despite the good intentions, the NEA bill has not succeeded in providing congressional oversight and accountability concerning the use of emergency powers. The law provided a normative framework, but was not able to overcome problems related to the actual content of the bill. One major problem is that the president alone is empowered to decide when, where and for what reason a national emergency exists. Another difficulty is that it puts the burden on

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139 Bradley and Goldsmith (2005, 2075) write that the Tonkin Gulf resolution granted broad authority as it "authorized the President (1) to use all necessary measures, without specification of particular resources, (2) without restriction on the method of force, (3) without restriction on authorized targets, except that the targets must have attacked the United States or, perhaps, threatened further aggression, (4) with the purpose of repelling attacks and preventing aggression, and (5) without procedural or timing limitation."

140 http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.198:

Congress to terminate the use of emergency powers. Currently the president can veto a termination request, which Congress can override only with a 2/3 majority in both houses. National emergencies continue to be long-term affairs. For instance, the national emergency proclaimed by President Bush after 9/11 is still valid, and was continued by President Obama again in September 2012.[141] What should be mentioned, however, is that in terms of the earlier WPR and NEA measures, there was an acknowledgment that the president has the constitutional authority to repeal sudden attacks and that that authority should be separated from the authority that the president has "over the citizenry in domestic affairs." (See Chapter 4, p. 145)

In retrospect, it seems that the NEA bill was unable to create a specific framework to eliminate the vagueness surrounding emergency powers discussions in the United States. The difficulty of repealing already existing emergency power statutes has proven to be a continuing problem as is the fact that emergency power statutes have been used for other purposes.[142] Klieman wrote in 1979 that it was hard to predict whether the NEA bill secured enough guarantees against a misuse of emergency powers, because the bill was new and uncontested. Klieman asked, for instance, what would happen if Congress and the president disagreed on the need to declare a national emergency. (Klieman 1979b, 254.) After September 11, 2001, the different conceptions of national emergencies and emergency powers have been at the very center of political discussions. Congress has, however, been reluctant to insist on a need to reassess the co-operation between the legislative and executive branches of government in a way similar to how the issue was discussed in the 1970s.

The NEA bill did not succeed in defining the exercise of emergency powers in a way that secured regular congressional oversight and accountability, despite the requirement that Congress should review whether an emergency should be terminated at intervals of every six months. One of the reasons was the vague wording of the bill and the lack of tools to create a specific framework for the use of emergency powers. Another problem of the bill also seems to be that, despite the 470 existing emergency power statutes identified in the 1970s, new statutes granting powers to the president are adopted all the time. It should be noted, however, that "emergency" powers legislation is by no means unambiguous. For example to what extent the legislation enacted after 9/11 such as the Patriot Act is considered as "emergency powers" legislation.

In short, there were surprisingly few debates on national emergency powers or references to the concept of national emergency after 9/11. In fact, the national emergency proclamation made by President Bush received no real consideration in the 9/11 debates analyzed in this thesis, whereas the WPR was brought up during the AUMF debates of 2001. When Congress adopted the au-

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141 Continuation of the National Emergency with Respect to Certain Terrorist Attacks (September 11, 2012). http://www.whitehouse.gov/the-press-office/2012/09/11/notice-continuation-national-emergency-respect-certain-terrorist-attacks

142 One example would be the Feed and Forage Act, which was discussed in Chapter 4, p. 144.

thorization to use military force after 9/11, members of the Congress debated about to what extent the president would need the congressional authorization in order to take action as well as whether the authorization of AUMF was consistent with the WPR, and whether AUMF undermines the constitutional power of the Congress to declare war.

Even without explicit references, the post-9/11 debates dealt with the same questions that were topical in the NEA debates. These questions included to what extent Congress should transfer its legislative powers to the executive in times of crisis, thereby enabling the executive branch to draft and make laws, as well as how to secure enough time for congressional debate and whether the legislative procedures were being followed adequately. While the president does have a certain role in the legislative process, the legitimacy of certain actions has remained debatable, as discussed in Chapter 4, for example, concerning what kinds of bills the executive may send to Congress in times of crisis, and the granting of powers to the president without congressional oversight or termination provisions.

During the Homeland Security Act debates references were made to the national emergency authorities of the president: "*As strange it sounds, as unbelievable as it is, the Lieberman bill takes power away from President Bush to declare a national emergency and, in the process, override business as usual in the Federal Bureaucracy, a power that Ronald Reagan had, a power that the first President Bush had, a power that Bill Clinton had and used*" (Senator Phil Gramm (R-TX), Homeland Security Act of 2002, September 19, 2002, S8881).[143] Senator Gramm's argument refers mainly to workers' rights:

> I am not sure the American people truly understand that President Bush has asked for no additional emergency powers to set aside work rules within the Federal bureaucracy. In fact, he has already agreed to reduce those powers very slightly as compared to what his four predecessors possessed. But that is not enough for the supporters of the Lieberman bill. They want to deny the President the power to declare, on a national security basis, that we change the way the bureaucracy works to allow him to put the right person in the right place at the right time. (Homeland Security Act of 2002, September 19, 2002, S8881)

The Senator (ibid.) urged the members of Congress to decline the idea and "in the name of national security" not to take the national security powers away from the president.

It seems that President Bush's proclamation of a national emergency and the measures activated by it were not contested, based on the lack of discussion over them in the 9/11 debates (at least the debates analyzed here). The adopted measures were not considered that significant.[144] When taking into account all of the 470 "emergency powers" that were distinguished in the 1970s, President

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143 The Lieberman bill seems to refer here to the amendment proposed by Lieberman (S.Amdt.4471) to the Homeland Security Act in the nature of a substitute.

144 See fn. 9, p. 19. Representative Conyers indeed stated during the House debate on AUMF (September 14, 2001, H5680): "[T]he President has declared that we are in a national emergency. Such an emergency triggers other, less severe statutes, including criminal prohibitions on the destruction of war materials."

Bush may be regarded as having instituted only a few after 9/11. Members of Congress were more concerned about how to provide new authorities for the president and how to make the existing legislation more up-to-date in order to respond better to the novel threats of terrorism. Constitutionally, the president has the power to respond to sudden attack, and so this power was excluded from the NEA legislation as redundant. This could be one of the reasons that the Commander-in-Chief clause has been extensively referred to after 9/11, even though the threat has been namely terrorism rather than war in the traditional sense. Overall, it seems that freedom as an absence of arbitrary power was no longer a topical question, at least when considered through the emergency power framework.

As noted above, the question of whether Congress needs to give authorization for the president to respond to terrorist attacks was topical during the 2001 AUMF debates. Representative Joseph Hoeffel (D-PA, AUMF debate House, September 14, 2001, H5640) raised the question by stating: "*It may be we do not need to grant this authority. Under the War Powers Act, the President has the ability to use force when America is attacked, as we have been in this week. But it is good for Congress to add our voice of support and to specifically grant this authority to the President*." In a similar way, Representative John Spratt (D-SC) noted that the resolution was not strictly speaking necessary, but could be useful, "*Even though the President can retaliate without this resolution, he is far stronger with it*" (AUMF debate House, September 14, 2001, H5649).

Representative Eleanor Norton (D-DC) further argued that when the country is attacked the power of the president to respond is under statutory law and Constitution "almost limitless". Congress' duty is to ensure that "*this power is always sufficient but never unchecked*" (AUMF debate House, September 14, 2001, H5642). In Representative Bernie Sanders' (ind.-VT) words the debate on the resolution authorizing the power of the president to respond to the threat of terrorism seemed to be "*more symbolic than legally necessary*" (AUMF debate House, September 14, 2001, H5664). The AUMF resolution was considered significant, however, because it not only defined the support of Congress for the president, but also, as Representative Rosa DeLauro (D-CT) noted, safeguarded the authority of the Congress (AUMF debate House, September 14, 2001, H5662).

Senator Thurmond noted during the Committee hearings on applying the War Powers Resolution to the war on terror that, while he agreed that presidents should consult with Congress, the president has "*As our Commander in Chief* […] *the power to commence military operations in Iraq or other countries without congressional authorization*." When Congress passed the AUMF resolution, it in Thurmond's view "*provided the President with an open-ended mandate to deter future acts of terrorism*" and was consistent with the War Powers Resolution. While the Constitution divides the war powers between the executive and legislative, "*It is readily apparent that war-making is more an executive function than a legislative one*." (Statement by Senator Thurmond before the Judiciary Subcommittee on

the Constitution hearing regarding the application of the War Powers Resolution to the war on terrorism 2001, 96-107.)

Senator Thurmond agreed that the debates on the war powers should have included the War Powers Resolution. However, the Senator tended to dispute the meaning of the resolution, saying it was "*largely a reaction to the conflict in Vietnam and was meant to add structure to the constitutional tug-of-war between the President and Congress regarding war powers*." Thurmond voted against applying the WPR in 1973 because he considered it unnecessary to limit the ability of the president to deploy whatever forces he decides to be in the best interest of the country. Thurmond further argued that since its adoption the resolution had turned out to be *"ineffective and largely irrelevant."* For Senator Thurmond the power of the purse was the real power of Congress to limit the executive's ability to conduct military operations. (Statement by Senator Thurmond before the Judiciary Subcommittee on the Constitution hearing regarding the application of the War Powers Resolution to the war on terrorism 2001, 96-107.)

The AUMF of 2001 resolution was considered appropriate in terms of preserving the balance of powers between the Congress and the president:

> The US Constitution carefully divides the power to wage war between Congress and the President. I am confident that the resolution before us today strikes the appropriate balance between the President and Congress. It gives the President flexibility as Commander in Chief to conduct military operations as he sees fit, but it also requires the President to consult and report to Congress. It retains the important 60-day limit on military action without further congressional approval. (Representative Ruben Hinojosa (D-TX), AUMF debate House, September 14, 2001, H5644)

Representative Hinojosa claims that because the AUMF was consistent with the WPR it maintained the limitation wherein the president could act without a declaration of war or other statutory authorization for 60-days, in addition to the consultation and reporting requirements. Representative Hinojosa overlooked, however, the possibility that the president could avoid triggering the 60-day time limitation, as presidents have done previously. The argument by Hinojosa is rather controversial when one takes into account the fact that Congress authorized the president to use military force with the AUMF resolution. Representative Hinojosa's argument could be interpreted referring to the fact that nothing in the AUMF supersedes the WPR in relation to the uses of forces without prior congressional authorization.

During the AUMF debate in the House, Representative David Wu (D-OR) referred to the constitutional framework by emphasizing the role of the Congress in war-making:

> Article I, Section 8 of the our Constitution grants to Congress the authority "to declare war". This is one of the most profound of powers. The Founders recognized that the power to send our sons and daughters to war is the most important decision a nation can make. They invested this power in Congress, the institution closest to the people. I believe this solemn congressional responsibility is critical to protecting the delicate balance of power between the legislative and executive branches. This balance of power was carefully crafted and has allowed the United States to remain one of the most stable end enduring democracies in the world. (AUMF debate House, September 14, 2001, H5673)

Wu refers to the "original reading" of the Constitution in order to emphasize that Congress should be considered as an equal branch of government in war-making. The vagueness of the language of the resolution raised concerns, however, among the members of the Congress. References to the "infamous" Tonkin Gulf resolution were made. Representative Jim Leach (R-IA) claimed that the Tonkin Gulf resolution was not a "proper precedent" to consider because it did not involve an attack on American citizens or military within American territory. The Representative continued by linking the general principles of war-making to an interpretation of the contemporary situation:

> The Congress, in conformity with the War Powers Resolution which resulted from the lack of constitutional clarity that engulfed our involvement in Vietnam, has no choice except to authorize executive discretion. What this debate must frame, however, is both the discretion that is appropriately delegated to the President or underscored under the Constitution and the limits of nature of judgment that must be applied to the circumstance. (AUMF debate House, September 14, 2001, H5672)

The Tonkin Gulf precedent was, however, used to question whether the Congress should authorize the president to use force. Representative Lee quoted Wayne Morse as follows: "*I believe that history will record that we have made a grave mistake in subverting and circumventing the Constitution of the United States* […] *I believe that within the next century, future generation will look with dismay and great disappointment upon a Congress which is now about to make such a historic mistake*." (Quoted in the AUMF debate House, September 14, 2001, H5672.) Lee (ibid.) also reminded members that by enacting the Tonkin Gulf Resolution Congress had not only abandoned its constitutional responsibilities, but allowed the country to become involved in the undeclared war in Vietnam.

The vagueness of the language of the bill was further referred to by Representative Jesse Jackson (D-IL) who claimed that the resolution was at the same time too narrow and too broad: "*It* [the resolution] *only pertains to the terrorism associated with the events surrounding September 11, 2001"* but at the same time "*the literal language of this legislation can be read as broadly as executive interpreters want to read it, which gives the president awesome and undefined power*" (AUMF debate House, September 14, 2001, H5675). Despite his concerns, Representative Jackson agreed to vote for the legislation.

The resolution was not, however, considered to supersede the WPR and therefore it could not be interpreted as a blank check for the president:

> This Resolution gives awesome responsibility to the President of the United States, but it should not be interpreted as unlimited power to use of force or commit troops. This resolution has been carefully drafted to restrict our response to those we know to be responsible for this atrocity. It is not a carte blanch for the use of force. This resolution requires compliance with the war powers resolution which directs the President to report to the Congress and to consult whenever possible. These requirements and this power must not be taken lightly. (Representative Jan Schakowsky (D-IL), AUMF debate House, September 14, 2001, H5663)

Schakowsky stresses that the reporting and consulting requirement of the WPR should not be treated as irrelevant.

Some members of Congress felt a need to give their reading of the WPR and its significance, and some could even speak from personal experience of the debates: "*Mr. Speaker, I served in the Congress during the heated debates about Presidential powers during the war in Vietnam. As a consequence of the differing opinions that were so heatedly fought on this floor, the War Powers Act was enacted. It clarified specifically what the Presidential powers were, and to what extent the responsibility of the Congress was to review those actions taken by the President*." (Representative Patsy Mink (D-HI), AUMF debate House, September 14, 2001, H5647.) Representative Mink refers to her personal experience of the debates, relating that passing the WPR was by no means a straightforward process and therefore the law should not be taken lightly.

During the Senate debate on authorizing the use of military force, Senator Russell Feingold (D-WI) emphasized the importance of the WPR legislation in the post-9/11 context by claiming the law was as relevant as now as when it was passed in 1973 (AUMF debate Senate, September 14, 2001, S9419). Feingold described the significance of passing the AUMF resolution in order to grant powers for the president to respond the 9/11 attacks:

> There is only one circumstance in which a President may act without statutory authorization, and that is to respond to legitimate emergencies. None among us doubt that we confront such an emergency today, and that it may grow into a sustained struggle. The Constitution foresaw and history has since demonstrated that there will continue to be events to which the President must respond in the defense of the country, or in response to urgent and vital interests abroad. Congress owns the war power. But by this resolution, Congress loans it to the President in this emergency. (AUMF debate Senate, September 14, 2001, S9418)

Feingold's argument illustrates a link between national emergencies and war powers. National emergency powers in the post-9/11 context seem to correspond to the power of the president to respond to sudden attacks by the use of force.

The legislative response to 9/11 included a joint resolution to provide authorization for the president to respond to the threat of terrorism, but it did not particularly refer to the language of WPR. The language in the joint resolution passed was consistent with the language of WPR. The AUMF resolution of 2001 further assured that "nothing in this resolution supersedes any requirement of the War Powers Resolution" and that the legislation "is intended to constitute specific statutory authorization within the meaning of section 5 (b) of the War Powers Resolution" (P.L.107-40). Some members had concerns regarding the lack of reporting requirements in AUMF. President Bush provided reports in which he claimed that the actions taken had been "consistent with" WPR and S.J.Res 23, but he avoided, similarly to past presidents, citing WPR (the language of section 4 (a) 1) in particular), which would have activated the 60-day time period to withdraw the troops (Grimmet 2010, 41).

As discussed above, Congress considered AUMF consistent with WPR and nothing in the resolution was viewed as superseding the requirements of

WPR. In this way both Congress and the president could uphold their views regarding the constitutionality of WPR and the presidential responsibilities under the legislation: in addition it provided for Congress with a legislative mean to give united support to the president in responding to the novel threat of terrorism (In detail, see Grimmet 2010, 42). Traditionally such resolutions have authorized actions against named nations, or nations that were "unnamed" though their geographical areas were mentioned. Grimmet (2010, 40) argues that the AUMF of 2001 is unparalleled in the US history and its full meaning is yet unresolved. The terrorist attacks of 9/11 were considered not just terrorism, but "an act of war" in President Bush's description (see Grimmet 2010, 39).

According to Howell (2004, 1147) the authorization to use military force against terrorists has been later on quoted by US administrations to authorize the wars in Iraq and Afghanistan and the US military tribunals. The AUMF served the purpose that it authorized powers to the president that were congruent with the WPR legislation. By enacting the WPR resolution in 1973, it seemed that the need for Tonkin Gulf types of resolutions in the future had been reduced. The overall problem remained the same, however, in the AUMF resolution: the vagueness of the language could lead to wide-range of interpretations as to the powers granted, even though during the debates some members argued that it was not a blank check for the president. The lack of oversight mechanisms in the AUMF has impeded congressional control over presidential powers since the resolution was passed. Members have responded, however, that under the arrangement still in effect from the WPR, the president is expected to consult and report to Congress.

A key question in the early 1970s debates of Congress was whether the decision-making related to war and emergencies should include Congress in order to ensure that the people could better make their voice heard through their elected representatives. This idea was also recognized in the AUMF debates in the House. Representative Sheila Jackson-Lee (D-TX) noted, "*By authorizing military action under the War Powers Act the American people not only support the President, but they also provide guidance through their elected leaders that the actions this great nations takes are neither over broad nor inadequate. This Congress can and must assure the proper response and level of retaliation.*" (AUMF debate House, September 14, 2001, H5665.) The president is accountable to the people in same way as the members of Congress. The balance of power sought through the WPR should provide possibilities for congressional control and oversight in order to ensure that the exercised powers are both appropriate and necessary.

5.2 From united government to divided government

In my perspective the main question in the aftermath of the September 11, 2001 terrorist attacks was the separation of powers and the role of the Congress in the "war on terror". The Congress was included in the decision-making process; it responded to the threat of the terrorism by enacting new statutory law in or-

der to provide additional authority to the president. In the aftermath of the attacks the US government was largely united. For instance Senator Feingold was the only Senator to vote nay on the passage of the USA Patriot Act in the Senate in 2001. In the House of Representatives the votes on the passage of the bill were divided 357 to 66.[145]

Some members of the Congress, however, opposed granting new authorities for the president in times of crisis without any possibilities for future congressional oversight. The normal congressional procedures that seek to secure enough time for debate and deliberation in the legislative process were bypassed in the post-9/11 legislation, was the accusation heard from some members of Congress. For instance, the sunset provisions were often necessary to the support the USA Patriot Act of 2001 received because the measures in the law were considered so "extraordinary", their legitimacy based entirely on the historically unique September 11 attacks (See Representative Woolsey's argument, p. 178). The juxtapositioning of thorough debate to swift decision-making became apparent in the post-9/11 debates. The overall question seemed to be whether there was room for deliberative processes in times of crisis?

Since then, Congress has faced a lot of criticism as having served mainly as a rubberstamp for the executive branch's policy decisions in the aftermath of 9/11. The USA Patriot Act of 2001 is one of the most cited examples in this context, as it was enacted only six weeks after 9/11 and contained new measures for the executive branch to use in the fight against terrorism. The law was adopted in the context of "urgency and necessity", and thus to the minds of some members failed to secure enough time for full debate and deliberation. Stone (2007, 131) has argued that only a few members of Congress actually read the bill before it was enacted.

The increased partisanship and the majority party control of at times one, at times both houses of Congress as well as the White House had a certain impact on the decision-making processes in the wake of the attacks.[146] Representative Corrine Brown (D-FL) during the Homeland Security Act debates in 2002 contrasted the Republican Party's traditional claim of supporting "small" government to its support "a huge monster" of government with the Homeland Security Act. Brown continued by saying that while she supported the idea of the creation of the new department, she was not convinced of the legislative process: "[*T]his Congress cannot just rubber-stamp this legislation. It is not unpatri-*

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145 See more detail at: http://www.govtrack.us/congress/bills/107/hr3162

146 The timeline considered here is years 2001 to 2006. The Democratic Party was the minority party in the House from 2001 to 2007. The Republican Party controlled the majority in the House during this time and in the Senate from 2003 to 2007. The Senate situation between 2001 and 2003 is a bit more complicated. Both parties held 50 seats in January 2001 (Jan. 3-20). The Republicans were the majority party in spring 2001 even though both parties had 50 seats (Jan.20-June 6) On June 6, 2001 the Democrats gained the Senate majority and held it until Nov. 12, 2002. The Republicans regained it until Jan. 3, 2003. The vice president had the deciding vote. See, http://artandhistory.house.gov/house_history/partyDiv.aspx; http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm

otic to ask serious questions about this agency, and we should not base the process on a symbolic date." (Homeland Security Act of 2002, July 25, 2002, H5656.)[147]

It seems that Democrats began to oppose some bills introduced after 9/11 by claiming that the Republicans were bypassing the rules and procedures of the Congress in order to secure the outcomes of the administration's policies. Senator Hillary Clinton (D-NY) described, for instance, the "partisan political process" during the Military Commissions Act debate in 2006 as follows:

> We are debating far-reaching legislation that would fundamentally alter our Nation's conduct in the world and the rights of Americans here at home. And we are debating it too hastily in a debate too steeped in electoral politics. The Senate, under the authority of the Republican majority and with the blessing and encouragement of the Bush-Cheney administration, is doing a great disserve to our history, our principles, our citizens, and our soldiers. The deliberative process is being broken under the pressure of partisanship and the policy that results is a travesty. (Military Commissions Act of 2006, September 28, 2006, S10382)

Democrats considered it problematic that the Republican Party would stand behind the president because it endangers the idea of the separation of powers and the role of the Congress. One of the problems seemed to be the pressure coming from the administration.[148] Senator Joseph Lieberman (D-CT) took note of the issue in the course of the Homeland Security Act debates by saying, "*Powers are strictly separated in our constitutional system for a reason. I have not hesitated to make clear that I believe the President, in his role as Commander in Chief, for instance, should have substantial powers to determine when and how we take military action to protect national security. But rewriting law is the job of Congress, the responsibility of Congress*." (Homeland Security Act of 2002, September 18, 2002, S8743.) Lieberman challenged the new post-9/11 powers of the president by saying that, while he did agree that the president should have sufficient power to de-

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147 The voting record seems to have become more polarized over time. Of course the content of the bills are different and therefore the voting records are not exact parallels.
* The votes on passage of the Homeland Security Act were divided in the Senate on Nov. 19, 2002, with 90 (48 Republicans, 41 Democrats, 1 independent) voting yea, and 9 (8 Democrats, 1 independent voting nay). Earlier in the House (July 26, 2002), the votes were 295 to 132 (206 Republicans, 88 Democrats, and 1 independent supporting vs. 10 Republicans, 120 Democrats, 1 independent and 1 independent Republican opposing. http://www.govtrack.us/congress/bills/107/hr5005
* The votes on passage of the Patriot Reauthorization bill in the form of the conference report (December 14, 2005) were divided in the House 251 to 174 (207 Republicans and 44 Democrats voted yea; 18 Republicans and 155 Democrats voted nay); in the Senate the votes (March 2, 2006) were divided 89 to 10 (54 Republicans and 35 Democrats voted yea; 9 Democrats and 1 independent voted nay).
http://www.govtrack.us/congress/bills/109/hr3199
* The votes on passage of the MCA in the Senate (September 28, 2006) was 65 to 34 (13 Democrats and 52 Republicans voting yea; 32 Democrats and only one Republican voting nay); in the House of Representatives; the voting (September 29, 2006) was divided 250 to 170 (32 Democrats and 218 Republicans voting yea; 162 Democrats voting and 7 Republicans voting nay).
http://www.govtrack.us/congress/bills/109/s3930

148 The administration required Congress to enact new legislation, but the legislative results did not give the administration all that it sought in the draft of Anti-Terrorism Act (See details in Howell 2004, 1179).

fend the country, he did not believe rewriting the law was part of the executive's authority.

During the Military Commissions Act in 2006 Senator Patrick Leahy (D-VT) also referred to the separation of powers principle by claiming that the partisan politics of the administration was threatening the role of the Congress: "*Secrecy for all time is to be the Republican rule of the day. Congressional oversight is no more. Checks and balances are no more*." (Military Commissions Act of 2006, September 28, 2006, S10415.) Senator Leahy (ibid.) continued: "*What we are saying is one person will make all the rules; there will be no checks and balances. There will be no dissent, and there will be nobody else's view, and we will remove, piece by piece, every single law that might have allowed checks and balances*." Leahy (ibid.) also said that, despite the Senate majority being on the hands of the president's party, he hoped that Congress could continue to function not only as an independent part of government but also as a check on the executive branch of government. For Leahy the debate on the Military Commissions Act in the Senate illustrated that the time for bipartisan cooperation seemed to have passed. Despite the partisanship, Leahy (ibid.) stressed that he "*will continue to speak out. That is my privilege as a Senator*." His argument emphasizes that even in times of war and crisis, there should be opportunities for dissent and differing views in the Congress.

The party division created certain discernible juxtapositions in the debates. During the debate of the Patriot Reauthorization Act, Minority Leader Nancy Pelosi (D-CA) described the vote on the bill as an opportunity for the members of Congress to decide whether the administration will be responsible to the Congress, to the courts, and to the people for its use of power (USA Patriot and Terrorism Prevention Reauthorization Act of 2005, July 21, 2005, H6239). Representative Sam Farr (D-CA) argued during the same debate that there should be room left also for debate and dissent and that the members of Congress should be able to criticize the introduced bills:

> We are all patriots today in the finest sense of the word, but just because some of us want to ensure that Congress retains its legislative oversight over these draconian provisions, some will call us unpatriotic. To quote Thomas Jefferson, "Dissent is the highest form of patriotism." (USA Patriot and Terrorism Prevention Reauthorization Act of 2005, July 21, 2005, H6243)

Representative Farr (ibid.) further disputed the motive for the bill: "*This administration consistently hides behind the fear of terrorism to achieve their legislative agenda. In this case, they are trying to convince the American people that giving up their civil liberties is necessary to combat terrorism*." Democrats were not, however, consistent in their views, or rather, in their voting as the legislative measures considered here were supported by a number of Democrats.[149]

According to some of the Democrats the members of Congress who opposed the bills authorizing new powers for the president in the war on terror were labelled unpatriotic by the Republicans and accused of endangering the

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149 See fn. 147, p. 187

US national security. The post-9/11 debates, however, illustrate that not all members of the Republican Party stood united behind the president, but some emphasized the role of the Congress. For instance, during the Military Commissions Act debates Senator Warner thought that the president should give take into account his duties as Commander-in-Chief: "*the maximum flexibility as to how he deals with these situations. We see that in a variety of issues around here. But, nevertheless, it is the exercise of executive authority, and that exercise of executive authority must also be subject to the oversight of the Congress of the United States.*" (Military Commissions Act of 2006, September 28, 2006, S10386.) Warner (ibid.) also reminded the other Senators that Congress could always change the law: "*As we commonly say around here, what the Congress does one day, it can undo the next day.*"

In the House, Representative Ron Paul (R-TX) also reminded members during the debates on the Patriot Reauthorization Act in 2005 that the concentration of the powers was not what the framers of the Constitution would have endorsed:

> The Founders recognized that one of the chief dangers to liberty was the concentration of power in a few hands, which is why they carefully divided power among the three branches. I would remind those of my colleagues who will claim that we must set aside the constitutional requirements during war that the Founders were especially concerned about the consolidation of power during times of war and national emergencies. (USA Patriot and Terrorism Prevention Reauthorization Act of 2005, July 21, 2005, H6296)

Representative Paul's argument seems to follow the often heard argument that the kind of the collective decision-making between the executive and legislative branches that was present in the 1970s and at times after 9/11 should be practiced again.

5.3 9/11 as a limit for the rhetoric

"*Debate is important; rhetoric is good. We should debate ideas. But there is also a time and place for action. Today is the time. This is the place for action.*" (Representative Mark Green (R-WI), Patriot Act of 2001, October 12, 2001, H6764.) The September 11, 2001 terrorist attacks were considered as imposing a limit on the rhetoric, as this quote by Green accentuates.

In the aftermath of 9/11, a felt need for action was evident. Issues that seemed "political" were considered to be unnecessarily slowing down the pace of legislative activity. The pressure to take quick action was expressed in several debates. A couple of days after 9/11, Representative Tom Lantos (D-CA) described the situation as follows: "*But the time for words has passed, Mr. Speaker, and the time for action is upon us. We must now make our rhetoric reality. We must now stand united in word and in deed, and we shall not flinch in the face of terror. Let us go forth, certain in our knowledge that should we cast this courageous vote.*"

(AUMF debate House, September 14, 2001, H5640.) As this argument indicates, the phrase 'time is of the essence' was central to the post-9/11 debates.

Several members of Congress noted after 9/11 that security should be put above politics. During the HSA debates Representative Dave Camp (R-MI) for example emphasized: "*Homeland security should not be a partisan issue. We must rise above politics and jurisdictional disputes to send the President a strong bipartisan bill*." (Homeland Security Act of 2002, July 26, 2002, H5875.) In a similar way Representative Max Thornberry (R-TX) argued that the creation of the Homeland Security department required a legislative process in which no room was left for partisan politics:

> I hope my colleagues can remember that what we are trying to do is create an integrated Department of Homeland Security to make us safer. This is no place for political agendas. This is no place for conspiracy theories. This is no place to be pointing fingers of blame. This is a place to work on a bipartisan basis to make this country safer. That is the only reason to create this Department and that must be the goal. (Providing for Consideration of H.R.5005, Homeland Security Act of 2002, July 25, 2002, H5624)

The partisan arguments seemed to be partly related to the claim that there is no need for politics in times of crisis, as the argument by Thornberry indicates. Bipartisan government should function as a united government in order to respond to the threat of terrorism.

Despite the "necessity arguments" present in the debates related to the consideration of the Patriot Act, an argument of necessity requiring Congress to follow normal procedures also in times of crisis became apparent when opposing or questioning the bill: "*Who decided that to defend democracy we had to degrade it? Who decided that the very openness and participation and debate and weighing of issues, who decided that was a defect at a time of crisis*?" (Representative Barney Frank (D-MA), Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act 2001), October 23, 2001, H2706.) In a similar way Representative Mark Udall (D-CO) emphasized that before the vote on the Patriot Act of 2001, members should have time to have a debate on the bill: "*On a subject so dear as our civil liberties, particularly in a time of crisis, surely the House could afford time to allow Members to read and understand this complicated legislative package before a vote*" (Patriot Act of 2001, October 12, 2001, H6772). Udall (ibid.) further claimed that the House was failing to meet its responsibilities in the legislative process. Criticism of the Patriot Act legislation in the House occurred, for example, because the House did not proceed to consider the bipartisan bill reported by the House Judiciary Committee.[150]

The arguments referring to the lack of debate and a bypassing of committee procedures were also made in the Patriot Act debates in 2001. It must be, however, noticed that the issue is by no means straightforward. For instance, the Patriot Act drafts arguably deserved committee consideration in the Congress even though the final version of the bill was enacted without going

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150 The legislative process of the USA Patriot Act is well documented by Howell 2004.

through the standard procedure of the conference committee (Howell 2004).[151] The question to consider was what is the criterion for a "sufficient degree or quality of debate"? Also: To what extent had the Congress legislated too hastily?

It was also noted that the substance of the bills should be considered more relevant than the question of how strictly procedures had been followed. During the debate on the USA Act (October 11, 2001, S10578) Senator Arlen Specter (R-PA) accused the Democratic majority leader of worrying too much about following the procedure when the focus should be on the substance of the bill:

> But when the majority leader says he is concerned about procedure and not about the substance, we are regrettably establishing a record where we have not only not shown the deliberative process to uphold constitutionality, but we are putting on the record a disregard for constitutionality and elevating procedure over substance, which is not the way you legislate in a constitutional arena.

Specter accentuates here the importance of the constitutional questions involved in the legislation and the need to concentrate on the substance of the bill rather than procedures.

Even in the post-9/11 context, some members of Congress felt that a sufficiency of debating time and quality should be secured and that procedures should be followed. Senator Maria Cantwell (D-WA) illustrated the need for debate in the legislative processes during the Homeland Security Act debates in the Senate: "*Our Founding Fathers created an ingenious system of Government that stresses deliberation as the only rational method to ensure sound decision-making*" (Homeland Security Act of 2002, September 24, 2002, S9059).

Similarly Senator Specter argued during the Senate debate on USA Patriot Act in 2001 that Congress needs to debate the bills under consideration because otherwise they may be considered unconstitutional: "*I had expressed concerns when the bill was on the Senate floor that there could be some question about the adequacy of the deliberative process because the Supreme Court of the United States has held acts of Congress unconstitutional where they questioned the thoroughness or deliberation*" (USA Patriot Act 2001, October 25, 2001, S11046). According to Specter (ibid.) this was not, however, the case with the USA Patriot Act because in its current form "it meets the standard."

The scarcity of time was emphasized several times in the debates, but also the possibility of renewed terrorist strikes was taken seriously. The sunset provisions included in the Patriot Act bill 2001 were one example of how Congress aimed to secure further debate on the substance of the bill in order to avoid the possibility of mistakes made in the heat of the moment. The topical question also was whether the Congress should act more cautiously despite the political tumultuousness of the time. Representative Carolyn Kilpatrick's (D-MI) argument during the Homeland Security Act of 2002 illustrates the question:

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151 Howell (2004, 1146) indeed writes that even though the bill was enacted only 6 weeks after the terrorist attacks, "the act was the product of intense work and negotiations involving the administration and multiple congressional committees, and it embodies a series of difficult and hand hard-fought compromises among all the participants."

> For all of our braggadocio stands and speeches, we are afraid. Our fear is making us overwhelmingly passive to government propaganda and carelessly willing to sacrifice our liberties to those among us who are more than glad to take them. If we pass the Homeland Defense Act, as presently proposed, the terrorists will have won. The terrorists will have won because we would have destroyed our Constitutional democracy of checks and balances. (Homeland Security Act of 2002, July 25, 2002, H5649)

The felt need for action was considered a threat to the constitutional separation of powers, in Representative Kilpatrick's argument. In contrast to Kilpatrick's view, Representative George Nethercutt (R-WA, Homeland Security Act of 2002, July 2006, 2002, H5876) argued that while the HSA bill indeed provided the much-needed flexibility for the executive to act, it also provided the constitutional congressional oversight required to prevent abuses and excess of government and to uphold the constitutional separation of powers. As the above quotes indicate, the representatives had very different views as to what extent the substance of the bill provided necessary safeguards for executive power as well as congressional oversight.

During the HSA discussions not only the lack of debate but also the quality of the debate was questioned. Senator Byrd commented on the procedure the House used to pass the Homeland Security Act:

> [T]his is a House bill which was passed by the House after 2 days of floor debate – imagine that. Two days of floor debate. Why, it would take longer than that to get a sewer permit approved by the city council in many towns. And here we are passing a bill of this magnitude in 2 days by the other body and great pressure on this body now, to act on this mammoth proposition, great pressure from the President, who is going up and down the country saying: Pass my bill. Pass my bill. Pass my bill. Then there are others from both sides who are willing to go along and really want to hurry through this legislation. (Homeland Security Act of 2002, September 9, 2002, S8361)

Byrd also claimed that the lack of Senators from both parties on the floor during the HSA debates illustrated that Senators had not read the bill (Homeland Security Act of 2002, September 9, 2002, S8361).

The quality of the debate was also referenced in the House during the HSA debates when Peter DeFazio (D-OR) asked the Chair whether it is assumed that the debate on the Floor is based on accurate facts. The Chair responded, "*The purpose of the debate is to discuss issues as Members see them.*" DeFazio further asked the Chair to be more specific and questioned whether this means *"the use of accurate facts or is fabrication allowed*?" The Chair concluded: "*Accuracy in debate is for each member to ascertain in his own mind*." Representative DeFazio thanked the Chair and ended his remarks by saying "*we just heard fabrication*". Representative DeFazio's remark may refer to the comment of the Chair or to the previous comment by Representative Thomas DeLay (R-TX) encouraging members of Congress to vote down Representative James Oberstar's

(D-MN) amendment to Homeland Security Act. (Homeland Security Act of 2002, July 26, 2002, H5844.)[152]

5.4 Reason of state vs. limited powers of government

Nomi Lazar (2009, 134) writes that there is no need to distinguish the exception from the normal. Instead, the emphasis should be to ensure that normal procedures continue to apply and provide accountability and oversight in times of crisis as well as peace. This argument was often contested in the congressional debates. The need to create new statutory laws and thus new tools for the law enforcement agencies to respond to the threat of terrorism was often legitimatized by referring to the newness of the situation, threat and enemy. By enacting statutory law after 9/11, Congress was, however, following the normal framework of how the US has dealt with "emergency" situations in the past.

When reading through the post-9/11 debates, the following concepts and arguments regarding the constitutional balance of powers were identified: congressional oversight of executive powers – including sunset provisions; civil liberties, and especially habeas corpus-provision; the need to find the right balance between liberty and security; deliberation and following congressional procedures; partisanship, separation of powers and party-line voting; the Founding Fathers, the Constitution and historical precedents; the rally-around-the-flag phenomenon and the unity of the government; the inherent powers of the presidency; that security should not be about "politics"; the powers of the president if Congress fails to act; signing statements of the president; and finally the perceived lack of options or differing opinions.

The post-9/11 legislation was a response to the threat of terrorism, and it contained elements of both war situations and national emergency situations (e.g. intelligence surveillance, military commissions, detainee treatments, the threat of excessively restricting of civil liberties, etc.) The terrorist threat was considered relevant and real even after several years had passed, and for instance, the Patriot Reauthorization Act in July 2005 debates referred to the terrorist attacks that had occurred in London on 7/7.

The difficulty of defining the situation after 9/11 was reflected in the position of the Congress. In the context of the enacted legislation considered here, the "war on terror" was a rhetorical figure rather than a war (despite the actual wars in Iraq and Afghanistan). Stone (2005, 554) writes that the war on terror was, however, more than a rhetorical device to gain public support; it also provided a possibility for the executive branch of government to exercise the "extraordinary" powers reserved for the president to be used in war. The members of the Congress shared a similar view shortly after the attacks. Republican Rep-

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152 Representative Oberstar's amendment "to strike the extension for airline baggage screening" was related to the airport security measures. (See the Homeland Security Act of 2002, July 26, 2002, H5837, H5839)

resentative David Vitter (R-LA) indeed advised members of how the concept of war should be interpreted in the post-9/11 context: "*Let us be clear when we use the phrase "war", it is not a turn-of phrase, it is not a war against drugs, we mean war*" (Expressing Sense of Senate and House of Representatives Regarding Terrorist Attacks September 11, 2001, H5512). Vitter refers to the common use of the word "war" in US political language in order to emphasize that now the war should not be understood in a metaphorical sense. As referred to by Vitter, the concept of war has been used in a variety of contexts in the US, including the "war on poverty", "the war on drugs", and "the war on crime".

Because of the novelty of the situation, Congress faced controversies when trying to define its role and responsibilities in the post-9/11 context. Representative Leach illustrated the issue during the AUMF debates: "*Mr. Speaker, American governance today is confronted with an unprecedented challenge. A concerted terrorist attack has been perpetrated against our institution, people, and way of life. As legislators we are obligated to look our constitutional heritage to craft an appropriate response. What is clear the imperative to act. What is less clear is the methodology to pursue*." (AUMF debate House, September 14, 2001, H5671.) Representative Leach's argument refers to the difficulties of defining appropriate tools for the novel circumstances.

One of the "problems" in regard to the new legislation was the lack of possibilities to oversee or terminate the powers that had been granted to the president. Representative Dana Rohrabacher (R-CA) during the debate on reauthorizing the Patriot Act took a critical view, saying that permanent legislation should not be drafted in "times of crisis":

> Now we have the Patriot Act being handed to us again, but instead it is being handed to us in a permanent form. You do not make policy for the United States Government protecting the rights and freedoms of our people in an extraordinary times as this, a time of war, and then mandate it so it is going to be the rule of our country once we live in peacetime. (USA Patriot and Terrorism Prevention Reauthorization Act of 2005, July 21, 2005, H6232)

Rohrabacher further refers to the idea that the powers of the government are or should be limited, and he highlights that the extraordinary laws that were passed "during times of war and crisis" should not be the laws of the normal times (USA Patriot and Terrorism Prevention Reauthorization Act of 2005, July 21, 2005, H6306-H6307). During the debate on appointing the conferees Rohrabacher refers to the question of permanently changing the law during times of crisis as follows: "*Our Founding Fathers understood limitations on government is a guarantee of freedom. Now is not the time for us permanently change law and permanently put freedom at risk*." (Appointment of Conferees on HR.3199, November 9, 2005, H10088.) Despite the novelty of the situation after 9/11, the members of the Congress recognized the problems involved in enacting permanent legislation in a rather "exceptional" situation.

The role of the courts and judiciary figured prominently in many of the debates, as well as the subject of the Constitution. A question that arose during the Patriot Act, for instance, was to what extent the powers of the executive can

be expanded without securing possibilities for judicial review. In the Military Commissions Act the *habeas corpus*-provision of the Constitution was debated. The need to enact the Military Commissions Act of 2006 was a result of the Supreme Court's ruling in *Hamdan* v. *Rumsfeld*, 548 US 557 (2006).[153]

The legitimacy of the role of the judiciary in military issues arose as an issue in the debates, especially those surrounding the Military Commissions Act of 2006. According to Representative Steve King (R-IA) the court has no jurisdiction in deciding military or security issues, and that the Supreme Court's decision in *Hamdan* v. *Rumsfeld* violated the ideal of the separation of powers:

> The Court decided the conclusion they desired and then shoehorned their decision to fit a preferred result, substituting their judgment for the constitutional judgment of Congress and of our Commander in Chief. And that was during a time of war. By doing this, the Supreme Court's majority in Hamdan further undermined our Constitution which relies on the separation of powers. The unconstitutional intervention by the Supreme Court in Hamdan could have been handled by Congress and the President in another way (Military Commissions Act of 2006, September 27, 2006, H7549)

King (ibid.) further states that Congress might have advised the Court in regard to the Hamdan decision if the political situation had been different:

> If we had not been a Nation at war, a Nation urgently concerned about protecting our citizens from attack, Congress may well have advised the Court of their unconstitutional intervention and the Court's obstruction of the ability of the Commander in Chief to protect America from our enemies and ignored the Court's decision. (Military Commissions Act of 2006, September 27, 2006, H7549)

The Representative criticizes the Court for interfering in a political issue that should have been dealt with by Congress and the president. The central question is how the checks and balances are interpreted in different contexts.

During the debate on the Military Commissions Act (September 28, 2006, S10416) Senator Leahy criticized the Bush administration's response to the Supreme Court decisions (e.g. Hamdan v. Rumsfeld): "*It insists that there be no more judicial check on its actions and errors. When the Senate accedes to that demand, it abandons American principles and all checks on an imperial presidency*." Leahy (ibid.) argued that the administration was trying to solve all problems by acquiring more presidential power: "*This is a formula for still fewer checks and balances and for more abuse, secrecy, and power-grabbing*." The Senator opposed the way in which the powers of the president were interpreted and exercised in the post-9/11 context. By the same token in the House Representatives Jerrold Nadler (D-NY) claimed the power granted to the president by the Military Commissions Act were so far-reaching that it undermines the constitutional framework. In Representative Nadler's words: "*The President wants to exist in a law-free zone. He does not want to be bound by the law of war or our treaty obligations. He does not want to answer to the Constitution, to the Congress or to the courts.*" (Military Commissions Act of 2006, September 27, 2006, H7550.) The opponents re-

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153 In *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006) the Supreme Court decided that the executive branch could not establish the military commissions without congressional authorization. http://www.supremecourt.gov/opinions/05pdf/05-184.pdf

ferred particularly to the possibility that the executive would use powers without securing the necessary congressional and judicial oversight.

The lack of congressional oversight was considered particularly problematic during the MCA debates. For Senator Leahy the judiciary had been the only branch capable of reviewing the executive branch's actions in the aftermath of 9/11: "*In fact, the irony is this conservative Supreme Court – seven out of nine members are Republicans – has been the only check on the Bush-Cheney administration because Congress has not had the courage to do that. Congress has not had the courage to uphold its own oath of office*." (Military Commissions Act of 2006, September 28, 2006, S10357.) Leahy (ibid. S10359) further criticized the political circumstances in which the decisions were made, claiming during the MCA debates that, "*Notwithstanding the harm the administration has done to national security – first by missing their chance to stop September 11 and then with their mismanaged misadventures in Iraq - there is no new national security crisis. Apparently there is only a Republican political crisis.*"

The need to find the right balance between liberty and security was the common theme in all of the post-9/11 debates analyzed in this thesis. The sunset provisions included in the USA Patriot Act 2001 provided possibility for Congress to review the authorized measures after some time had passed and distance was gained from the September 11 attacks. By including the sunset provisions, Congress also ensured that it would consider, review, and debate the authorities the bill provided in the future. The sunset provisions were, however, considered by some as sending the wrong signal to the public regarding to the legislation. For example, Representative Paul questioned the sunset provisions in the House by saying "*if these provisions are critical tools in the fight against terrorism, why remove the government's ability to use them after five years*?" (Patriot Act of 2001, October 12, 2001, H6769) The sunset provision requirement was not included in other post-9/11 bills considered in the thesis. During the MCA debates it was emphasized that Congress could always pass new legislation to specify or change the existing legislation if abuses of the granted authorities occurred (See Senator Warner's argument, Military Commissions Act of 2006, September 28, 2006, S10385).

It seems unlikely, however, that the president would voluntarily give up the granted authorities and circumscribe his own powers. The Congress should have a two-thirds majority in both houses in order to override the president's veto. Representative Solomon Ortiz (D-TX) asked members to think carefully about the current political circumstances because in the future it could prove rather difficult to impose limitations: "*When Congress gives away power to the President, it is a permanent move. The question each of must ask is: how wise will this policy seem 10 years from now. And when the Congress gives power to the President, we must understand that the President today will not be in office years down the road*." (Military Commissions Act of 2006, September 27, 2006, H7537.) It seems that including termination dates on the granted authorities was not, however, the highest priority of Congress.

Central to the Military Commissions Act of 2006 was the question of suspending the writ of habeas corpus provision. The substance of the bill was

questioned by Representative Ike Skelton (D-MO), who distinguished seven provisions of the bill that he considered controversial or unconstitutional (Military Commissions Act of 2006, September 27, 2006, H7536). Indeed, the Supreme Court in its *Boumediene v. Bush*, 553 US 723 (2008) decision considered as unconstitutional the Military Commissions Act's suspension of the writ of habeas corpus for "designated enemy combatants detained in Guantanamo".[154]

The need for safety often supported arguments for granting new powers for the president. For example Representative John Linder (R-GA) supported the Homeland Security Act of 2002 by saying that according to the Founding Fathers the greatest duty of the Federal Government is to provide protection for the people (Providing for Consideration of H.R.5005, Homeland Security Act of 2002, July 25, 2002, H5626). 'Security should be above politics' was appealed to as an argument to cut off debate and move to the vote. For instance during the House debate on the Military Commissions Act of 2006 Candice Miller (R-MI) said that the nation is at war with the terrorists and therefore the response of Congress should be appropriate to the circumstances: "[*T*]*he first and foremost responsibility of the Federal Government is to provide for the national defense, that is in the preamble of our Constitution. And national defense should always be above politics. Yet, the Democratic minority leader of this House has said that national security should not be an issue in the upcoming election. Think about that*." (Providing for consideration of H.R.6166, Military Commissions Act of 2006, September 27, 2006, H7512.) Representative Miller (ibid.) argued that it is only a reasonable to expect that in times of war and crisis the politics should transcend partisanship in order "to do what is right for America."

As previously discussed, party-line voting became apparent in the post-9/11 debates. During the MCA debate in the Senate, Republican Senator Saxby Chambliss (R-GA) advised his party members to oppose the amendments that have been but forward:

> I think it is important that we send a bill to the White House, to the desk of the President that is exactly the same as the bill that has already been passed by the House so we can put this program in place immediately. The way we do that is to continue to defeat all the amendments that have been put forward, and that we send the President the same bill that has already been passed by the House so that this program can be reinitiated immediately. (Military Commissions Act of 2006, September 28, 2006, S10392)

Republicans were accusing Democrats of voting nay for everything, Democrats on the other hand claimed that Republicans were using the procedures, timing, elections, and rules of the houses in order to guarantee legislative outcomes. But the party-line voting, though evident, was not decisive. Members of both parties made critical comments on the policies of the administration and the majority party. For instance Republican Representative Butch Otter from Idaho was one of the members of the Republican Party that voted nay on the passage

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154 See the argument in detail at: http://www.supremecourt.gov/opinions/07pdf/06-1195.pdf

of the USA Patriot Act.[155] He criticized the bill for granting too many powers to the president at the expense of the rights of the people: "*Some of the provisions place more power in the hands of law enforcement than our Founding Fathers could have ever dreamt.* The Representative continued by stressing, "*This bill promises security, but Americans need to be secure with their liberties*." (Patriot Act of 2001, October 12, 2001, H6762.)

One interesting issue that was not that extensively debated is the question of to what extent the president can act if Congress has not authorized the action? During the Patriot Reauthorization Act debates, Senator Dick Durbin (D-IL) wanted to know whether the president could claim the authority to carry out his actions if Congress decided not to extent the Patriot Act authorities (USA Patriot Act and Terrorism Prevention Reauthorization Act of 2005 – Conference Report 2005, December 16, 2005, S13719). During the same debate John D. Rockefeller (D-WV) referred to the question of the unilateral powers of the president by saying: "*If a President refuses to deal with the Congress as a co-equal branch of Government, then the Congress cannot fulfill its responsibility on behalf of the people to ensure that the executive branch is acting under the rule of law"* (USA Patriot Act and Terrorism Prevention Reauthorization Act of 2005 – Conference Report 2006, March 2, 2006, S1611). Senator Rockefeller, however, seems to refer mainly to the lack of information. Congress cannot perform its oversight duties if the president refuses to treat Congress as an equal branch of government.

Members of the Congress were also keen to know to what extent the president actually would follow the enacted legislation. The practice of issuing signing statements was mentioned in the debate of Military Commissions Act in the House as follows: "*Why should we be concerned about providing this administration with such discretion, one might ask? Because our President and our Attorney General have routinely flouted congressional authority with signing statements and legal interpretations, which give to them unfettered authority*." (Representative Steny Hoyer (D-MA), Military Commissions Act of 2006, September 27, 2006, H7540.) The legal weight of issuing signing statements continues to remain rather vague and controversial in the United States. According to Fisher (2011, 55) the "constitutionality of these signing statements" is dealt with almost entirely outside the courts.[156]

The history of the signing statements can be traced to the early 19th century but the way that these were used in George W. Bush's administration deserves to be analyzed more in detail. Garvey (2012, 7) outlines the use of the signing statement by President Bush as follows: "*Like its predecessors, the Administration of George W. Bush (Bush II) employed the signing statements to voice constitutional objections to, or concerns with, congressional enactments, or to enunciate the Administration's interpretation of an enactment it deemed ambiguous.*" Garvey (ibid.) notes that President Bush's signing statements raised controversy not due their large number so much as to their substance: "*Of President Bush's 161 signing*

155 http://www.govtrack.us/congress/votes/107-2001/h398

156 At least one federal court, however, did tackle the signing statements practice, in 1972 (DaCosta v. Nixon, 55 F.R.D. 145, 146 (E.D.N.Y. 1972). See Fisher 2011, 55 for details.

statements, 127 (79%) contain some type of constitutional challenge or objection, as compared to 70 (18%) during the Clinton Administration." What is even more interesting, as Garvey (2012, 8) shows, is that 127 of the statements contained a "multiple constitutional and statutory objection" involving questions on more than 1000 separate provisions of law. It seems that President Bush and his administration particularly concentrated on issuing signing statements that challenged the provisions that it considered infringements on the powers of the president in foreign affairs (ibid.).

The post-9/11 debates show that the Founding Fathers, the Constitution, and historical precedents were topical. Senator Feingold, for instance, reminded members that the Constitution was written by men who had gone through the revolutionary war. Their intention was that the Constitution and Bill of Rights would apply and secure civil liberties both in times of war and peace. Feingold also referred to the less glorious examples of US history when "*civil liberties have taken the back seat to what appeared at the time to be the legitimate exigencies of war*." The examples included the Alien and Sedition Acts, Lincoln's suspension of habeas corpus during the Civil War, the World War II internment of Japanese-Americans, the McCarthy era and the "blacklisting" of assumed communist supporters, and the harassment and surveillance of antiwar protesters during the Vietnam War. (USA Act of 2001, October 11, 2001, S10570.) The Weimar Republic reference did not come up to the debates analyzed here. Rather the members referred to US historical examples. As discussed above, it is possible, however, to distinguish arguments, formulations, and conceptions in the US debates similar to those referred in the debates of the Weimar Republic.

The historical precedents were used to diminish the urgency of the situation. In the course of the Homeland Security Act discussions Senator Fred Thompson (R-TN), for instance, noted that the current situation is "not that bad" when compared to other events in the US history:

> There has been a concern expressed about personal liberties. Democracy always has to – especially a democracy under attack – balance the national security of the country with the personal liberties that we hold so dear. I think we have done a pretty good job of that. Some of the things that the administration has done have been somewhat controversial. They are not reflected in this bill. This bill really doesn't deal with any of those things. But I do think it is appropriate to point out that in other times President Lincoln instituted Habeas Corpus. President Roosevelt had internments, and things of that nature. Other presidents have taken rather severe action when they deemed it necessary in times of war and in times of national security. We are not even approaching things of that nature. (Homeland Security Act - motion to proceed 2002, September 3, 2002, S8073)

Thompson (ibid.) further stressed that even under the theme of "democracy under attack" the right balance must be struck between civil liberties and national security.

During the House debate on reauthorizing the Patriot Act, Mel Watt (D-NC) claimed that the political circumstance necessarily have an impact on the legislative outcomes: "[*T*]*he American people do not realize just how much the process of legislating is about reacting to events that take place around us."* The Representative continues that the measures should be considered in relation to the

political context of the time: "*When the events of 9/11 occurred, we obviously reacted to those events. And quite often when we react, we are looking for an appropriate new balance that takes into account some outrageous activity that took place.*" (USA Patriot and Terrorism Prevention Reauthorization Act of 2005, July 21, 2005, H6231.) Watt's remark illustrates the importance of the compromise in the legislative process. While post-9/11 legislation was not "perfect" by any means doing nothing seemed not to be an option: "*The complexity of the issue, the vagueness of the enemy, and the political pressure to respond immediately limits our choices. The proposed resolution is the only option we are offered, and doing nothing is unthinkable.*" (Representative Paul, AUMF debate House, September 14, 2001, H5640.) The question of what could be passed in Congress was critical.

Representative Bob Barr (R-GA) also argued in the course of the debate on the Homeland Security Act that "*We owe it to this President the same as our forefathers owed and gave to Franklin Delano Roosevelt in December of 1941 the power and the flexibility to respond to a threat that our Nation had never faced before*" (Homeland Security Act of 2002, July 25, 2002, H5655). The historical precedents were used also to support the new powers for the president. Why should President Bush not be given the same authority that President Lincoln and Roosevelt had? Opinions differed among members as whether the previous measures served as warnings or as motivating examples.

The debates illustrate the difficulty of finding the right balance between the constitutional framework and the political situation. To what extent is it legitimate, if ever, to bypass normal procedures in times of crisis? Representative John Dingell (D-MI) spoke of the controversies during the House debate on the Patriot Act of 2001 as follows:

> I am not sure this kind of action protects the peoples' basic liberties. We can protect the Constitutional rights of our people from the whims of the attorney general, the Republican administration, and the Republican leadership of this House. A bill, which would have achieved overwhelming support by the Congress, has been cast into question by this irregular process, and basic American liberties are being put into question. However, despite these egregious breaches of House procedure, these border concerns are so great that I support the PATRIOT Act of 2001. (Patriot Act of 2001, October 12, 2001, H6765)

Representative Dingell was, however, willing to accept the maneuvering because of the broader concerns he had about the political situation. Similarly Senator Leahy argued during the USA Act debates in 2001 that it was essential to find the right balance between the changed authorities of the different branches of government, a balance that could provide security against a continuation of attacks while at the same time preserving constitutional freedoms. He continued that, despite his doubts toward the bill, he would settle for some of the administration's proposals. According to Senator Leahy it was important to move the bill forward and to maintain national unity in the nation's hour of crisis. (USA Act 2001, October 11, 2001, S10548.)[157]

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157 Howell (2004, 1174) writes that the reason Senator Leahy was willing to move the legislation forward was because he thought there would be opportunities to improve

Many of the members, however, insisted that Congress had no other option than to enact the new legislation: "*The terrorist attacks of September 11 make it an urgent priority to act as soon as possible*" (Senator Olympia Snowe (R-ME), USA Act 2001, October 11, 2001, S10597). A common argument to support the new legislation was to emphasize that "*This is an unprecedented state of affairs, and it demands unprecedented action*" (See e.g. Senator Dianne Feinstein (D-CA), USA Act 2001, October, 11, 2001, S10591). In the course of the Patriot Act debates, Representative Lamar Smith (R-TX) also declared: "*We seek a return to "normal", although the word normal takes on a new meaning now*" (Patriot Act of 2001, October 12, 2001, H6760).

Critical comments were, however, presented against this kind of "emergency rhetoric". During the debate on the rule of the Patriot Act bill Representative Conyers highlighted the issue as follows: "*Now, the previous speaker, the gentleman from Florida* (Representative David Weldon R-FL*), tells us we have got to move really fast because there is a national emergency that requires us to get this bill into law before we have even seen it or read it. But the fact of the matter is that there are going to be two different bills that will come before the House, and we are going to conference. So there is not any emergency whatsoever*." (Representative Conyers, Waiving Requirement of clause 6(a) of rule XIII with respect to consideration of certain resolutions, October 12, 2001, H6709.) Conyers accentuates that the national emergency by itself is no reason to enact a bill before members have even had an opportunity to read the bill.

The question is to what extent the bills that have been enacted in the post-9/11 context count as "emergency power" legislation? Senator Roth noted in the 1974 (NEA Source Book 1976, 170) that it is clear that, in the times of crisis, bills do not warrant the same treatment as in normal times. This is not necessarily a problem for emergency power legislation that is passed for a specific purpose for a specific period of time. But as critics during the debates on the Patriot (Reauthorization) Act or Military Commissions Act noted, the bills have a tendency to become "permanent" legislation and, therefore, normal legislative procedures and practices should be followed.

Representative Conyers related the following during the debate on the Patriot Act:

> One week ago, the Committee on the Judiciary passed a bill 36 to 0, every member of every persuasion supported the bill that was worked on by the chairman, myself, and all the members. There was good process. There was ample debate. No one was cut off. No amendments were prevented. And in that environment, we agreed to sunset the expansion in government surveillance power that are in this bill to 2 years. It would have given the administration not only the emergency powers it requested on an expedited basis, but at the same time allows us in Congress to revisit the issue after 2 years. (Patriot Act of 2001, October 12, 2001, H6767.)

Conyers labels the Patriot Act as emergency powers legislation. The five-year sunset provisions were indeed included in the original version of the Patriot

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the bill in conference committee. But in the end there was no conference committee, only preconference negotiations.

Act. In 2005 during the debate on the Patriot Reauthorization Act Representative Mike Rogers (R-MI), however, said that the United States is at war and that the reauthorization bill will help not only to protect people, but will also ensure that the Constitution is not limited. Rogers further continued that those who claim that the bill includes emergency powers are wrong (USA Patriot and Terrorism Prevention Reauthorization Act of 2005, July 21, 2005, H6235). Rogers stressed that when passing the act, Congress would not be turning any emergency powers into permanent law. Conceptualizing the situation as a war on terror resulted in a rather complicated language in the Congress when it sought to combine different interpretations and definitions regarding war powers and emergency powers of the Congress and of the president.

President Bush proclaimed a national emergency after the terrorist attacks, but the "war on terror" rhetoric and the adoption of the Commander-in-Chief clause of the Constitution to legitimatize the president's powers indicated that the state of affairs was not considered particularly through the lens of national emergency. As mentioned above, however, the NEA did not really refer to the president's power to repel sudden attacks. The AUMF debates, for their part, referred only to the War Powers Resolution.

As discussed, Congress by enacting the AUMF authorized the president to use military force against "non-traditional actors" (Bradley & Goldsmith 2005). Instead of declaring war Congress decided to enact the statutory legislation (AUMF), which is consistent with the War Powers Resolution. What is important to notice is that both Congress and the president considered the 9/11 attacks "as a war" (see more in detail Bradley & Goldsmith 2005, 2070). The question arises: What meaning does "war" have in conceptions such as the "war on terror", especially when it becomes part of "normal" political language.

Barron & Lederman (2008b, 945) argue that the central question regarding constitutional war powers as it was discussed academically in the latter twentieth century is no longer concerned the scope of the authorities of the president when Congress fails to act. On the contrary, now the debates are related to the scope of Congress' authority to impose restrictions on presidential war powers following Justice Jackson's opinion in the *Youngstown* v. *Sawyer*, 343 US 579 (1952) case. On the basis of reading the WPR debates, it seems that central to the debates already in the 1970s was the question of to what extent the Congress can actually impose limitations for the powers of the president in war-making. Barron & Lederman (2008a) have pointed out that President Bush's actions in war on terror were, also, circumscribed by several congressional authorizations. For Barron & Lederman (2008a, 691-692) there is "*surprisingly little historical evidence supporting the notion that the conduct of military campaign is beyond legislative control*." Instead of concentrating the analysis on the inherent powers of the president, we should direct the focus, as Barron & Lederman (2008a, 691) suggest, to the question of "whether and when" presidents can rely on their constitutional powers to act "in contravention of Congressional limitations."

The question to consider then is what Barron & Lederman (2008a) describe as the "lowest ebb question" following Justice Jackson's opinion in the Youngs-

town case. Barron & Lederman's view (2008a, 721) is that the framework of the debate - defining the constitutional war powers of Congress versus those of president - should be changed. Rather than determining specific categories for the powers, the question should be to what extent the president has powers under the Commander-in-Chief clause and to separate that authority from the powers that are subject to treaties or to statutory limitations. It seems to me that Barron & Lederman's argument corresponds to the idea Congress had in mind when passing the WPR bill in the 1970s. The whole debate seems to revolve around the Commander-in-Chief clause. Barron & Lederman (2008a, 729) argue that their approach assumes that, "*the Commander-in-Chief Clause confers a broad range of powers that the President can exercise without advance legislative authorization; that Congress has the authority to limit some of those powers by statute; but that other of those powers are beyond legislative reach*."

Congress has not been silent about war powers recently. According to Barron & Lederman (2008a, 720) Congress has intervened in the presidential use of military force on several occasions since the Korean War. It seems that even if the power to initiate has shifted to the president in contrast to the original language of the Constitution, Congress has been increasingly willing to take a stand once US armed forces have already been introduced into hostilities.

The AUMF resolution granted the president the authority to use all necessary and appropriate force against those persons or institutions related to the September 11, 2001 terrorist attacks. Bradley & Goldsmith (2005, 2100) define the authorization as follows: "*The AUMF is a congressional authorization for the President to act in a context – a military response to an attack on the United States – in which he possesses independent constitutional authority under Article II*." It seems to me, however, that Congress when providing the AUMF resolution and other post-9/11 legislation, ensured that the inherent powers of the president would be to some extent circumscribed.

The WPR and NEA bills did not seem to provide any definite answer or guidelines on how to deal with the novel threat of terrorism after 9/11. As the AUMF debates referred to above indicate, the constitutional role of the Congress is to declare war and the AUMF bill does not undermine the WPR legislation (See e.g. Representative Hinojosa's argument p. 182). The actual language of the AUMF states: "*The Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5 (b) of the War Powers Resolution*" (S.J.Res.23, 107th Congress 2001). In short, Congress has granted authority for the president to act. Congress could have declared war in 2001 or given another authorization after having received more information about the attacks. Representative Jackson, however, claimed that the AUMF resolution undermined the WPR:

> I am not voting "yes" on September 14, 2001, for an open-ended Tonkin Gulf-type Resolution. I do not want a repeat of the Johnson administration – which used it to provide dubious legal cover for a massive escalation of an unwinnable war in Vietnam – for either a similar domestic or foreign over-reach against terrorism. I'm not willing to give President Bush carte blanch authority to fight terrorism. We need to

> agree to fight it together within traditional constitutional boundaries. (AUMF debate House, September 14, 2001, H5675)

Representative Jackson further stated that he would have liked to cast a vote, "*to reaffirm the authority of the President under the War Powers Act, which gives the President all the authority he currently needs to fight terrorism and protect the citizens of the United States. That would give all Americans more time – 60 or 90 days – to investigate more and learn more about all of the issues and facts involved on September 11*." (AUMF debate House, September 14, 2001, H5675.) According to Jackson, the resolution under consideration seemed inconsistent with WPR.

In the post-9/11 context the members of the Congress have had differing views regarding the powers of Congress and the president related to war. For example Representative Ken Bentsen (D-TX) noted during the AUMF debate in the House that he "*believes this authority* [authorizing the president to respond to terrorist attacks] *fully complies with Congress' constitutional and statutory authority in authorizing the use of force in the defense of the nation*." Whereas, according to Representative Spratt "[*I*]*n a strict sense, this resolution is not necessary, because the Constitution makes the President commander in chief; and as such, he has the power to strike back when our country is struck, as it was struck on September 11, and the War Powers Act confirms that power*." (AUMF debate House, September 14, 2001, H5647-H5648, H5649.) It seems, however, that Representative Bentsen is referring to the constitutional power of the Congress "*To … provide for the common Defence and general Welfare of the United States*." (US Constitution 1781, Article 1, section 8) This was an argument that was not that popular in the WPR debates in the early 1970s compared to the argument that Congress shall declare war.[158]

The collective judgment idea was relevant in order to maintain the separation of powers principle in the post-9/11 debates. During the AUMF debate Representative Spratt adopted the framework of what Justice Jackson specified in the *Youngstown* v. *Sawyer*, 343 US 579 (1952) case, i.e. that even though the president does not need to have the resolution in order to respond to sudden attacks, "he is far stronger with it" (AUMF debate House, September 14, 2001, H5649). In the same vein, Representative Jackson-Lee for instance spoke about the dual responsibility of the executive and legislative branches during the AUMF debates in the House; this idea resembled that of the collective decision-making idea present in the WPR debates in the 1970s (See AUMF debate, House, September 14, 2001, H5665).

Further, Representative Pete Stark (D-CA) questioned the AUMF resolution by saying that he does not believe that Congress should hand over its constitutional responsibilities to the president, even "in times of extreme crisis" (AUMF debate House, September 14, 2001, H5678). He (ibid.) continued by referring to the framework of the Constitution:

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158 During the Patriot Act debates, for example, there were not many references to the war-making powers of the Congress. Representative Ron Kind (D-WI, Patriot Act of 2001, October 12, 2001, H6773), however, referred to the constitutional powers of Congress by stating, "Congress shall have the power – to provide for the common defense and general welfare of the United States."

> When writing the Constitution, our Founding Fathers created a balance of powers between the three branches of government to prevent one branch from inappropriately dominating another. Although the Constitution empowers the President as Commander in Chief, it gives the Congress the sole power of declaring war. This resolution gives the President the power to conduct a war without reporting to or consulting with Congress. Frankly stated, it cedes congressional authority to the President.

As implied in both the WPR and the NEA, the reporting and consulting requirements were included in the bills in order to provide the possibility for Congress to review whether the actions taken were in accordance with the laws.

In contrast to the argument mentioned above by Representative Stark, Representative Lantos supported the resolution, saying that the resolution secures the collective decision-making of Congress and the president: "*In granting the President this power, Congress is not abdicating its prerogatives. We do not weaken our role by approving this measure. By signaling our solidarity with the President and by trusting him with this power, we take our place at his side as full partners in this fight*." (AUMF debate House, September 14, 2001, H5640.) Lantos' argument seems to refer to the authorization of powers to the president as one of Congress' roles, and by virtue of this, Congress secures its position in the decision-making process, as the WPR bill underscored. In contrast, Representative Stark thought the resolution undermined WPR, because it only grants powers to the president without giving Congress any further oversight powers or ways to be part of decision-making process regarding the use of armed forces.

Representative Defazio, however, argued: "*Under the* [AUMF] *resolution of force pending today, Congress will reserve the right to review the President's plans and actions*" (AUMF debate House, September 14, 2001, H5651). Congress could always enact a bill to terminate the authorization for the use of force. Furthermore, since the AUMF resolution was considered consistent with the WPR, it should force the president to report and consult with Congress. Representative Wu clarified that the AUMF resolution did not undermine Congress' War Powers Resolution:

> This resolution restates the authority I believe Congress already granted to the President under Section 2 (c) (3) of the War Powers Resolution. My reading is that nothing in this resolution supersedes congressional authority under the Constitution or War Powers Resolution and the President would continue to be bound by the reporting and consultation requirements. Under this resolution, Congress reserves the right to review the President's plans and actions. (AUMF debate House, September 14, 2001, H5673)

It seems that Wu refers here to the purpose and policy section of the WPR, which states that the Commander-in-Chief powers of the president can be used when pursuant to a national emergency. According to Wu's reading of the AUMF resolution, Congress in passing the resolution maintained its right to review and oversee presidential actions. However, already during the WPR debates in the 1970s Representative Dellums noted, in regard to the consultation part of the WPR conference bill, that he considered congressional consultation

to be something else: "*Congress can move quickly when it wants to, but there is a difference between moving quickly and being bypassed*" (House debate on Conference Report on H.J.Res.542, October 12, 1973, 33871). As discussed in Chapter 3, the consultation part of WPR raises questions about what it means to say that a president consults, or with whom is the president supposed to consult. More importantly, what happens if two branches of government disagree on whether the consultation requirement was fulfilled or not.

Interestingly there were no termination methods included in the AUMF. There were some different interpretations in the debates of the 1970s about whether Congress could terminate the use of the force within the 60-day period or at any time when the president has employed the armed forces without prior congressional authorization.[159] The Tonkin Gulf Resolution did include a concurrent resolution provision on termination. It seems that Congress has to enact a joint resolution, which is subject to presidential veto, in order to repeal the AUMF. Representative Jim McDermott (D-WA) said in the House in the course of the AUMF debates that he will follow the example of Wayne Morse, Ernest Guering, and Gaylord Nelson in reserving "*the right to vote against funding if the President is not careful and does plan carefully*" (AUMF debate House, September 14, 2001, H5656). As noted in the debates of the 1970s, the Congress does have the 'power of the purse' as a means to control the use of military force by the president.

While the terrorist attacks were for Representative David Price (D-NC) "*unparalled in our history*", he continued to emphasize that the "military action" should be dealt with "*within the parameters of the Constitution and the War Powers Resolution, as this resolution provides*" (AUMF debate House, September 14, 2001, H5652). The US Constitution "*places the Congress at the center of any decision to use force over any extended period of time*", said Representative Benjamin Gilman (R-NY) during the AUMF debate (AUMF debate House, September 14, 2001, H5664). Similar juxtapositions existed in the AUMF debates as in the WPR debates some 30 years earlier. Should the Congress make the initiatives in regard to introducing US armed forces into hostilities? What are the constitutional powers of the president to respond to sudden attack? What does it mean that the president acts as Commander-in-Chief? The interesting question to consider is to what extent were the arguments new in the post-9/11 context?

The question was raised in Congress of whether the administration was trying to have Congress authorize powers not strictly related to the terrorist attacks. In the Senate, Feingold was concerned about the administration's original version of the antiterrorism bill because it "*contained vast new powers for law enforcement, some seemingly drafted in haste and other that came from the FBI's wish list that Congress has rejected in the past.*" The Senator continued, "*You may re-*

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159 It seems that according to the original reading of the bill, Congress can at any time use the concurrent resolution: "(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." (P.L.93-148)

member that the Attorney General announced his intention to introduce a bill shortly after the September 11 attacks. He provided the text of the bill the following Wednesday, and urged Congress to enact it by the end the week. That was plainly impossible, but the pressure to move on this bill quickly, without deliberation and debate, has been relentless ever since." (USA Patriot Act 2001, October 25, 2001, S11020.) Feingold refers to the necessity and urgency to legislate after 9/11 in order to respond to the threat of terrorism.

The need to debate and deliberate was set against the need to act quickly with the legislative process, as Senator Cantwell noted, "*I have my concerns, as well, with the scope and the pace of these sweeping changes. We may have gone further than we really need to go to address terrorism*." (USA Patriot Act 2001, October 25, 2001, S11029.) Congress acknowledged that the political circumstances of the moment had an effect on the legislative outcomes.

The substance of the bills produced conflicting arguments. In short, the commonly asked question concerned the interpretation of the Constitution and the constitutional powers of the branches. For example, Senator Byrd remarked during the Homeland Security Act of 2002 debate that there were two competing interpretations of the Constitution related to war powers:

> The Constitution says that Congress shall have power to declare war. We can split hairs all we want, but there are the words. I know that there are traditionalists who believe every word of that Constitution, and that was the position held in this country up until the Korean War. But there are revisionists today who want to change that. They want to give the President power; they think he should have it. So that is what we hear from those who want the Commander in Chief to have that power. (Homeland Security Act of 2002, September 13, 2002, S8604)

The Senator's argument illustrates the two lines of interpretation, and these were distinguishable also in the debates of the WPR in the 1970s.

Congress had very differing views on the nature of the measures adopted in the aftermath of 9/11. Representative Green, for example, argued during the debate on the Patriot Act of 2001 as follows: "*[T]his legislation balances the need to move quickly with the need to move carefully. First, the need to move carefully. If we listen to the rhetoric from the other side, it sounds like we are making all these dramatic, broad changes in laws. In fact, what we are doing today primarily is modernizing our laws, helping law enforcement to deal with evolving technology and evolving threats*." (Patriot Act of 2001, October 12, 2001, H6764.) Green seems to suggest that the Democrats were exaggerating the importance of the Patriot Act legislation. The "need to move carefully must be balanced with the need to move quickly" according to Green. As discussed earlier in this context, Green (p. 189) emphasized that there is a time for debate and a time for action.

Representative Maxine Waters (D-CA) a member of the House Committee on Judiciary strongly opposed the Patriot Act of 2001 (October 12, 2001, H6762). During the House debate she commented on the current Senate draft of the bill, which had been passed at 3 am that morning. The bill was rather different to the bill one from the Committee on Judiciary. According to Waters (ibid.), "*Under the rules of the House, the Committee on Judiciary's bill should have been heard on this floor and the differences between this bill and the House bill should have been*

worked out in a conference committee." Representative Waters further argued that John Ashcroft had "destroyed" the bipartisan bill and therefore the Attorney General, in Representative Waters' words, had "*fired the first partisan shot since September 11*" (Patriot Act of 2001, October 12, 2001, H6762).

The bill before the House was to Waters "*a faulty and irresponsible piece of legislation*" that impaired not only the US Constitution but also civil liberties. Waters claimed that the bill took advantage of the trust that they put in the administration. She further argued that the intelligence community and law enforcement had all the money and laws that they needed to do their job. (Patriot Act of 2001, October 12, 2001, H6763.) The latter argument was questioned by Representative Green, who mentioned that the September 11, 2001 terrorist attacks had illustrated that law enforcement as well as the Permanent Select Committee on Intelligence should have more tools and resources to do their job (Patriot Act of 2001, October 12, 2001, H6764).

Some members of the Congress argued that Congress should not go along with the emergency rhetoric that claimed that in times of crisis the procedures of the Congress could be bypassed in order to enact bills. Similar to Representative Waters' argument discussed above was Representative Bobby Scott's (D-VA) questions about the legislative process of Patriot Act: "*Mr. Speaker, the Committee on Judiciary worked long and hard on this particular bill. We spent several weeks of research and deliberation, but apparently an intelligent, deliberative process is not welcomed, and now here we are under martial law considering a completely different bill than that that was reported from the Committee on Judiciary*." (Waiving Requirement of clause 6(a) of rule XIII with respect to consideration of certain resolutions, October 12, 2001, H6710.) Representative Conyers also commented on the peculiarities of the procedures related to the Patriot Act legislation: "*We had a preconference before we had a bill and before there was a conference; and now we are not going to have a conference*" (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act 2001), October 23, 2001, H7207).

The debates, at least on the Patriot Ac can be grouped under three headings: the bill was to be supported because of what happened on 9/11; the bill should be opposed because 9/11 did not put the United States under such a threat as to warrant the undermining of US constitutional principles or the abandonment of thoughtful deliberation and proper legislative processes; the bill in the end must be supported despite concerns about its problematic legislative processes or controversial content, because 'doing nothing' was really not an option.

In order to provide more possibilities for cooperation between the president and Congress, the establishment of a joint commission was suggested during a Senate debate on the US response. Senator Gramm described the usefulness of the joint committee as follows:

> I think it is clear that under these circumstances, the Congress would literally be willing to pass any appropriations bill and spend any amount of money. As this conflict lengthens, as other priorities emerge, as we need more resources, as we ultimately will in this conflict, we will wish we had been responsible […] I personally believe

> we should set up a joint bipartisan committee with the job of overseeing these expenditures, just as the Truman Commission oversaw the expenditures of World War II. (A United Response September 14, 2001, S9423.)

The Senator acknowledges, although related to financial matters, that Congress after 9/11 was willing to enact legislation without the necessary forethought. According to Gramm, Congress should set up a joint bipartisan committee in order to oversee the (here budgetary) actions, similar to the Truman Commission after the Second World War.

Ackerman (2009) has also recently proposed that Congress should establish "a presidential commission on presidential power". The period in 2009 when Barack Obama was elected president and Democrats controlled the majority would have been, according to Ackerman, a perfect time to reconsider the line of action that had developed in the US to respond to war and emergencies. The job of such a commission would not be to evaluate the events of the past, but rather to concentrate on the future. Ackerman (ibid.) specifies that the committee should consist of ranking members of the Congress and "engage in a year-long process of deliberation." For Ackerman, Congress missed the opportunity in the early 1970s to change course by enacting the WPR and NEA bills. According to Ackerman (ibid.), while Congress did respond to the misuse of powers by President Nixon, in the end the WPR and NEA statutes proved somewhat insubstantial, due to the effects of the continuing political battle between the Democrats in Congress and Presidents Richard Nixon and Gerald Ford.

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In the post-9/11 debates examined here, the inability of Congress to be in a session to make the decision was not really debated. The issue was raised when the Congress introduced the Continuity of Representation act of 2005 (H.R.841), which was passed in the House but not in the Senate.[160] The issue was considered important in the House of Representatives, because the separation of powers system assumes that all the three branches of government are able to operate: "*We cannot predict how the Executive, claiming potentially dictatorial powers, will operate in the absence of a functioning Legislative Branch or whether such actions will withstand legal challenge*" (John Larson (D-CT), H.J.Res.83, June 2, 2004, H3679).

While, the Constitution advises on how to provide continuity of government with regard to the president and the senators, it does not discuss members of the House. P.L.109-55 (an appropriation bill for the legislative branch for 2006) includes a provision originally proposed by the House that requires "*the states to hold special elections to fill vacancies in the House in extraordinary circumstances.*"(See details in Relyea 2005, 6; Continuity of Government report 2003.) While this matter is not central to the discussion here, it is important to note that such types of discussions occurred in the aftermath of 9/11.

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160 http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.00841:

6 CONCLUSION

Emergency and war powers are of particular political interest because they illuminate how an executive branch of government may act in times of crisis while at the same time illustrating how the legislative branch may control the exercise of these powers. The study has investigated politically and historically relevant examples of how exceptional situations have been dealt with in parliamentary and presidential systems. The Weimar 1919 Constitution granted specific emergency powers to the president to be used in responding to domestic emergencies. The study has illustrated the relevancy of the Weimar 1919 Constitution's Article 48 in particular and how it may serve as an example of how to, or how not to, formulate constitutional emergency powers; the study did not mean to use Weimar as a "warning example" of how emergency powers could be misused in later times, as was interpreted, for example, in the 1970s during the US Congress debates on the National Emergencies Act.

The Weimar debates on Article 48 were discussed in Chapter 2. Interestingly, despite the very different frameworks for the use of emergency powers in Weimar and in the US there are certain similarities. For example, the Weimar Reichstag to some extent gave up its legislative power to the president when it passed the enabling acts. The US Congress has faced criticism for allowing the president to draft bills in times of crisis without ensuring adequate possibilities for congressional review and oversight. US presidents have also been criticized for acting without seeking prior congressional consent. In both cases, the main question seemed to be that only the legislative branch – Congress or the Reichstag - could prevent the powers from "slipping from its fingers", to use Justice Jackson's words in the *Youngstown* v. *Sawyer,* 343 US 579 (1952).

What ought to be noted is that particularly because of Article 48, the Weimar regime was not a typical cabinet government system, even though Weimar governments were responsible to the parliament. In Weimar the executive was divided between the president and the government. This kind of "dual executive" has not existed in the United States, and therefore indirect measures have been required to control the government and the president.

While the US Constitution is silent on emergency powers, there is room for interpretation and flexibility. The Constitution includes the *habeas corpus* writ, but no specific reference is made to the possibility to suspend or transfer constitutional powers in times of crisis. The lack of explicit constitutional language has resulted in varying interpretations of the constitutional powers in different contexts. The debates of the 1970s seemed to concentrate on the question of to what extent the explicit language of the Constitution could be adapted to the political circumstances at the time. What does it mean to say that Congress shall declare war? What does it mean to maintain a separation of powers in times of war and emergency? How may the contingency in the executive-legislative relationship during times of war and emergency be reduced? And, finally, to what extent can Congress control presidential use of war and emergency powers within the separation of powers system? As discussed in detail in Chapter 3, there were different constitutional interpretations of war-making. For example, the US Senate accorded a considerably greater role to the Congress in both the WPR and the NEA debates than did the House. The institutional characteristics of the different houses partly explain their differing approaches. The members of the House of Representatives face elections every two years. When the public supports the president, representatives must take into account this support. Senators can afford to be more critical toward the president as they serve two years longer than the president.

Central to the debates analyzed in the thesis was the concept of the Constitution. What did the Constitution, the separation of powers and the checks and balances system mean for the Founding Fathers and how do they relate to contemporary politics? The 1970s US debates especially referred to the imbalance of powers in foreign policy matters, which as Congress saw it, undermined the US Constitution and the separation of powers principle. That Congress shall declare war may be more a constitutional ideal than a historically grounded principle. Given the historical background, Congress had to invent a War Powers Resolution that respected not only the constitutional framework, but also the historical precedents that seemed to acknowledge the role of the executive as the first branch in war-making. "When the foreign policy issues are supported by Congress and the American people", then new congressional legislation on war-making "strengthens the presidency as well" noted Representative Anderson during the debate on the Conference Report of the WPR in the House (October 12, 1973, 33872).

This study set out to investigate the "historical opportunity" of Congress in the early 1970s to reassert its constitutional powers in war-making. It seems that this was part of a more general trend in which Congress sought to regain its political powers. The war power debates are indeed interesting because the powers are divided at the same time as they are shared. The presidential "monopoly" in national security issues, as Congress saw it, forced Congress to react. The political context of the 1970s brought Congress to a turning point in the executive-legislative relationship. It is clear that the WPR bill enjoyed considerable support among the members of the Congress and as a result Congress was

able to override President Nixon's veto. The proponents of the bill described the contemporary political context as being the right time for Congress to act. In the minds of opponents, the time was not right for a redefinition of constitutional powers due to the turmoil caused by the Vietnam War, the Watergate scandal, and the divisions in Washington between Republican presidency and a Democrat–controlled Congress. The reason to oppose or to support the legislation, however, varied among the members and the parties. What was emphasized in the debates in regard to the political context of the time was that Congress was legislating also for the future and not only for the moment.

Congress recovered the momentum again three years later when passing the National Emergencies Act, as was discussed in Chapter 4. In addition to the four formally continuing national emergencies, the president was estimated to possess up to 470 special emergency powers. The view of members of Congress was that, even though the existing emergencies had not resulted in severe violations or suspensions of basic rights, the potential for such abuse continued to exist. In order to avoid the possible arbitrary use of powers, Congress members sought to maintain the constitutional balance of power, particularly through restoring the powers of Congress in regard to war and national emergencies.

To prevent arbitrary presidential use of powers, Congress sought to bring the emergency powers under its own control. The intention of Congress in enacting the NEA was to secure its control of the use of emergency powers and to ensure that effective oversight was provided through Congress rather than through courts. A similar idea appeared in the WPR debates. Representative du Pont, for example, illustrated this in the House by saying, "*Unfortunately, we have little judicial precedent to look to for guidance. I want to point, however, that as members of Congress we are sworn to uphold the Constitution. We ourselves have the ability to make the precedent.*" (Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President, June 25, 1973, 21223.) Du Pont's argument illustrates the turning point of Congress in the 1970s. Congress should not rely on courts for a restoration of its own constitutional powers. Further, by enacting statutory legislation Congress could provide the necessary oversight and accountability.

The National Emergencies Act of 1976 established a regular congressional oversight mechanism on national emergencies and the possibility to terminate emergencies by enactment of a concurrent resolution, which are not subject to presidential veto. The law reinforced the authority of Congress, but also maintained the president's flexibility to respond to future exigencies. Members of Congress regarded the Act as highly significant at the time. The NEA has, however, lost at least some of its relevancy in the contemporary context. The Act has been applied for example in relation to 9/11. The problem in this context has been the lack of regular oversight over emergency powers by the executive. The NEA may be regarded as in part a failure, for emergencies continue to be formally enduring, long-term affairs. The public and Congress are nowadays, however, aware of what powers are involved in national emergency proclamations.

Unlike the NEA debates, the post-9/11 analyzed contained no direct references to the experiences of the Weimar Republic. However, some parallels, and similar formulations and arguments can be distinguished in both the Weimar and the post-9/11 debates. The debates on the "state of exception" in the United States after 9/11 was not about suspending provisions of the Constitution or bypassing the Congress per se. A juxtaposition between debate and decision-making adapted from Schmitt's concept of *Ausnahmezustand* can, however, be perceived in the 9/11 debates.

Since the US Constitution specifies no emergency powers in the way that Article 48 of the Weimar 1919 Constitution does, the US president, in order to respond to the novel threat of terrorism, must rely on an interpretation of what "inherent powers" are implicitly granted by the Constitution to the president or on statutory delegations of powers by the Congress. As the post-9/11 debates illustrate, by a statutory delegation of powers, Congress not only authorized new powers, but also limited some of the authority of the president.

The politics of momentum to restore a specific situation presupposes certain similarities between the past and present-day state of affairs. It is also premised on the notion that Congress, the institution behind this momentum, has sufficient power to give such restoration a fighting change. When reading the WPR debates, one is left with the impression that the specific momentum that members of Congress were aware of has gone unrecognized or unappreciated by later researchers and politicians. The results of that momentum, namely, the laws enacted in the 1970s and changed relationship between the executive and the legislative branches, also suggest the failure of Congress to maintain the political momentum. In short, the change in the executive-legislative relationship was not a definitive turning point, for Congress continues to struggle with the same questions and problems as in the 1970s. The essential difference now is that members of the Congress have not challenged the executive in a manner similar to the way Congress did in the 1970s.

The momentum here, however, is premised not only congressional power and opportunity to maintain the momentum, but also that Congress has the will to act. A question raised already during the debates of the 1970s was whether future members of Congresses would have the willingness to oversee and hold the executive accountable. Representative Zablocki (1984, 597) noted ten years after passing the War Powers Resolution that the WPR is "a political fact of life". But he (ibid.) further emphasized "*this does not mean some changes in Resolution's framework may not be desirable at an appropriate political moment*."

It should be noticed that, unlike the parliamentary system, the president is not responsible to Congress and Congress cannot decide the fate of the executive branch. Therefore, there were no references in the debates to the idea that Congress should ever exercise effective parliamentary "control" over the presidency as such. Instead, references were made to the principle of separation of powers system, and that this system of checks and balances should not be undermined as is threatened when the powers of the president expand and infringe on the powers of Congress. The role of Congress is not only to produce

legislative results, but also to slow-down the decision-making process. Congress is the first instance a legislature, but debate has an important affirmative role in the legislative process. A question of topical concern that did not really appear in the WPR or NEA debates is how Congress can strengthen its abilities and realize its potential as an institution. Making better use of its procedures and securing adequate time for consideration and debate on introduced measures, including emergency measures, would be one possibility. The existing of a parliamentary procedure is the one of the most significant factors that distinguishes Congress from the executive branch of government. In the post-9/11 debates, for example, Congress has put a special emphasis on the need to follow the congressional procedures and thereby secure adequate time to debate the motions that are introduced.

Although Congress cannot elect the members of the cabinet or vote them out of the office, Congress does have other means to control and oversee the executive. In the debates, members of Congress referred to the power of the purse, for example, as well as to: impeachment; the use of concurrent resolutions; the ability to influence the public, the media, and the voters; Congress' control of time and agenda, in particular, the filibuster in the Senate, which provides an opportunity for a minority to challenge the majority views; the power of Congress to legislate and to propose constitutional amendments. Further, automatic termination provisions on emergency and war-making authorities as well as the "court of public opinion" i.e. the popular vote at the end of the president's electoral term were referred to.

One of the sponsors of the Senate war powers bill (Senator Javits) emphasized that it is much harder to terminate a war after one has started because e.g. any attempt to cut-off funds is subject to presidential veto (War Powers Act, July 18, 1973. 24583). Opponents of the WPR bill, such as Senator Goldwater, emphasized the other means Congress has as its disposal to control the executive branch of government:

> Congress can set the size of the various branches of the armed services. Congress can choose not to increase taxes, thereby placing tremendous political pressure on a president where own instincts for international adventurism must be weighed against the risks of bucking a public that want butter not guns and of assuming the stigma of a grossly unbalanced budget. Congress can also repel or limit the numerous delegations of emergency powers that have been granted the president over wages and prices, the exportation, manufacture, or distribution of vital or rare materials, the licensing of trade with foreign countries and the multitude of other economic elements that bear on the defense strength of the US. (The Founding Fathers and War Powers July 19, 1973, 24907)

During the war power debates it was said that Congress should be able to receive more information upon which to base its foreign policy decisions. As referred to in the introduction, some institutional changes were made in Congress in the early 1970s to bring it more up to date in foreign policy issues. The opponents of the WPR claimed that passing a statutory law was not the only way to increase or enhance cooperation between Congress and the president in foreign policy. Proposals were made to establish, for example, a new joint committee or

panel to study governmental decision-making processes as they relate to foreign affairs and the formulation of US foreign policy. A Senate Special Committee, for example, was established to investigate national emergencies and the use of emergency powers in the early 1970s. Furthermore, the committees of Congress may organize hearings and investigations. As identified in the 1970s debates, the means available to Congress to exercise some control over the executive branch were not novel as such.

Ideas from the 1970s were perceptible in the debates after 9/11. As discussed in Chapter 5, legislation of the 1970s was also a backdrop for the 9/11 debates. Issues such as the scope of the powers of the Commander-in-Chief raised many questions and differing interpretations. To what extent may Congress legislate according to its normal procedures in a time of crisis? Does the president need to have authorization from Congress in order to respond to a terrorist attack? A cluster of concepts including the Constitution, the balance of power, war, national emergency, collective judgment and the Commander-in-Chief can be distinguished in both the 1970s and the post-9/11 debates.

Congress responded to 9/11 by enacting statutory law. As a result President Bush's actions had to be adapted to conform to the enacted statutory authorizations. The AUMF debates show that nothing in the AUMF resolution was to be considered as superseding the requirements laid down in the WPR resolution. Some members of Congress, however, pointed out that the substance and the style of language used in the AUMF was vague, and therefore the scope of its reach had yet to be determined. In the post-9/11 debates analyzed in this study, references were not really made to the WPR and the NEA except during the AUMF debates. As Chapter 5 suggests, however, the actions of the administration had to be somehow explicated through the framework of WPR and NEA. The administration could not consider bypassing Congress in the process. Rather it had to follow at least to some extent the framework for dealing with wars and emergencies that was established by Congress in the early 1970s.

As earlier discussed, by enacting statutory legislation Congress set limits on the powers of the executive to act in times of war and emergency. In the 1970s as well as to some extent after 9/11, members of Congress also opposed bills that would legitimatize presidential actions and/or presidential powers. For example, Senator Abourzek expressed his opposition to the war powers legislation as follows: "*Senators have proposed legislation which would authorize impoundments with the provisio that Congress approve them within a given time period. Once again, the Congress would legitimate a clearly unconstitutional Presidential practice in the hope of limiting it.*" (War Powers Act, July 20, 1973, 25053.) The members of Congress had very differing viewpoints as to whether the proposed WPR bill would actually granting more powers to the president or would in fact limit them.

In the 1970s Congress clearly had the momentum. In the post-9/11 debates, however, it seems to me that the situation may be better understood in terms of the presidential momentum, which is traceable to Franklin Delano

Roosevelt's presidency and the expansion of presidential powers, particularly in foreign policy matters and war-making. Unilateral use of war powers by one branch of government seems to be contrary to the writings of the Founding Fathers and the language of the Constitution. Notwithstanding, the US history in its broad outlines tells a different story. With this viewpoint in mind, the challenge was to establish the right balance between an original understanding of the Constitution and the contemporary political context. By passing the laws it did in the 1970s, it seems to me that Congress persisted in its view that interpretation of the Constitution should not be left to the president exclusively.

The Supreme Court has usually declined to decide on issues related to the war and emergency powers, referring to them as political issues. However, when Congress enacted the WPR and the NEA they also become in some sense legal questions. However, they have not been often ruled on by the Court (the *INS.* v. *Chadha* was one exception). By enacting the WPR and the NEA, Congress wanted to ensure that it and not the courts would oversee and control the use of war and emergency powers. In the aftermath of 9/11, the situation changed. During the debates on the Military Commissions Act, for example, it was noted that the Court has been the only body able to serve as a check on the presidential use of powers since 9/11 (See Senator Leahy's argument in Chapter 5, p. 195-196).

Congress has granted the president new authorities in order to respond to war and emergency situations. The problem has not been the granted authorities as such, but that these powers are never returned to the Congress because it has failed to include oversight or termination requirements into its statutory delegations of powers. Even in cases like the Tonkin Gulf Resolution, which did include a concurrent resolution mechanism for its termination, Congress faced difficulties in repealing its provisions. The post-9/11 debates give the impression that the granting of new powers to the president was necessary because of the novel threat of terrorism. Some members claimed that Congress was granting too much power to the president because the passed laws did not include any sunset or termination provisions (except for certain parts of the USA Patriot Act). As has been noted, when Congress has passed such laws subsequent to 9/11, has imposed limitations to the discretionary powers of the president, in accordance with the principle that when there are statutory laws the president is obliged to follow them.

To summarize the argumentation of the US congressional debates in the 1970s and after 9/11, I will outline some of the rhetorical topoi that can be distinguished in the debates. One of the main controversies related to the use of emergency and war powers has been the juxtaposition between, on the one hand, urgency or necessity, versus the following of normal procedures. The institutional differences between Congress and the president are relevant in this regard. To what extent is it reasonable to allow a place for a deliberative process in times of crisis? If we look at the debates after 9/11 we find there were members of Congress who took the view that Congress can and should maintain the

separation of powers principle by securing sufficient time for debate and deliberation.

Balancing the reason of the state against the ideal of limiting the powers of government was central particularly to the NEA debates, which strove to prevent possible arbitrary uses of powers in the future by putting in place the formal statutory processes of declaring, executing and terminating national emergencies. To what extent does any war or emergency threatens the carefully established constitutional framework of the balance of powers? The question of reviewing the novelty of the threat was central to all of the congressional debates considered in this study, but particularly to the post-9/11 debates. This is closely related also to the discourse of the Constitution. The original reading of the Constitution and interpreting the intention of the Founding Fathers have come into play with modern day political necessities and the recent historical precedents that emphasize the role of the Commander-in-Chief powers of the president.

It should be noted that in the 1970s debates, the historical precedent argument emphasized how the flexibility of Constitution in regard to the division of war powers allowed near monopoly powers for the president in war-making. This argument lacks force, in my opinion when set against the post-Vietnam political context. Some members of Congress have seen the precedent argument as being in recent history implicated in an undermining of congressional war powers, and creating a need for new statutory legislation in order to provide clarification to this "twilight zone" or gray area of Constitution. Not all of the members were, however, convinced about the effectiveness of the legislation in restoring the war-making powers of Congress. Representative Eckhardt, for example, stated during the House debate on the Conference Report of the WPR (October 12, 1973, 33869): "*In the provisions taken from the Senate bill it is said that the bill is to insure the collective judgment of both houses of Congress and the president to apply to the introduction of US Armed Forces into hostilities or into situations wherein involvement is hostilities is clearly indicated. I thought it was the judgment of Congress alone*." In the WPR debates, the House discussed extensively the bill in terms of, for example, the automatic termination provisions, concurrent resolution, constitutional amendment, legislative-executive institutional differences, and whether the bill actually granted new powers to the president.

In the NEA debates the context was, however, very different because there was no constitutional provision to turn to. However, it is important to note that the NEA legislation enjoyed broad bipartisan support and the debates themselves were less controversial and polarized.

After 9/11 the novelty and "seriousness" of the situation provided the need-to-act-now-arguments that seemed to some extent to override the opposing views about the need to follow the normal procedures even in times of crisis and to secure enough time for a thoughtful consideration of motions. However, even in such a tumultuous political situation, many congressional members upheld the principle and the value of the culture of the debate.

The turning point of the 1970s, as Congress members identified it, was not an absolute break if we consider it from the viewpoint of momentum. The turning point was not that decisive when considering the bills that were passed and their relevancy in the contemporary debates. For my point of view, however, neither has the framework established in the 1970s been completely bypassed in the wake of 9/11. Even post-9/11 members of Congress have referred to the necessity of including Congress in the decision-making process and to the importance of holding a thorough debate on any legislation that would authorize new or additional powers to the president. Therefore, it seems that in the executive-legislative relations in regard to war-making and national emergencies, the situation after 9/11 has not meant a return to the situation as it was before the reforms of the 1970s. These reforms were not without effect; their momentum is still felt on.

TABLE 1 Party division in the US Congress 1969-1977

President	Congress	R House	D House	Other	R Senate	D Senate	Other
Richard M. Nixon (R)	91st 1969-1971	192	243		43	57	
Nixon	92nd 1971-1973	180	254		44	54	1 Conservative 1 Independent
Nixon / Gerald Ford (R)	93rd 1973-1975	192	239	1 Ind. Democrat	42	56	1 Conservative 1 Independent
Ford	94th 1975-1977	144	291		37	60	1 Conservative 1 Independent

Data from: US Senate Party division in the Senate, 1789 - Present.
http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm
Party Divisions of the House of Representatives 1789 to present
http://artandhistory.house.gov/house_history/partyDiv.aspx

TIIVISTELMÄ

Tutkimuksessa tarkastellaan erilaisia poikkeustilanteita ja niihin liittyviä valtuuksia parlamentaarisessa ja presidentiaalisessa järjestelmässä poliittisesti ja historiallisesti merkittävien esimerkkien kautta. Siinä analysoidaan Yhdysvaltojen kongressin debatteja 1970-luvulla ja vuoden 2001 syyskuun 11. päivän terroristi-iskujen jälkeen. Kongressin debatit suhteutetaan Weimarin vuoden 1919 perustuslaista ja erityisesti sen 48. artiklasta dokumentoituihin keskusteluihin, jotka koskivat perustuslaillisia poikkeustilavaltuuksia ja niiden tulkintaa. Weimarin 1919 perustuslakia koskevassa kansalliskokouksessa ja myöhemmin parlamentissa käydyt keskustelut muodostavat erityisen poikkeustilaa koskevan kysymysten agendan, jota voidaan soveltaa mainittuihin kongressin debatteihin 1970-luvulla ja 9/11-iskun jälkeen. Weimarissa käydyt keskustelut ovat tutkimuksen kannalta mielenkiintoisia etenkin poikkeustilojen ja poikkeustilavaltuuksien parlamentaarisen kontrollin näkökulmasta tarkasteltuna.

Tarkoituksena on nostaa kokonaan uusi tutkimuksellinen näkökulma kongressin asemasta ja itseymmärryksestä presidentiaalisessa järjestelmässä. Tuomalla esiin poikkeustilojen problematiikan ja parlamentaarisen auktoriteetin välinen yhteys valtiosääntöpolitiikkaa ja -oikeutta voidaan lähestyä nykytutkimuksesta poikkeavasta näkökulmasta. Keskeistä siinä on tutkia debattien kautta etenkin kongressin jäsenten omia tulkintoja kongressin perustuslaillisesta asemasta ja valtuuksista suhteessa toimeenpanovaltaan ja siihen, miten tutkimuksessa tarkasteltavat 1970-luvun lakiesitykset asettuvat suhteessa kysymykseen kongressin vallan palauttamisesta etenkin ulkopolitiikkaan liittyvissä kysymyksissä.

Parlamentaarisen kontrollin mahdollisuuden kannalta keskeinen referenssi on Walter Bagehotin vuonna 1867 julkaisema kirja *The English Constitution.* Bagehot korosti hallinnon kontrollin mahdollisuuksia ja parlamentin auktoriteettia nimenomaan parlamentaarisen debatin kautta. Parlamenttia lähestytään tässä tutkimuksessa lähtökohdasta, jonka mukaan myös presidentiaalisessa, vallanjakoon perustuvassa järjestelmässä agendan esityksistä debatoidaan puolesta ja vastaan parlamentaarisen proseduurin mukaisesti. Poikkeus- ja sotatilaan liittyvien keskustelujen erityinen lukutapa ottaa lähtökohdakseen retorisen- ja käsitehistoriallisen analyysin.

Toimeenpanovallan kasvu etenkin ulkopolitiikkaan liittyvissä kysymyksissä on ollut hallitseva trendi presidentti Franklin Delano Rooseveltin valtakaudesta lähtien. Kongressi ei ole kuitenkaan hyväksynyt tätä kehitystä sellaisenaan ilman mitään vastakkaisia argumentteja. Tutkimuksessa tarkastellaan kahta poliittista tapahtumaa, joita voidaan luonnehtia kongressin yritykseksi (momentum) palauttaa sen perustuslaillinen valta liittyen sota- ja poikkeustilanteisiin. Nämä tapahtumat ovat the *War Powers Resolution* (WPR 1973) ja the *National Emergencies Act* (NEA 1976) ja erityisesti niistä käydyt keskustelut kongressissa. Nämä kaksi debattia asetetaan tutkimuksessa suhteessa kolmanteen uudempaan esimerkkiin poikkeuksellisista tilanteista, nimittäin syyskuun 11. päivän 2001 terroristi-iskuista käytyihin keskusteluihin.

1970-luvun sota- ja poikkeustilavaltuuksia koskevat keskustelut Yhdysvalloissa ovat erityisen mielenkiintoisia tutkimuskohteita, koska niiden voidaan katsoa olevan tietynlainen käännekohta toimeenpano- ja lainsäädäntövallan välisessä suhteessa. Näiden keskustelujen tulkinnassa on olennaista huomata poliittinen konteksti, vaikka tutkimuksen tarkoituksena ei olekaan kirjoittaa Yhdysvaltojen historiaa sellaisenaan. Perustuslaillisten valtuuksien tulkinta erityisesti Vietnamin sodan ja Watergate-skandaalin jälkeen herätti runsaasti kysymyksiä uuden lainsäädännön tarpeellisuudesta ja legitimiteetistä. Hyväksymällä the *War Powers Resolutionin* kongressin tarkoituksena oli korostaa, että ulkopolitiikkaan liittyvässä päätöksenteossa huomioitaisiin sekä lainsäädäntö- että toimeenpanovalta.

Kahta edellä mainittua lakiesitystä koskevaa keskustelua on mielekästä tarkastella erikseen, koska ne poikkeavat toisistaan. Yhdysvaltain perustuslaissa sotaan liittyvät toimivaltuudet on jaettu presidentin ja kongressin kesken. Uutta lainsäädäntöä sekä puolustettiin että vastustettiin vetoamalla perustuslakiin, sen ”oikeaan” tulkintaan ja soveltuvuuteen erilaisissa poliittisissa konteksteissa. Perustuslaissa ei ole kuitenkaan mitään mainintaa erilaisista poikkeustilanteista, kuten Weimarin vuoden 1919 perustuslain 48. artiklassa, lukuun ottamatta *habeas corpus* -säädöstä, joten NEA-keskusteluiden kannalta olennaisia olivat perustuslain yleiset periaatteet, kuten vallanjakoperiaate. Huolimatta pitkään jatkuneista poikkeustiloista, varsinaisia poikkeustilavaltuuksien väärinkäytöksiä ei ollut tapahtunut Yhdysvalloissa. Keskusteluissa kuitenkin korostettiin, että poikkeustilanteita sellaisenaan ei tulisi vähätellä. Keskusteluissa viitattiin Weimariin esimerkkinä poikkeustilavaltuuksien käytön problemaattisuudesta. Hyväksymällä uutta poikkeustilojen julistamista ja valtuuksien käyttöä koskevaa lainsäädäntöä kongressin tarkoituksena oli lisätä mahdollisuuksia kontrolloida ja arvioida poikkeustiloja ja etenkin poikkeustilavaltuuksien tarpeellisuutta.

Tutkimuksessa vuoden 2001 syyskuun 11. päivän jälkeistä tilannetta tulkitaan presidentiaalisen momentumin kautta. Se liittyy sekä republikaanien että demokraattien osoittamaan tukeen presidentin toimille uudessa ja dramaattisessa tilanteessa terroristi-iskujen jälkeen, mutta myös toisen maailmansodan jälkeiseen yleiseen toimeenpanovallan kasvun trendiin, joka on havaittavissa myös muualla kuin Yhdysvalloissa.

Huolimatta tietynlaisesta presidentin valtaoikeuksien korostumisesta ja koetusta tilanteen uutuudesta, kongressin 1970-luvulla hyväksymällä sota- ja poikkeustilanteita koskevalla lainsäädännöllä on ollut oma merkityksensä myös nykyisessä keskustelussa. Presidentti Georg W. Bush julisti poikkeustilan the *National Emergencies Act* -lainsäädännön perusteella vain muutama päivä vuoden 2001 terroristi-iskujen jälkeen. Kongressi myös auktorisoi presidentille toimivaltaa hyväksymällä uutta lainsäädäntöä kuten AUMF of 2001 (*Authorization for Use of Military Force*), jonka katsottiin olevan yhteensopiva kongressin vuonna 1973 hyväksymän the *War Powers Resolutionin* kanssa.

Syyskuun 11. päivän debateissa myös selkeästi viitataan teemoihin, jotka jo 1970-luvun keskusteluissa olivat keskeisiä, kuten perustuslain tulkinta ja so-

veltuvuus erilaissa poliittisissa konteksteissa sekä lainsäädäntövallan ja toimeenpanovallan suhde poikkeuksellisissa tilanteissa. Huolimatta tapahtuman vaatimasta nopeasta päätöksenteosta ja erilaisten presidentin toimivaltuuksien hyväksymisestä, kongressissa korostettiin erityisesti debatin ja proseduurien noudattamisen merkitystä sekä perustuslaillisen vallanjakojärjestelmän että kongressin omien perustuslainmukaisten valtaoikeuksien kannalta.

Tutkimuksessa osoitetaan miten kongressin voidaan katsoa jossakin määrin menettäneen 1970-luvun momentuminsa, mutta vuoden 2001 syyskuun 11. päivän terroristi-iskujen jälkeiset keskustelut selkeästi osoittavat, että tilannetta tulkittiin osittain 1970-luvun lainsäädännön kehyksen kautta, ja että terroristi-iskuista huolimatta presidentin oli toimissaan otettava huomioon myös kongressi.

REFERENCES

Weimarer Nationalversammlung
Verhandlungen des Deutschen Reichstags
http://www.reichstagsprotokolle.de/rtbiiiaufauf_wv.html

Stenographische Berichte Band 326, 17. Sitzung, 28. Februar 1919
Stenographische Berichte Band 327, 46. Sitzung, 4. Juli 1919
Stenographische Berichte Band 327, 47. Sitzung, 5. Juli 1919
Stenographische Berichte Band 328, 70. Sitzung, 30. Juli 1919
Stenographische Berichte Band 330, 112. Sitzung, 29. Oktober 1919
Stenographische Berichte Band 332, 147. Sitzung, 3. März 1920

1. Wahlperiode:
Stenographische Berichte Band 361, 392. Sitzung, 22. November 1923
Stenographische Berichte Band 361, 405. Sitzung, 5. März 1924

Verfassunggebende Deutsche Nationalversammlung. Aktenstück Nr. 59. Entwurf einer Verfassung des Deutschen Reichs 21.2.1919. http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000019_00066.html
Verfassungsgebende Deutsche Nationalversammlung Aktenstück Nr. 391 IV. Abschnitt. Band 336, 22. Sitzung, 4.4.1919. Der Reichspräsident Referat des Berichterstatters Dr. Ablass. http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000020_00233.html
Verfassunggebende Deutsche Nationalversammlung. Aktenstück Nr. 391. Entwurf einer Verfassung des Deutschen Reichs nach den Beschlüssen des 8. Ausschusses Band 336, 21.6.1919. http://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000020_00000.html

Congressional Record:

War Powers Resolution of 1973:
Conference Report on House Joint Resolution 542, War Powers Resolution of 1973. Congressional Record (House), October 12, 1973, 33858-33874.
Goldwater, Barry. 1973. *The Founding Fathers and War Powers*. Congressional Record (Senate), July 19, 1973, 24901-24911.
Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President. H.Res. 456. Congressional Record (House), June 25, 1973, 21205-21209.
Providing for Consideration of House Joint Resolution 542, War Powers of Congress and the President. Congressional Record (House), June 25, 1973, 21209-21236.
War Powers Act (S.440). Congressional Record (Senate), July 18, 1973, 24531-24550.

War Powers Act (S.440). Congressional Record (Senate), July 18, 1973, 24590-24596.
War Powers Act (S.440). Congressional Record (Senate), July 20, 1973, 25051-25092.
War Powers Act (S.440). Congressional Record (Senate), July 20, 1973, 25093-25120.
War Powers of Congress and the President (H.J.Res.542). Congressional Record (House), July 18, 1973, 24653-24708.
War Powers of Congress and the President – Veto. Congressional Record (Senate), November 7, 1973, 36175-36198.
War Powers Resolution of 1973 – Conference Report. Congressional Record (Senate), October 10, 1973, 33548-33569.
War Powers Resolution – Veto Message from the President of the United States. Congressional Record (House), November 7, 1973, 36202-36222.

National Emergencies Act of 1976:

Church, Frank. 1974. *A National Emergency.* Congressional Record (Senate), August 22, 1974, 29975-29986.
Church, Frank. 1976. *The National Emergencies Act*. Congressional Record (Senate), September 29, 1976, 33416-33418.
Debate and adoption of S.3957. Congressional Record (Senate), August 22, 1974, 18356-18367.
Drinan, Robert. 1975. *Amendments needed to improve National Emergencies Act*. Congressional Record (House), September 3, 1975, 27480-27481.
Legget, Robert L. 1975. *In Support of the Matsunaga Amendment*. Congressional Record (House), September 5, 1975, 27792-27793.
National Emergencies Act (Consideration of S.3957). Congressional Record (Senate), October 7, 1974, 34011-34022.
Providing Consideration of H.R.3884, National Emergencies. Congressional Record (House), September 4, 1975, 27631- 27647.
Rodino, Peter W. 1974. *Bill to End Unterminated National Emergencies*. Congressional Record (House), September 16, 1974, 31133.
Taft, Robert Jr. 1974. *The National Emergencies Act*. Congressional Record (Senate), October 9, 1974, 34557.
Termination of National Emergencies (H.R.3884). Congressional Record (Senate), August 27, 1976, 28224-28228.

Congressional debates after 9/11:

Available at:
http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CREC

Appointment of Conferees on H.R.3199, USA Patriot and Terrorism Prevention Reauthorization Act of 2005. Congressional Record (House), November 9, 2005, H10084-H10090.

Authorizing Use of United Armed Forces Against Those Responsible for Recent Terrorist Attacks Against the United States (AUMF, H.J.Res.64). Congressional Record (House), September 14, 2001, H5638-H5681.
Authorization for Use of Military Force (AUMF, S.J.Res.23). Congressional Record (Senate), September 14, 2001, S9413-S9421.
Homeland Security Act of 2002 (H.R.5005). Congressional Record (House), July 25, 2002, H5633-H5704.
Homeland Security Act of 2002 (H.R.5005). Congressional Record (House), July 26, 2002, H5793-H5845.
Homeland Security Act of 2002 (H.R.5005). Congressional Record (House), July 26, 2002, H5845-H5888.
Homeland Security Act of 2002 (H.R.5005). Motion to proceed. Congressional Record (Senate), September 3, 2002, S8036-S8041, S8052-S8078.
Homeland Security Act of 2002 (H.R.5005). Congressional Record (Senate), September 9, 2002, S8352-S8367.
Homeland Security Act of 2002 (H.R.5005). Congressional Record (Senate), September 12, 2002, S8527-S8535.
Homeland Security Act of 2002 (H.R.5005). Congressional Record (Senate), September 13, 2002, S8595-S8609.
Homeland Security Act of 2002 (H.R.5005). Congressional Record (Senate), September 18, 2002, S8718-S8746.
Homeland Security Act of 2002 (H.R.5005). Congressional Record (Senate), September 19, 2002, S8880-S8889.
Homeland Security Act of 2002 (H.R.5005). Congressional Record (Senate), September 24, 2002, S9056-S9065.
Military Commissions Act of 2006 (H.R.6166). Congressional Record (House), September 27, 2006, H7522-H7561.
Military Commissions Act of 2006 (S.3930). Congressional Record (Senate), September 28, 2006, S10354-S10431.
Patriot Act of 2001 (H.R.2975). Congressional Record (House), October 12, 2001, H6726-H6776.
Providing for Consideration of H.R.5005, Homeland Security of 2002. Congressional Record (House), July 25, 2002, H5621-H5631.
Providing for Consideration of H.R.3199, USA Patriot and Terrorism Prevention Reauthorization Act. Congressional Record (House), July 21, 2005, H6210-H6221.
Providing for Consideration of H.R. 6166, Military Commissions Act of 2006. Congressional Record (House), September 27, 2006, H7508-7520.
Uniting and Strengthening America Act (USA Act, S.1510) 2001. Congressional Record (Senate), October 11, 2001, S10547-S10630
Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act 2001 (H.R.3162). Congressional Record (House), October 23, 2001, H7159-H7207.
USA Patriot Act (H.R.3162) 2001. Congressional Record (Senate), October 25, 2001, S10990-S11059.

USA Patriot and Terrorism Prevention Reauthorization Act of 2005 (H.R.3199). Congressional Record (House), July 21, 2005, H6221-H6269, H6239-H6309.
USA Patriot Act and Terrorism Prevention Reauthorization Act of 2005 - Conference Report to accompany H.R.3199. Congressional Record (Senate), December 16, 2005, S13708-S13735.
USA Patriot Act and Terrorism Prevention Reauthorization Act of 2005 – Conference Report to accompany H.R.3199. Congressional Record (Senate), March 2, 2006, S1598-S1632.
Waiving Requirement of clause 6(a) of rule XIII with respect to consideration of certain resolutions. H.Res. 264 (to H.R.2975). Congressional Record (House), October 12, 2001, H6706-H6712.

Committee reports and hearings:

War Powers Resolution:

Committee on Foreign Affairs of the House of Representatives. 91st Congress, 2nd session. Report No. 91-1547. *Concerning the War Powers of Congress and the President*. Report to accompany H.J.Res. 1355. Washington: US Government Printing Office.
Committee on Foreign Affairs of the House of Representatives. 92nd Congress, 1st session. Report No. 92-383. *Concerning the War Powers of Congress and the President*. Report to accompany H.J.Res.1. Washington: US Government Printing Office.
Committee on Foreign Affairs of the House of Representatives. 92nd Congress, 2nd session. Report No. 92-1302. *Concerning the War Powers of Congress and the President.* Report to accompany S.2956. Washington: US Government Printing Office.
Committee on Foreign Affairs of the House of Representatives. 93rd Congress, 1st session. Report No. 93-287. *War Powers Resolution of 1973*. Report to accompany H.J.Res. 542. Washington: US Government Printing Office.
Committee on Foreign Relations of the United States Senate. 93rd Congress, 1st session. Report No. 93-220. *War Powers*. Report to accompany S.440. Washington: US Government Printing Office.
Subcommittee on the Constitution, Federalism, and Property Rights of the Committee on the Judiciary of the United States Senate. 107th Congress, 2nd session. S.HRG. 107-892. *Hearings: Applying the War Powers Resolution to the War on Terrorism*. April 17, 2002. Washington: US Government Printing Office.
Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs House of Representatives. 93rd Congress, 1st session. Report No. 93-626. *War Powers Hearings*. Washington: US Government Printing Office.

National Emergencies Act:

Committee on the Judiciary of House of Representatives. 94th Congress, 1st session. Report No. 94-238. *National Emergencies*. Report to accompany H.R.3884. Washington: US Government Printing Office.

Committee on Government Operations and the Special Committee on National Emergencies and Delegated Emergency Powers United States Senate 1976: *The National Emergencies Act (Public Law 94-412) Source Book: Legislative History, Texts, and Other Documents*. Washington: US Government Printing Office.

Committee on Government Operations United States Senate. 94th Congress, 2nd session. Report No. 94-1168. *National Emergencies Act. Report to Accompany H.R. 3884, Terminating Certain Authorities with Respect to National Emergencies Still in Effect and to Provide for Orderly Implementation and Termination of Future National Emergencies*. Washington: US Government Printing Office.

Special Committee On National Emergencies and Delegated Emergency Powers of the United States Senate. 93rd Congress, 2nd session. Report No. 93-1170. *A Recommended National Emergencies Act. Interim Report*. Washington: US Government Printing Office.

Special Committee on the Termination of the National Emergency of the United States Senate. 93rd Congress, 1st session. A Committee Print 96-780. *Review and Manner of Investigating Mandate Pursuant to S.RES. 9, 93d Congress. A Working paper.* Washington: US Government Printing Office.

Special Committee On National Emergencies and Delegated Emergency Powers of the United States Senate. 94th Congress, 2nd session. Report No. 94-922. *Final Report National Emergencies and Delegated Emergency Powers.* Washington: US Government Printing Office.

Special Committee on the Termination of the National Emergency of the United States Senate. 93rd Congress, 1st session. *Hearings: Part 1- Constitutional Questions concerning Emergency Powers*. April 11, 12, 1973. Washington: US Government Printing Office.

Other referred Congressional Materials:

A United Response. Congressional Record (Senate), September 14, 2001, S9422-S9430.

Constitutional amendment regarding appointment of Individuals to fill vacancies in House of Representatives (H.J. Res. 83). Congressional Record (House), June 2, 2004, H3665-H3681.

Continuity in Representation Act of 2005. (H.R.841, 109th Congress). http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.00841:

Department of State publications 8591. 1971. General Foreign Policy Series 255. Current Foreign Policy: *Congress, the President, and The War Powers*.

Expressing Sense of Senate and House of Representatives Regarding Terrorist Attacks 2001 launched against United States. 2001. Congressional Record (House), September 11, 2001, H5503-H5590.

Joint Resolution of Congress. S.J.Res.22, September 12, 2001. *Expressing the sense of the Senate and House of Representatives regarding the terrorist attacks launched against the United States on September 11, 2001*. http://www.gpo.gov/fdsys/pkg/BILLS-107sjres22enr/pdf/BILLS-107sjres22enr.pdf

Joint Resolution of Congress. S.J.Res.23, September 14, 2001. *To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States*. http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm

Kirk, Mark. 2001. *Our Political Tradition*. Congressional Record (House), February 8, 2001, H236-H238.

Legislative Branch Appropriations Act 2006 (H.R.2985, 109th Congress). http://www.gpo.gov/fdsys/pkg/BILLS-109hr2985enr/pdf/BILLS-109hr2985enr.pdf

Message from the President of the United States. *Vetoing House Joint Resolution 542, A Joint Resolution concerning the War Powers of Congress and the President, October 25, 1973*. House Document No. 93-171.

Relyea, Harold C. 1974. *A Brief History of Emergency Powers in the United States. A Working Paper*. Prepared for the Special Committeeon National Emergencies and Delegated Emergency Powers United States Senate. Washington: US Government Printing Office.

Repeal of the Authorization for Use of Military Force (H.R.198, 113th Congress). http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.198:

Online databases and resources:

Biographical Directory of the United States Congress: http://bioguide.congress.gov/biosearch/biosearch.asp

Heinonline database online access to Congressional Record vols. 1-155: http://home.heinonline.org/ (Subscription required)

US Government Printing Office access to the Congressional Record online, 103rd Congress, 1994 – date: http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CREC

The Library of Congress (Thomas): http://thomas.loc.gov/home/thomas.php

Verhandlungen des Deutschen Reischtags: http://www.reichstagsprotokolle.de/index.html

Online sources (All checked 2.5.2013):

Ackerman, Bruce. 2009. Why We Need a Commission on Presidential Power. The *American Prospect*. March 25, 2009. http://prospect.org/article/why-we-need-commission-presidential-power

Barret, John Q. 2007. The Nuremberg roles of Justice Robert H. Jackson. *Washington University Global Studies Law Review*. Vol. 6, No. 3, 511-525. http://law.wustl.edu/WUGSLR/Issues/Volume6_3/barrett.pdf

Brandeis, Louis. 1926. *Dissenting opinion, Myers v. United States*, 272 US 52 (1926). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0272_0052_ZD1.html

Bush, George W. 2001. *Declaration of National Emergency by Reason of Certain Terrorist Attacks*. 14.9.2001. http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010914-4.html

Congressional Institute. *112th Congress House Floor Procedures Manual*. http://conginst.org/112th-congress-house-floor-procedures-manual/

Continuity of Government Commission. 2003. *Preserving Our Institutions. The Continuity of Congress. First Report.* http://www.brookings.edu/~/media/research/files/reports/2003/5/governance%20continuity%20of%20government/continuityofgovernment.pdf

Dean, John. 2002. *FindLaw Forum: President needs congressional approval to declare war on Iraq*. http://archives.cnn.com/2002/LAW/08/columns/fl.dean.warpowers/

Doyle, Charles. 2001. *Terrorism: Section by Section Analysis of the USA Patriot Act*. CRS Report for Congress. Order Code RL31200, December 10, 2001. http://fpc.state.gov/documents/organization/7952.pdf

Ford, Gerald. 1976. *Statement on Signing the National Emergencies Act. September 14, 1976.* http://www.presidency.ucsb.edu/ws/index.php?pid=6334#axzz1tWR223gE

Garvey, Todd. 2012. *Presidential Signing Statements: Constitutional and Institutional Implications*. CRS Report for Congress. Order Code RL33667, January 4, 2012. http://www.fas.org/sgp/crs/natsec/RL33667.pdf

Gesetz betreffend die Verfassung des Deutschen Reiches vom 16. April 1871 [„Bismarcksche Reichsverfassung"]. http://www.documentarchiv.de/

Grimmet, Richard F. 2010. *The War Powers Resolution: After Thirty-Six Years*. CRS Report for Congress. Order Code R41199, April 22, 2010. http://www.fas.org/sgp/crs/natsec/R41199.pdf

GovTrack. H.R.5005, Homeland Security Act of 2002. *Voting Record on the Passage of the Bill.* http://www.govtrack.us/congress/bills/107/hr5005

GovTrack. S.3930, Military Commissions Act of 2006. *Voting record on the passage of the bill*. http://www.govtrack.us/congress/bills/109/s3930

GovTrack. H.R.3162, Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism (USA PATRIOT Act of 2001). *Voting Record on the passage of the Bill.* http://www.govtrack.us/congress/bills/107/hr3162

GovTrack. H.R.3199, USA Patriot Improvement and Reauthorization Act of 2005. *Voting Record on the passage of the Bill*. http://www.govtrack.us/congress/bills/109/hr3199

Hamilton, Alexander. 1788. The Real Character of the Executive. *Federalist Papers,* No. 69. http://thomas.loc.gov/home/histdox/fedpapers.html

Jackson, Robert H. 1952. *Concurring opinion, Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0343_0579_ZC2.html

Jefferson, Thomas. 1801. *Jefferson's Manual of parliamentary practice*. http://www.gpo.gov/fdsys/pkg/HMAN-105/content-detail.html

Madison, James. 1788. The Particular Structure of the New Government and the Distribution of Power Among its Different Parts. *Federalist Papers*, No. 47. http://thomas.loc.gov/home/histdox/fedpapers.html

Madison, James or Hamilton, Alexander. 1788. The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments. *Federalist Papers*, No. 51. http://thomas.loc.gov/home/histdox/fedpapers.html

Madison, James or Hamilton, Alexander. 1788. The Total Number of the House of Representatives. *Federalist Papers*, No. 55. http://thomas.loc.gov/home/histdox/fedpapers.html

National Archives. *The Constitutional Amendment Process*. http://www.archives.gov/federal-register/constitution/

National Archives. *The Constitution of the United States 1787*. http://www.archives.gov/exhibits/charters/constitution.html

Obama, Barack. 2011. *Letter from the President on the War Powewrs Resolution*, June 15, 2011. http://www.whitehouse.gov/the-press-office/2011/06/15/letter-president-war-powers-resolution

Obama, Barack. 2012. *Continuation of the National Emergency with Respect to Certain Terrorist Attacks*, September 11, 2012. http://www.whitehouse.gov/the-press-office/2012/09/11/notice-continuation-national-emergency-respect-certain-terrorist-attacks

Relyea, Harold C. 2005. *Continuity of Government: Current Federal Arrangements and the Future*. CRS Report for Congress. Order Code RS21089, August 5, 2005. http://www.fas.org/sgp/crs/secrecy/RS21089.pdf

Relyea, Harold C. 2007. *National Emergency Powers*. CRS-report for Congress. Order Code 98-505 GOV, August 30, 2007. http://www.fas.org/sgp/crs/natsec/98-505.pdf

Robert, Henry, M. 1876. *Robert's Rules of Order*. http://www.rulesonline.com/

Savage, Charlie & Landler, Mark. 2011. White House Defends Continuing US Role in Libya Operation. *The New York Times*, June 15, 2011. http://www.nytimes.com/2011/06/16/us/politics/16powers.html?page wanted=all

Supreme Court of the United States. 1866. *Ex Parte Milligan*, 71 US 2 (1866). http://www.law.cornell.edu/supct/html/historics/USSC_CR_0071_0002_ZO.html

Supreme Court of the United States. 1983. *INS.* v. *Chadha*, 462 US 919 (1983). http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=462&page=919

Supreme Court of the United States. 2004. *Hamdi* v. *Rumsfeld*, 542 US 507 (2004).

http://www.supremecourt.gov/opinions/03pdf/03-6696.pdf
Supreme Court of the United States. 2006. *Hamdan* v. *Rumsfeld*, 548 US 557 (2006). http://www.supremecourt.gov/opinions/05pdf/05-184.pdf
Supreme Court of the United States. 2008. *Boumediene* v. *Bush,* 553 US 723 (2008). http://www.supremecourt.gov/opinions/07pdf/06-1195.pdf
The Library of Congress. *About the Congressional Record.* http://thomas.loc.gov/home/cr_help.htm
The Library of Congress. *Detailed information about the Congressional Record.* http://thomas.loc.gov/home/abt.cong.rec.html
The Library of Congress. Legislative History of P.L.93-148, *the War Powers Resolution of 1973.* http://thomas.loc.gov/cgi-bin/bdquery/z?d093:H.J.Res542:
The Library of Congress. Legislative History of P.L.94-412, *the National Emergencies Act of 1976.* http://thomas.loc.gov/cgi-bin/bdquery/z?d094:H.R.3884:
The Library of Congress. Legislative history of P.L.107-40, *Authorization for Use of Military Force of 2001.* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:S.J.Res23:
The Library of Congress. Legislative history of P.L.107-56, *Uniting and Strengthening America by providing Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act of 2001).* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@@X
The Library of Congress. Legislative history of P.L.107-296, *Homeland Security Act of 2002.* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR05005:@@@S
The Library of Congress. Legislative history of P.L.109-177, *USA Patriot Improvement and Reauthorization Act of 2005.* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:H.R.3199:
The Library of Congress. Legislative history of P.L.109-366, *Military Commissions Act of 2006.* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.03930:
The Miller Center, University of Virginia. 2008. National War Powers Commission. Appendix One. *An Overview of Proposals to Reform the War Powers Resolution of 1973.* http://millercenter.org/policy/commissions/warpowers/appone
United States House of Representatives. Authorizing for Use of Military Force of 2001 (on passage of the Bill). *Voting Record H.J.Res.64 (September 14, 2001)* http://clerk.house.gov/evs/2001/roll342.xml
United States House of Representatives. *Party Divisions of the House of Representatives 1789 to present.* http://artandhistory.house.gov/house_history/partyDiv.aspx
United States Senate. Authorization for Use of Military Force of 2001 (the joint resolution). *Voting Record S.J.Res.23 (September 14, 2001).* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00281

United States Senate. *US Senate Party division in the Senate, 1789 - present.* http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm

United States Senate. Thomas Jefferson, 2nd Vice President (1797-1801). http://www.senate.gov/artandhistory/history/common/generic/VP_Thomas_Jefferson.htm

Weimarer Reichsverfassung. 1919. http://www.documentarchiv.de/wr/wrv.html

Yeh, Brian T. & Doyle, Charles. 2006. *USA Patriot Improvement and Reauthorization Act of 2005: A Legal Analysis*. CRS Report for Congress. Order Code RL33332, December 21, 2006. http://www.fas.org/sgp/crs/intel/RL33332.pdf

Secondary literature:

Ackerman, Bruce. 2000. The New Separation of Powers. *Harvard Law Review*. Vol. 113, No. 3, 642-729.

Agamben, Giorgio. 2005. *State of Exception*. Translated Kevin Atte. Chicago: Chicago UP.

Amar, Akhil R. 2005. *America's Constitution. A Biography*. New York: Random House.

Anschütz, Gerhard, Bilfinger, Karl, Schmitt, Carl & Jacobi, Erwin. 1924. *Der Deutsche Föderalismus. Die Diktatur des Reichspräsidenten*. Berlin & Leipzig: Walter de Gruyter.

Bagehot, Walter. 2000 [1872]. *The English Constitution*. Second edition. Ontario: Batoche Books.

Bagehot, Walter. 2001 [1867]. *The English Constitution*. Edited by Miles Taylor. Oxford: Oxford UP.

Balakrishnan, Gopal. 2002. *The enemy: an intellectual portrait of Carl Schmitt*. New York: Verso.

Balkin, Jack M. & Levinson, Sanford. 2010. Constitutional Dictatorship: Its Dangers and Its Design. *Minnesota Law Review*. Vol. 94, No. 6, 1790-1865.

Barron, David J. & Lederman, Martin S. 2008a. The Commander in Chief at the Lowest Ebb – Framing the Problem, Doctrine, and Original Understanding. *Harvard Law Review*. Vol. 121, No. 3, 689-804.

Barron, David J. & Lederman, Martin S. 2008b. The Commander in Chief at the Lowest Ebb – A Constitutional History. *Harvard Law Review*. Vol. 121, No. 4, 941-1112.

Björk, Anna. 2011. *The politics of citizenship tests: time, integration and the contingent polity*. Jyväskylä: University of Jyväskylä. Jyväskylä studies in education, psychology and social research, 431.

Bradley, Curtis A. & Goldsmith, Jack L. 2005. Congressional Authorization and the War on Terrorism. *Harvard Law Review*. Vol. 118, No. 7, 2048-2133.

Brecht, Arnold. 1944. *Prelude to Silence. The end of the German Republic*. New York: Oxford UP.

Caldwell, Peter C. 1997. *Popular Sovereignty and the Crisis of German Constitutional Law. The theory and Practice of Weimar Constitutionalism*. Durham & London: Duke UP.
Campion, Gillbert. 1958 [1929]. *An Introduction to the Procedure of the House of House of Commons*. London: McMillan & CO Ltd.
Carter, Stephen L. 1984. The Constitutionality of the War Powers Resolution. *Virginia Law Review*. Vol. 70, No. 1, 101-134.
Davidson, Roger H., Oleszek, Walter J. & Lee, Frances E. 2012. *Congress and its Members*. Thirteenth Edition. Washington DC: CQ Press.
Dyzenhaus, David. 1997a. *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Herman Heller in Weimar*. Oxford: Clarendon Press.
Dyzenhaus, David. 1997b. Legal Theory in the Collapse of Weimar. *The American Political Science Review*. Vol. 91, No. 1, 121-134.
Edling, Max M. 2003. *A Revolution in Favor of Government. Origins of the US Constitution and the Making of the American State*. Oxford: Oxford UP.
Ely, John H. 1988. Suppose Congress Wanted a War Powers Act that Worked. *Columbia Law Review*. Vol. 88, No. 7, 1379-1431.
Emerson, Terry. 1971. War Powers Legislation. *West Viriginia Law Review*. Vol. 74, 53-119.
Farr, James. 1989. Understanding conceptual change politically. In Terrence Ball, James Farr, Russell L. Hanson (ed.), *Political innovation and conceptual change*. Cambridge: Cambridge UP, 24-49.
Ferejohn, John. & Pasquino, Pasquale. 2004. The law of the exception: A typology of emergency powers. I*nternational Journal of Constitutional Law*. Vol. 2, No. 2, 210-239.
Finney, John W. 1973. On the big one Congress stood up to be counted: the nation limiting presidential war powers. *The New York Times*, Nov. 11, 1973.
Fisher, Louis & Adler, David Gray. 1998. The War Powers Resolution: Time to Say Goodbye. *Political Science Quarterly*. Vol. 113, No. 1, 1-20.
Fisher, Louis. 2005. Judicial Review of the War Power. *Presidential Studies Quarterly*. Vol. 35, Issue 3, 466-495.
Fisher, Louis. 2007. *Constitutional Conflicts between Congress and the President*. Lawrence: University Press of Kansas.
Fisher, Louis. 2011. *Defending Congress and the Constitution*. Lawrence: University Press of Kansas.
Fraenkel, Ernst. 1960. *Das amerikanische Regierungssystem. Eine politische Analyse*. Köln und Opladen: Westdeutscher Verlag.
Friedrich, Carl J. 1928. The Issue of Judicial Review in Germany. *Political Science Quarterly.* Vol. 43, No. 2, 188-200.
Frykholm, Lars. 1942. *Studier över artikel 48 i Weimar-författningen*. Uppsala: Almqvist & Wiksells Boktryckeri A.B.
Fuller, Glenn E. 1979. The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability. *Southern California Law Review*. Vol. 52, 1453-1511.

Glennon, Michael J. 1984a. The War Powers Resolution Ten Years Later: More Politics than Law. *The American Journal of International Law*. Vol. 78, No. 3, 571-581.

Glennon, Michael J. 1984b. The War Powers Resolution: Sad Record, Dismal Promise. *Loyola of Los Angeles Law Review*. Vol. 17, No. 3, 657-670.

Gross, Oren & Aoláin Ní Fionnuala. 2006. *Law in Times of Crisis. Emergency Powers in Theory and Practice.* New York: Cambridge UP.

Haapala, Taru. 2012. *"That in the Opinion of this House" The Parliamentary Culture of Debate in the Nineteenth-Century Cambridge and Oxford Union Societies*. Jyväskylä: University of Jyväskylä. Jyväskylä studies in education, psychology and social research, 456.

Holborn, Hajo. 1975. *A History of Modern Germany 1840-1945*. New York: Alfred A Knopf.

Honig, Bonnie. 2011. *Paradox, Law, Democracy. Emergency Politics*. New Jersey: Princeton UP.

Howell, Beryl. A. 2004. Seven Weeks: The Making of the USA PATRIOT Act. *George Washington Law Review*. Vol. 72, Issue 6, 1145-1207.

Ihalainen, Pasi & Palonen, Kari. 2009. Parliamentary sources in the comparative study of conceptual history: methodological aspects and illustrations of a research proposal. *Parliaments, Estates & Representation*. Vol. 29, Issue 1, 17-34.

Javits, Jacob K. 1985. War Powers Reconsidered. *Foreign Affairs*. Vol. 64, No.1, 130-140.

Kelsen, Hans. 1930-31. Wer soll der Hüter der Verfassung sein? *Die Justiz*. Vol. 6, 576-628.

Kelsen, Hans. 1942. Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution. *The Journal of Politics*. Vol. 4, No. 2, 183-200.

Klieman, Aaron S. 1979a. Preparing for the Hour of Need: The National Emergencies Act. *Presidential Studies Quarterly*. Vol. 9, No. 1, 47-65.

Klieman, Aaron S. 1979b. Preparing for the Hour of Need: Emergency Powers in the United States. *The Review of Politics*. Vol. 41, No. 2, 235-255.

Koh, Harold H. 1988. Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affairs. *The Yale Law Journal*. Vol. 97, No. 7, 1255-1342.

Koger, Gregory. 2010. *Filibustering: A Political History of Obstruction in the House and Senate*. Chicago: Chicago UP.

Kolb, Eberhard. 1984. *Die Weimarer Republik*. München: Oldenbourg Verlagen.

Kronlund, Anna. 2009. *Poikkeustilanne ja poikkeustila. Analyysi Yhdysvaltojen Kongressin debattien retoriikasta ja käsitteistöstä 11.9.2001 jälkeisellä ajanjaksolla*. Lisensiaatin tutkimus (unpublished), Jyväskylän yliopisto.

Kurz, Achim. 1992. *Demokratische Diktatur? Auslegung und Handhabung des Artikels 48 der Weimarer Verfassung 1919-1925*. Berlin: Duncker & Humblot.

Lasswell, Harold. 1958 [1936]. *Who Gets What, When, How*. New York: Meridian Books

Lazar, Nomi Claire. 2009. *States of Emergency in Liberal Democracies*. New York:

Cambridge UP.
Lehnert, Detlef. 1999. *Die Weimarer Republik*. Stuttgart: Philipp Reclam jun.
Lindseth, Peter L. 2004. The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s. *The Yale Law Journal.* Vol. 113, No. 7, 1341-1415.
Linz, Juan J. 1990. The Perils of Presidentialism. *Journal of Democracy*. Vol. 51, No. 1, 51-69.
Lobel, Jules. 1989. Emergency Power and the Decline of Liberalism. *The Yale Law Journal*. Vol. 98, No. 7, 1385-1433.
Mann, Thomas E. & Ornstein, Norman J. 2008. *The Broken Branch. How Congress is Failing America and How to Get it Back on Track*. New York: Oxford UP.
McKay, William & Johnson, Charles W. 2010. *Parliament and Congress. Representation and Scrutiny in the Twenty-First Century*. Oxford: Oxford UP.
Mergel, Thomas. 2002. *Parlamentarische Kultur in der Weimarer Republik*. Düsseldorf: Droste Verlag.
Mommsen, Hans. 1996. *The Rise and Fall of Weimar Democracy*. Translated by Elborg Forster & Larry Eugene Jones. Chapel Hill & London: The University of North Carolina Press.
Palonen, Kari. 2006. *The Struggle With Time. A Conceptual History of 'Politics' as an Activity*. Hamburg, London: LIT Verlag Münster.
Palonen, Kari. 2007. *Rethinking Politics. Essays from a quarter-century*, ed. by Kia Lindroos. Helsinki: The Finnish Political Science Association.
Palonen, Kari. 2008. *The Politics of Limited Times. The Rhetoric of Temporal Judgment in Parliamentary Democracies*. Baden-Baden: Nomos.
Palonen, Kari. 2010. Book Review, A Lost Momentum of Parliamentary Democracy? *Redescriptions*, Vol. 14, 203-208.
Palonen, Kari (forthcoming, 2013). Parliamentarism as a European type of polity - Constructing the presidentialism vs. parliamentarism divide in Walter Bagehot's *English Constitution* in Meike Schmidt-Gleim and Claudia Wiesner (eds.), *Meanings of Europe*. London: Routledge.
Patch, William L. Jr. 1998. *Heinrich Brüning and the Dissolution of the Weimar Republic*. Cambridge, New York, Melbourne: Cambridge UP.
Patrick, John J., Pious, Richard M. & Ritcie, Donald A. 2001. *The Oxford Guide to the United States Government*. New York: Oxford UP.
Phelps, Glenn A. & Boylan, Timothy S. 2002. Discourses of War: The Landscape of Congressional Rhetoric. *Armed Forces & Society*. Vol. 28, No. 4, 641–667.
Pocock, J.G.A. 1981. The Machiavellian Moment Revisited: A Study in History and Ideology. *The Journal of Modern History*. Vol. 53, No. 1, 49-72.
Pocock, J.G.A. 2003 [1975]. *The Machiavellian Moment. Florentine Political Thought and the Atlantic Republican Tradition*. New Jersey: Princeton UP.
Pettit, Philip. 2002. *Republicanism. A Theory of Freedom and Government*. New York: Oxford UP.
Pradshaw, Kenneth & Pring, David. 1972. *Congress and the Parliament*. London: Quartet Books.
Preuss, Hugo. 1923. Reichsverfassungsmässige Diktatur. *Zeitschrift für Politik*.

Dreizehnter Band 1923/1924, 97-113.
Pyle, Christopher H. & Pious, Richard M. 1984. *The President, Congress and the Constitution. Power and Legitimacy in American Politics*. New York: The Free Press.
Remini, Robert. 2006. *The History of the House of Representatives.* New York: Smithsonian Books in association with HarperCollins Publishers.
Richter, Melvin & Richter, Michaela W. 2006. Introduction: Translation of Reinhart Koselleck´s "Krise" in Geschichtliche Grundbegriffe. *Journal of the History of Ideas*. Vol. 67, No. 2, 343-356.
Rogers, William P. 1971. Congress, the President, and the War Powers. *California Law Review*. Vol. 59, No. 5, 1194-1214.
Rostow, Eugene V. 1986. "Once More Unto the Breach:" The War Powers Resolution Revisited. *Valparaiso University Law Review*. Vol. 21, No. 1, 1-52.
Scheppele, Kim Lane. 2004. Law in a time of emergency: States of exception and the temptations of 9/11. *Journal of Constitutional Law*. Vol. 6, No. 5, 1001-1083.
Scheppele, Kim Lane. 2006. Small emergencies. *Georgia Law Review*. Vol. 40, 835-862.
Schlesinger, Arthur Jr. 2004. *The Imperial Presidency*. Boston, New York: A Mariner Book Houghton Mifflin Company.
Schmitt, Carl. 1985 [1922]. *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, Berlin: Duncker & Humblot.
Schmitt, Carl. 1994 [1921]. *Die Diktatur*. Berlin: Duncker & Humblot.
Skinner, Quentin. 1996. *Reason and Rhetoric in the Philosophy of Hobbes*. Cambridge: Cambridge UP.
Skinner, Quentin. 1998. *Liberty Before Liberalism*. Cambridge: Cambridge UP.
Soininen, Suvi & Turkka, Tapani. 2008. *The Parliamentary Style of Politics*. Helsinki: The Finnish Political Science Association.
Spong, William B. Jr. 1971. Can Balance Be Restored in the Constitutional War Powers of the President and Congress*? University of Richmond Law Review*. Vol. 6, No. 1, 1-47.
Spong, William B. Jr. 1975. The War Powers Resolution Revisited: Historic Accomplishment or Surrender? *William and Mary Law Review*. Vol. 16, Issue 4, 823-882.
Steiner, Jürg, Bächtiger, André, Spörndli, Markus & Steenbergen, Marco R. 2004. *Deliberative Politics in Action. Analyzing Parliamentary Discourse.* Cambridge: Cambridge UP.
Stirk, Peter. 2005. Hugo Preuss, German Political Thought and the Weimar Constitution. *History of Political Thought*. Vol. 23, No. 3, 497- 516.
Stolleis, Michael. 2003. Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic. *Ratio Juris*. Vol. 16, Issue 2, 266-280.
Stolleis, Michael. 2004. *A History of Public Law in Germany 1914-1945*. Translated by Thomas Dunlap. New York: Oxford UP.

Stone, George R. 2005. *Perilous Times. Free Speech in Wartime. From the Sedition Act of 1798 to the War on Terrorism*. New York & London: W.W. Norton & Company.
Stone, George R. 2007. *War and Liberty. An American Dilemma: 1790 to Present*. New York: W.W. Norton & Company.
Thurber, James A. (ed). 2009. *Rivals for Power. Presidential – Congressional Relations*. Lanham: Rowman & Littlefield Publishers.
Tulis, Jeffrey K. 1987. *The Rhetorical Presidency*. New Jersey: Princeton UP.
Wilson, Graham K. 2009. Congress in Comparative Perspective. *Boston Law Review*. Vol. 89, No. 2, 827-845.
Wilson, Woodrow. 1900 [1884]. *Congressional Government: A study in American Politics*. Boston & New York: Houghton Mifflin Company.
Wilson, Woodrow. 1961 [1908]. *Constitutional Government in the United States*. New York: Columbia UP.
Wolfe, Alan. 2009. *The Future of Liberalism*, New York: Vintage Book.
Zablocki, Clement J. 1984. War Powers Resolution: Its Past Record and Future Promise. *Loyola of Los Angeles Law Review*. Vol. 17, No. 3, 579-598.
Zurcher, Arnold J. 1950. The Presidency, Congress and Separation of Powers: A Reappraisal. *The Western Political Quarterly*, Vol. 3, No. 1, 75-97.

APPENDIX 1 Legislative history of the War Powers Resolution of 1973

Below there is a brief overview of the legislative history of the War Powers Resolution P.L.93-148 on the debates that are referred in the thesis. The more detailed section-by-section analysis of the bill is provided in the House Report 93-287 which was published to accompany H.J.Res. 542.

Relevant reports

House Report of the Committee on Foreign Affairs to accompany H.J.Res.542. 93rd Congress, 1st Session. Report No. 93-287.

Senate Report of the Committee on Foreign Relations to accompany S.440 93rd Congress, 1st Session. Report No. 93-220.

House Conference Report to accompany H.J.Res.542. 93rd Congress, 1st Session. Report No. 93-547.

Dates of consideration and passage

House of Representatives:
*War Powers of Congress and the President, July 18, 1973, 24653-24708
*Conference Report on House Joint Resolution 542, War Powers Resolution of 1973, October 12, 1973, 33858-33874
*War Powers Resolution – Veto message from the President of the United States, November 7, 1973, 36202-36222

(See also House debate on H.J.Res.542, June 25, 1973)

Senate:
*Debate on War Powers Act, July 20, 1973, 25051-25120
*War Powers Resolution of 1973 – Conference Report, October 10, 1973, 33548-33569
*War Powers of Congress and the President – Veto, November 7, 1973, 36175-36198

(See also Senate debate on S.440, July 18, 1973)

APPENDIX 2 Legislative history of the National Emergencies Act of 1976

Below there is a brief overview of the legislative history of the National Emergencies Act P.L.94-412 on the debates that are referred in the thesis. The more detailed section-by-section analysis of the bill is provided in the Senate Report 94-1168, which was published to accompany H.R.3884 and the NEA Source Book, 1976.

Relevant reports

House Report of the Committee on Judiciary to accompany H.R.3884 National Emergencies. 94th Congress, 1st Session. Report No. 94-238.

Senate Report of the Committee on Government Operations United States Senate to accompany H.R. 3884, Terminating Certain Authorities With Respect to National Emergencies Still in Effect, and to Provide for Orderly Implementation and Termination of Future National Emergencies. 94th Congress, 2nd Session. Report No. 94-1168.

Dates of consideration and passage

House of Representatives:
*Debate and adoption of H.R.3884, September 4, 1975, H8325-H8341 (included in the NEA Source Book 1976)
*Consideration and passage of the Senate amendments to the H.R.3884, August 31, 1976, H9353 (included in the NEA Source Book 1976)

Senate:
*Debate and adoption of H.R.3884, amended, August 27, 1976, S14840-S14844 (included in the NEA Source Book)

(See also Senate debate on S.3957, October 7, 1974)

APPENDIX 3 Floor actions on the War Powers Resolution of 1973

Floor actions on the War Powers Resolution 1973, Public Law 93-148[161]

1970, 91st Congress

House:

- The House Foreign Affairs Subcommittee on National Security Policy and Scientific Developments considered 17 war power resolutions and bills during the summer of 1970.
- On May 21, 1970, the Chairman of the Foreign Affairs Committee referred the bill to the Subcommittee on National Security Policy and Scientific Developments legislation relating to the war powers. The Subcommittee held hearings for 11 days between June 18 and August 5, 1970.
- On August 13, 1970, House Joint Resolution 1355 was introduced in the House by Representative Zablocki.
- September 24, 1970, the Committee on Foreign Affairs reported favorably the bill on war powers of the president and the Congress (House Joint Resolution 1355). The bill was approved under the suspension of rules with a vote 288 to 39 (16 Nov. 1970).
- Measure was sent to the Senate, but Senate failed to take any action before the expiration of the 91st Congress and the bill "died upon adjournment".

Senate:

- Senator Javits introduced the first war powers bill on June 15, 1970 (S.3964)

1971, 92nd Congress

House:

- At the beginning of the 92nd Congress, the chairman of a subcommittee of the Foreign Affairs Committee reintroduced the slightly rewritten version as House Joint Resolution 1.
- A new set of hearings were held on June 1-2, 1971.
- On July 21, 1971 House Joint Resolution 1 was reported to the House by the Committee on Foreign affairs without amendments. It passed with a suspension of rules by a voice vote (2 Aug. 1971).

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161 The following documents were used to track down the detailed legislative history of the War Powers Resolution: H.Rept. 91-1547; H.Rept. 92-383; H.Rept. 93-287; H.Rept. 92-1302; S.Rept. 93-220; War Powers of the Congress and the President (H.J.Res.542); Congressional Record (House), July 18, 1973, 24653-24707; War Powers Act; Congressional Record (Senate), July 20, 1973, 25051-25120. See also, Spong, William B. 1975. The War Powers Resolution Revisited: Historic Accomplishment or Surrender? *William and Mary Law Review*. 823 (1975), 823-882.

Senate:

- Senator Javits introduced on February 10, 1971 a revised version of the war powers bill (S.731).
- Other war powers bills were introduced was by: Senator Taft on January 27, 1971; Senator Eagleton on March 1, 1971; Senator Stennis on May 11, 1971; and Senator Bentsen on May 15, 1971.
- The Foreign Relations Committee held public hearings on war powers bills between March 8, 1971 and October 6, 1971.
- On March 8, 1971, the Committee on Foreign Relations started its hearings on S.731, Senate Joint Resolution 59, and Senate Joint Resolution 18 concerning the war powers of the president and the Congress
- After thorough hearings in the Senate Committee on Foreign Relations, Senators Javits, Stennis, Spong and Eagleton introduced a joint bill (S.2956) in December 1971. The War Powers Act bill was marked up by the Committee on December 7, 1971, adopting improving and clarifying amendments. The Committee reported the bill favorably to the Senate.

1972, 92nd Congress

House:

- The war powers legislation was considered to be critically important and the members believed that a compromise could be achieved in the House-Senate conference. Therefore, the Committee on Foreign Affairs (House of Representatives) called up S.2956 and amended the bill by striking out all the text after the enacting clause and inserting in lieu the language of H.J. Res. 1. The Committee also made the effort to strike the title of the Senate bill and replaced it with a House-approved legislation. By doing this, the Committee tried to overcome "a parliamentary impasse created in the Senate." The motion was approved by a vote of 344 to 13. (See H.Rept. 92-1302, 2)

Senate:

- The Senate Foreign Relations Committee reported on March 29, 1972 "a hybrid bill", the War Powers Act, combining the proposals of Senators Stennis, Eagleton and Javits.[162]
- The Senate debated the committee proposal for two weeks in March and April in 1972. The bill was changed only by amendments offered by its sponsors.
- On April 13, 1972 the Senate enacted the War Powers bill (S.2956) by a vote of 68 to 16.
- The Senate Foreign Relations Committee was not responsive to the Zablocki's resolution (H.Res. 1) because it favored more "strict" language to the bill con-

[162] S.J.Res. 95, 92nd Cong., 1st sess. (Introd. by Sen. Stennis, May 11, 1971); S.J. Res.59, 92nd Cong., 1st sess. (Introd. By Sen. Eagleton, Mar. 1, 1971); S.731, 92nd Cong., 1st sess. (Introd. By Sen. Javits, Feb. 10, 1971).

cerning the codifying and time limitations of presidential authority to deploy the US armed forces without congressional authorization.

- The intention to send Senate bill S.2956 to Conference with House bill H.J. Res. 1 failed, because the necessary unanimous consent agreement was blocked by the opponents of the bill.
- The conference committee failed to reach an agreement on the bill.

1973, 93rd Congress

House:

- The chairman of the Subcommittee on National Security Policy and Scientific Developments introduced a new war powers resolution (H.J. Res.2). Hearings were held in the Subcommittee on the resolution and other war powers related measures which had been referred to the Committee on Foreign Affairs (see the introduced motions H.Rept. 93-287, 2-3).
- On May 3, 1973 the House Joint Resolution 542 was introduced by the Chairman of the Subcommittee. The resolution was amended and reported.
- House Foreign Affairs Committee considered H.J. Res. 542 and reported it June 15, 1973.
- June 25, 1973: consideration of House Joint Resolution 542, War Powers of Congress and the President.
- July 18, 1973: House debate and consideration of War Powers of Congress and the President (H.J.Res.542). Amendments offered:
  1. (Rejected) Representative Dennis offered an amendment in the nature of a substitute. The relevant difference to the committee bill was that the amendment stated that the president should ordinarily not have the possibility to commit troops "abroad in the absence of a declaration of war or an attack upon this country without prior authorization of Congress." (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24655)

     Amendments offered to Dennis substitute amendment:

     - (Rejected) "Amendment offered by Mr. De La Garza to the amendment in the nature of a substitute offered by Mr. Dennis". The amendment concerned the language of the bill. Whereas Dennis' amendment in section 3 read "by bill or resolution", De La Garza wanted to insert instead "by concurrent resolution". (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24668)
     - (Rejected) "Amendment offered by Mr. Regula to the amendment in the nature of a substitute offered by Mr. Dennis." Representative Regula's amendment (similar to the "antifilibuster" section of H.J.Res.542, but more straightforward and simple) provided a new section to the bill in which "some machinery is provided to get action and to get this issue before this body." (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24672)

- (Agreed to) "Amendment offered by Mr. Eckhardt to the amendment in the nature of a substitute offered by Mr. Dennis." Amendment concerned the language of the Dennis substitute amendment: strike out the last words of section 1 "the existence of which emergency or necessity is determined by the President of the United States" and insert instead "of a nature which makes impossible a congressional determination of the requisite timeliness." (War Powers of Congress and the President (H.J.Res.542) 1973, 24676)

Substitute Amendments offered to Dennis' substitute amendment:

- (Rejected) "Substitute amendment offered by Mr. Bennet for the amendment in the nature of a substitute by Mr. Dennis". Representative Bennet opposed writing into a statute that the President has the right "to put the United States at war in certain circumstances." (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24661)
- (Rejected) "Substitute amendment offered by Mr. Young of Florida for the amendment in the nature of substitute offered by Mr. Dennis." Amendment provided to strike out everything and insert instead "the war powers resolution of 1973". The essential difference was that if there was no action at all on the behalf of the Congress, then the action of the President must be considered to be approved. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24677)

2. (Rejected) "Amendment in the Nature of a substitute offered by Mr. Eckhardt." The core of the amendment was its second section, where it states: "that the President shall not commit the troops of the United States to situations in which hostilities are inherent or imminent unless: One, there has been a declaration of war by the Congress; or two, there has been action by Congress specifically authorizing such commitment and enlargement of forces – that is the Tonkin Gulf situation, or three, and this is limited to the case where the President has already the power to act as, for instance, he might put carriers in Tonkin Gulf – he has reported to Congress what he is doing." (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24679)
3. Committee amendments (Approved/Rejected insertion of the "applicability to certain existing commitments") The Committee amendments were considered together as a block. The amendments mainly concerned the technical language of the bill and time limitations mentioned in the bill. However, the section "applicability to certain existing commitments" raised some debate. Adding this section to the bill would have made the proposal applicable to already existing commitments.
4. (Rejected) Amendment offered by Mr. Eckhardt: "What it (the amendment) says is what the committee says the resolution does not say. The committee says the resolution does not at all enlarge presidential power." (War Powers of Congress and the President (H.J.Res.542), July 19, 1973, 24684)

5. (Rejected) Amendment offered by Mr. Whalen: the amendment "amends the section 4(b) of the bill by providing that once the report of the President is received by the Congress, within 120 days the Congress shall vote yes or no to this report."[163] (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24685)
   Substitute amendments offered to amendment by Representative Whalen
   - (Rejected) "Substitute amendment offered by Mr. Stratton for the amendment offered by Mr. Whalen." According to Representative Stratton's amendment: "if the President as Commander in Chief has committed armed forces, he can continue to employ them unless Congress specifically disapproves." And this disapproval must be enacted with appropriate legislation. According to Stratton it is not possible to require the Congress to vote if it does not want to vote. (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24692)
6. (Rejected) Amendment offered by Mr. Buchanan: The amendment "simply writes into section 4 (c) the flexibility we sought to write into section 4 (b) that is, it would provide that Congress could try a concurrent resolution to overrule presidential action, but would not be confined to that." (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24694)
7. (Agreed to) Amendment offered by Mr. Frelinghuysen: the amendment concerned the reporting requirement of the president mentioned in the bill, including the financial costs. The requirement should be left out of the bill, argued Representative Frelinghuysen.

- July 18, 1973: the House passed the measure with amendments by a vote of 244 to 170.
- October 12, 1973: the House agreed the conference report by a vote of 238 to 123.
- November 7, 1973: the House overrode the presidential veto with a vote of 284 to 135.

Senate:

- The Committee on Foreign Relations recommend passing the bill to control the use of US armed forces when there is no declaration of war.
- S.440 (identical to S.2956) was introduced again on January 18, 1973.
- The Foreign Relations Committee held public hearings on the war powers bills on April 11 and 12, 1973.
- The Committee reported the bill favorably to the Senate on May 16, 1973.

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163 The Whalen amendment was very narrowly rejected by a vote 200 to 211. The language of the amendment stated: "(b) within one hundred and twenty calendar days after a report is submitted or is required to be submitted (whichever is earlier) pursuant to Section 3, the Congress, by a declaration of war or by the passage of a resolution appropriate to the purpose, shall either approve, ratify, confirm, and authorize the continuation of the action taken by the President and reported to the Congress, or shall disapprove such action in which case the President shall terminate any commitment and remove any enlargement of United States Armed Forces with respect to which such report was submitted." (War Powers of Congress and the President (H.J.Res.542), July 18, 1973, 24685)

- July 18, 1973: the Senate discussed the War Powers Act.
- Debate on the War Powers Act (S.440) July 20, 1973. Amendments offered:
  1. (Agreed to) Amendment offered by Senator Eagleton. The amendment (no. 364) was "a housekeeping type" concerning a typographical error in the language of the bill (Military forces was inserted in place of Armed Forces on the page 5 of bill). (War Powers Act, July 20, 1973, 25051)
  2. (Agreed to) Amendment (no. 365) offered by Senator Eagleton. "The Amendment is as follows: on page 4, line 22, strike out the words "Specific statutory authorization is required for" and insert in lieu thereof the following: "For purposes of this clause (4), 'introduction of the Armed Forces of the United States' includes." (War Powers Act, July 20, 1973, 25078)
  3. (Rejected) Amendment (no. 366) offered by Senator Eagleton concerning the CIA and other paramilitary forces. "The amendment is as follows: On page 9, line 15, after the period, add the following: Any person employed by, under contract to, or under the direction of any department or agency of the United States Government who is either (a) actively engaged in hostilities in any foreign country; or (b) advising any regular or irregular military forces engaged in hostilities in any foreign country shall be deemed to be a member of the Armed Forces of the United States for this purposes of this Act." (War Powers Act, July 20, 1973, 25079)
  4. (Rejected) Amendment (no. 361) offered by Senator Fulbright. The amendment concerned inserting the following section of "troop location and deployment." Senator Fulbright's amendment tackled the issue of president's capability to introduce US Armed Forces abroad when there is an absence of hostilities or imminent threat of hostilities. (War Powers Act, July 20, 1973, 25086)
  5. (Rejected) Amendment (no. 387) offered by Senator Fulbright. The Amendment concerned the circumstances under the President would be allowed to "make emergency use of the Armed Forces." According to Senator Fulbright these conditions "go too far in the direction of the Executive prerogative, especially in allowing the President to take action not only to 'repel an armed attack' […] but also to 'forestall the direct and imminent threat of such an attack' on the United States or its Armed Forces abroad." (War Powers Act, July 20, 1973, 25094)
  6. (The Amendment was withdrawn) An amendment (no. 368) offered by Senator Griffin. The amendment concerned the setting of limits and procedures with respect to Congress' own actions. The amendment required consultation between the Congress and the president before the US armed Forces are introduced. The main idea was not to impose limitations for the powers of the president beforehand but to create a procedure for Congress to consider the actions of the executive and to execute its power of the purse related to the continuance of the US Armed Forces in hostilities. (War Powers Act, July 20, 1973, 25099, 25100)
  7. (The amendment in question was ruled out of order) An amendment (no. 386) offered by Senator Tower with regard to the title of the bill: "Amend

the title so as to read: "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, and thereby reduce the United States of America to the status of a second rate power." (War Powers Act, July 20, 1973, 25103)

8. (Agreed to) An amendment offered by Senator Eagleton aiming "to strike out those anachronistic parts which are no longer effective and to assure that the provisions of S.440 go into effect immediately on the date of enactment." (War Powers Act, July 20, 1973, 25104)

- July 20, 1973: the Senate agreed to S.440 by a vote of 72 to 18.
- October 10, 1973: the Senate agreed the conference report. The votes were announced as follows: 75 to 20.
- November 7, 1973: the Senate overrode the presidential veto by a vote of 75 to 18.

APPENDIX 4 Floor actions on the National Emergencies Act of 1976

Floor actions on the National Emergencies Act 1976, Public Law 94-412

1974, 93rd Congress

Senate:

- The legislation (S.3957) recommended by the Senate Special Committee was introduced in the Senate on August 22, 1974.
- The bill was introduced by the Committee on Government Operations, which reported the bill on September 30 without amendments or public hearings.
- The bill was debated on October 7. Senator Mathias introduced amendments on behalf of the President by the Office of Management and Budget and the Senate Special Committee. (Debate and adoption of S.3957, October 7, 1974, S18356-S18367)
- Amendments offered and enacted:
  1. Extension of a grace period from nine months to one year regarding the abolition of certain emergency powers statutes in the US code.
  2. Even though the Congress can terminate with concurrent resolution a national emergency at any time, if there is no affirmative action, there will be no automatic termination after six months. This has been substituted by the requirement that Congress should meet every six months to decide whether the emergency powers should be terminated.
  3. The number of the repealed statutes will be reduced.
  4. Six statutes including the Trading With the Enemy Act, which involve substantial governmental operations, are exempted from the provisions of the bill.

House:

- Version H.R.1668 of the Senate Special Committee bill was introduced in the House on September 16, 1974.
- The bill was introduced to the Committee on the Judiciary, which failed to take any action.

1975, 94th Congress

Senate:

- A bill (S.977) was introduced in the Senate on March 6, 1975.
- The House measure (H.R.3884) was sent to the Senate and referred to the Committee on Government Operations on September 5, 1975.

House:

- A bill (H.R.3884) was offered on February 27, 1975.
- The Subcommittee on Administrative Law and Government Relations held hearings on March 6, 13, 19, and April 9. The bill was reported to the Committee on the Judiciary on April 15, 1975. The following amendments were of-

fered: The existing grace period on the termination of certain emergency powers was extended from one year to two years. The further addition of "emergency power provisions of the US Code to the exemption from termination section of the legislation." (See NEA Source Book, 1976, 8)

- The bill was reported by the Committee on the Judiciary with some technical amendments (H.Rept. 94-238).
- House debate on the measure on September 4, 1975 in the Committee of the Whole House.
- Amendments offered and enacted:
  1. The House approved the committee amendments.
  2. An amendment offered by Representative Matsunaga: "On page 3, line 16, strike the sentence beginning "at the end"; And on page 6, immediately after line 15, insert the following new subsection: "(d) Any national emergency declared by the President in accordance with this title, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency, if, within 90-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that the emergency is still in effect." According to Matsunaga the reason to provide an amendment was his concern that H.R.3884 included a provision "that requires the President to redeclare any national emergency every year by publishing it in the Federal Register and transmitting to Congress a notice stating that the emergency is still effect. By failing to provide for any direct sanction in the event that President fails to comply with this notice provision, the bill encourages Executive neglect, which may well result in frustration when Congress attempts to enforce this requirement." (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 267)
- Rejected amendments:
  1. An amendment offered by Representative Drinan: "Page 3, strike out the period at the end of line 15 and insert in lieu thereof the following: "; or "(3) thirty calendar days elapse following the declaration of an emergency unless Congress (A) has authorized by concurrent resolution the extension of such an emergency to a date certain, or (B) is physically unable to meet as a result of an armed attack upon the United States." (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 269)
  2. An amendment offered by Representative Conyers as a substitute for the amendment offered by Representative Drinan: "Page 3, strike out the period at the end of line 15 and insert in lieu thereof the following: "; or "(3) 90 calendar days elapse following the declaration of an emergency unless Congress (A) has authorized by concurrent resolution the extension of such an emergency to a date certain, or (B) is physically unable to meet as a result of an armed attack upon the United States." (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 277)
  3. An amendment offered by Representative Drinan: "Page 2, line 22, insert immediately after the period the following: "The President shall issue such

a proclamation pursuant only to: (1) a declaration of war; (2) an attack upon the United States; its territories or possessions, or its armed forces; or (3) the prior enactment of a joint resolution specifically authorizing the President to issue such proclamation. The President in every possible instance shall seek to advice and counsel of Congress and provide Congress with all pertinent information before proclaiming the existence of a national emergency. After such proclamation has been issued, the President shall consult regularly with Congress until the national emergency has been terminated." (House debate and adoption of H.R.3884, September 4, 1975, NEA Source Book 1976, 278)

- The House enacted the bill with a yea-and-nay vote 388 to 5 on September 4, 1975.

1976, 94th Congress

Senate:

- The Senate Special Committee gave its final report on May 28, 1976.
- The Senate Committee on Government operations reported the bill on August 26, 1976 with one substantive and other technical amendments.
- Amendments offered and approved:
  1. According to the Senate Report No. 94-1168 the substantive amendment concerned the situations in which the president can declare a national emergency. (Sec. 201a) The report states that the vague statute could be interpreted in a way granting the President new authority related to declaring emergencies. The committee's amendments clarify and clear the issue. Most importantly, the committee found that the definition of when the president is entitled to declare a national emergency should be left to the numerous statutes that authorize powers to the executive branch in times of crisis. The intention of the statute is not to enlarge presidential powers but rather to provide affirmative procedures to deal with the emergencies. Therefore, the committee suggests that the bill should not try to define "when a declaration of national emergency is proper." On the technical amendments see, S.Rept. 94-1168, 3.
- The Senate debated and enacted the bill (H.R.3884) with all the committee amendments on August 27, 1976.
- The Senate returned the matter again to the House.

House:

- On August 31, 1976 the House approved the Senate amendments.

See details in the NEA Source Book 1976.

APPENDIX 5 Biographies of the members of the Congress

Key persons regarding the WRP and NEA bills in the 1970s
Data collected from the Biographical Directory of the United States Congress http://bioguide.congress.gov/biosearch/biosearch.asp[164]

Senators:

Senator Church, Frank (D-ID, 1957-1980)
- Chairman Special Committee on Termination of the National Emergency (92nd – 94th Congresses)[165], Select Committee on Government Intelligence Activities (94th Congress), and Committee on Foreign Relations, (96th Congress)
- A key figure behind the National Emergencies Act of 1976

Senator Dominick, Peter H. (R-CO, 1963-1974)
- Member of the House of Representatives 1961-1963
- Opposed War Powers Resolution and voted to sustain President Nixon's veto on November 7, 1973

Senator Eagleton, Thomas (D-MO, 1967-1986)
- Ran unsuccessfully for the Vice Presidential candidacy in 1972
- Introduced and supported the Senate draft of the War Powers bill, but voted against Conference Bill and voted to sustain President Nixon's veto on the War Powers Resolution, November 7, 1973

Senator Goldwater, Barry (R-AZ, 1953-1964, 1969-1986)
- Unsuccessful candidate in US Presidential elections in 1964: won 6 states and 52 electoral votes (ran against Lyndon B. Johnson)
- Chairman of the Select Committee on Intelligence (97th & 98th Congresses) and Committee on Armed Services (99th Congress)

Senator Humphrey, Hubert (D-MN, 1949-1964, 1971-1978)
- Resigned from the Senate in 1964 to become the Vice President of Lyndon Johnson
- Whip of the Democratic Party 1961-1964
- Unsuccessful nominee of Democrats in the US presidential elections in 1968

Senator Javits, Jacob (R-NY, 1957-1980)
- A key figure related to the War Powers Resolution in the Senate
- Lectured and wrote widely on the topic of the war powers of Congress

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164 I have selectively chosen the information and not included, for instance, all of the committee positions, but the ones that matters for the topic

165 Other members of the Special Committee on Termination of the National Emergency included Senators Hart (D-MI), Case (R-NJ), Pearson (R-KS), Pell (D-RI), Stevenson (D-IL), and Hansen (R-WY).

- Member of the US House of Representatives 1947-1954 (New York)
- One of the sponsors of the NEA bill (S.3957), which was introduced in the Senate in 1974

Senator Mathias, Charles, Jr. (R-MD, 1969-1986)
- Member of the US House of Representatives 1961-1969
- Chairman Special Committee on Termination of the National Emergency (92nd – 94th Congresses), Committee on Rules and Administration (97th - 99th Congresses)
- A Key figure in the National Emergencies Act of 1976

Senator Muskie, Edmund (D-ME, 1959-1980)
- Unsuccessful candidate for the Vice President of the United States in 1986
- Secretary of State in Jimmy Carter's cabinet, 1980-1981
- One of the sponsors of the NEA bill (S.3957), which was introduced in the Senate in 1974

Senator Spong, William B., Jr. (D-VA, 1965-1972)
- Published an article "The War Powers Resolution Revisited: Historic Accomplishment or Surrender?" Published in *William and Mary Law Review*, Vol. 16, issue 4, 1975

Senator Thurmond, James Strom (D/R-SC, 1953-2002)
- Became a member of the Republican Party in 1964
- The oldest member ever to serve in the Senate
- President pro tempore emeritus in the Senate 2001-2003
- Voted to sustain President Nixon's veto on the War Powers Resolution November 7, 1973

Representatives:

Representative Anderson, John (R-IL, 1961-1980)
- Unsuccessful independent candidate in the US presidential elections of 1981

Representative Drinan, Robert (D-MA, 1971-1980)
- Voted against H.R. 3884 (National Emergencies Act bill) in the House of Representatives September 4, 1975 (Others were Conyers, Dellums, Holtzman and Moss)

Representative Findley, Paul (R-IL, 1961-1982)
- Actively participated in the War Powers Resolution debates in the House of Representatives
- Voted for the War Powers Resolution in the House

Representative Flowers, Walter (D-AL, 1969-1978)
- Chairman of the Subcommittee on Administrative Law and Government Relations, and the House Committee on Judiciary, which held hearings on the National Emergencies Act (H.R.3884) in March and April 1975
- One of the sponsors of the House NEA bill (H.R.3884) introduced in 1975

Representative Ford, Gerald R., Jr. (R-MI, 1949-1974)
- Minority leader of the House of Representatives 1965-1973
- In 1973 resigned from the House of Representatives to become the Vice President of the United States
- Voted to sustain Nixon's veto in the House
- President of the United States 1974-1977

Representative Frelinghuysen Peter Jr. (R-NJ, 1953-1974)
- Actively criticized and questioned the meaning and purpose of the War Powers Resolution in the House of Representatives
- Voted to sustain President Nixon's veto on the War Powers Resolution in the House November 7, 1973

Representative Goldwater Barry, Jr. (R-CA, 1969-1982)
- Son of Senator Barry Goldwater
- Voted to sustain President Nixon's veto on the War Powers Resolution in the House November 7, 1973
- Unsuccessfully ran for the Senate in 1982

Representative Kemp, Jack (R-NY, 1971-1988)
- Run unsuccessfully for Republican nomination for US Presidential elections in 1988
- Unsuccessful candidate in US Vice President elections in 1996

Representative Rodino, Peter, Jr. (D-NJ, 1949-1988)
- Chairman of the Committee on the Judiciary (93rd -100th Congresses)
- Introduced the NEA bill in the House of Representatives

Representative Zablocki, Clement (D-WI, 1949-1982)
- Chairman of the Committee on International Relations (95th Congress) and Committee on Foreign Affairs (96th-98th Congresses)
- One of the key figures in the WPR in the House of Representatives

Others:

Rogers, William P.
- Secretary of State, in office 1969-1973