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Justiciability of Presidential War Power (Holtzman v. Schlesinger)

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serve to calm those fears by limiting access to a reporter's sources in civil cases only to those whose disclosure goes to the heart of the underlying case and only in instances where independent effort to discover the desired information has been made. Moreover, the clarity with which *Baker* balanced the relevant interests will serve as an example for the method of inquiry to be utilized in future litigation involving the newsman's privilege.

JUSTICIABILITY OF PRESIDENTIAL WAR POWER

Holtzman v. Schlesinger

The constitutionality of United States military activity in Indochina pursuant to executive mandate[1] has been the subject of considerable discussion[2] and litigation in the federal courts.[3] The extent of

N.Y. Times, Oct. 4, 1973, at 1, col. 4. This action was precipitated by leaks of information pertaining to the investigation of criminal activity allegedly attributed to Mr. Agnew. Eight subpoenas were served on various news organizations and reporters in a search for sources close to the investigation. N.Y. Times, Oct. 6, 1973, at 1, col. 6. Although the probable controversy was eventually mooted when the Vice President resigned, very serious questions were involved. In light of the *Baker* and *Branzburg* approach it is clear that a prospective criminal defendant's interest in securing an impartial jury may well outweigh the privilege accorded the media to protect their sources.

1 Presidential war powers derive principally from article II, section 2 of the Constitution providing that "The President shall be Commander in Chief of the Army and Navy . . ." and the reservation of presidential war making power in the article I, section 8 grant to Congress of the power "to declare war." In the debate over whether Congress should be granted the power to "make" or "declare" war, the framers desired to allow some war making power to reside in the Executive, especially the power to repulse sudden attacks without first consulting Congress. 2 RECORDS OF THE FEDERAL CONVENTION OF 1789 at 318-19 (M. Farrand ed. 1911). *See* Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 5-8 (1972).

2 *See, e.g.*, Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet Nam*, 112 CONG. REC. 13232-33 (daily ed. June 22, 1966); Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243 (1969); Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEXAS L. REV. 1033 (1968); Van Alstyne, *Congress, the President and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972); 116 CONG. REC. 7117-23 (daily ed. May 13, 1970) (Yale Paper, Pt. 1); 116 CONG. REC. 759-93 (daily ed. May 21, 1970) (Yale Paper, Pt. 2); Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968); (Special Issue) 50 B.U.L. REV. (1970).

3 Massachusetts v. Laird, 400 U.S. 886 (1970) (original jurisdiction); Holtzman v. Schlesinger, 484 F.2d 1307, *rehearing en banc denied*, — F.2d — (2d Cir. 1973); Mitchell v. Laird, — F.2d — (D.C. Cir. 1973); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); Mattola v. Nixon, 464 F.2d 178 (9th Cir. 1972), *rev'g* 318 F. Supp. 538 (N.D. Cal. 1970); Sarnoff v. Connally, 457 F.2d 809 (9th Cir.) (per curiam), *cert. denied*, 409 U.S. 929 (1972); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Pietsch v. President of the United States, 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970); Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970);

congressional participation in the decision to commit American forces has been an issue central to almost all of the debate. This has been so not only where the disputed activity was the overall conduct of the Vietnam war itself,[4] but also when incidentals thereto, such as the incursions into and bombing of Cambodia[5] and the mining of North Vietnam's harbors and rivers,[6] were questioned. Except for two district court decisions[7] which were subsequently overturned on appeal, all plaintiffs seeking judicial declaration of the unconstitutionality of these activities have been denied relief for failure to state a "case or controversy." Suits have been dismissed for plaintiffs' lack of standing, mootness, and non-justiciability of the subject matter.[8]

Mora v. McNamara, 387 F.2d 862 (D.C. Cir.) (per curiam), *cert. denied*, 389 U.S. 934 (1967); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd without opinion*, 411 U.S. 911 (1973); Campen v. Nixon, 56 F.R.D. 404 (N.D. Cal. 1972); Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972); Head v. Nixon, 342 F. Supp. 521 (E.D. La.), *aff'd without opinion*, 468 F.2d 951 (5th Cir. 1972); DaCosta v. Nixon, 55 F.R.D. 145 (E.D.N.Y.), *aff'd without opinion*, 456 F. 2d 1335 (2d Cir. 1972); Davi v. Laird, 318 F. Supp. 478 (W.D. Va. 1970).

For cases in which the constitutionality of the Vietnam war was challenged as a defense by alleged draft law violators see Mattola v. Nixon, 464 F.2d 178, 179-180, nn. 4 & 5 (9th Cir. 1972). *See also* Holtzman v. Schlesinger, 484 F.2d 1307, 1310 n.3 (2d Cir. 1973).

[4] Second Circuit cases include DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Pietsch v. President of the United States, 434 F.2d 861 (2d Cir. 1970), *cert. denied*, 403 U.S. 920 (1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970); DaCosta v. Laird, 55 F.R.D. 145 (E.D.N.Y. 1972).

[5] Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973).

[6] DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973).

[7] Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd*, 484 F.2d 1307 (2d Cir. 1973); Mattola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd*, 464 F.2d 178 (9th Cir. 1972).

[8] *See* 484 F.2d at 1310 n.3 for compilation of cases challenging the legality of the Vietnam war. Courts have held that the question of American military involvement in Southeast Asia is nonjusticiable because it is political and cannot be settled under "judicially discoverable and manageable standards."

> The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need . . . for case by case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. . . .
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> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a *lack of judicially discoverable and manageable standards* for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 210, 217 (1962) (emphasis added).

The controversy between President Nixon and the Congress over the continued bombing of Cambodia, subsequent to repatriation of American forces and prisoners, resulted in a compromise, *viz.*, the Joint Resolution Continuing Appropriations for Fiscal 1974.[9] This enactment required cessation of United States military activity relative to Cambodia as of August 15, 1973. Congress' failure to terminate the bombing immediately prompted Congresswoman Elizabeth Holtzman of Brooklyn and several Air Force officers to bring suit in the District Court for the Eastern District of New York seeking a determination that United States military activities in Cambodia were illegal as without congressional authorization. Judge Orrin Judd granted summary judgment to the plaintiffs; he declared that United States military activity in Cambodia was unlawful[10] and enjoined further military activity in or over Cambodia.[11] In *Holtzman v. Schlesinger* the Second Circuit reversed the district court.[12]

Prior to the district court decision in *Holtzman*, no federal court has ever attempted to restrain United States military activity in Indo-

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The *Baker* guidelines for determining whether a court should refuse to adjudicate a claim on the ground that it presents a political question were applied to the Vietnam War in Massachusetts v. Laird, 400 U.S. 886 (1970) (Douglas, J., dissenting). *See* Gilligan v. Morgan, 413 U.S. 1 (1973) wherein the Court overturned a decision requiring the district court to supervise the Ohio National Guard in the wake of the Kent State killings on the ground that there were no "judicially discoverable and manageable standards."

For history and discussions of the development of the political question doctrine see Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd without opinion*, 411 U.S. 911 (1973); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Scharpf, *Judicial Review and The Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Tigar, *Judicial Power, The "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A. L. REV. 1135 (1970).

In general, the decision of a court to abstain may be constitutionally mandated if the matter in question "has in any measure been committed by the constitution to another branch of government." 369 U.S. at 211. Otherwise it is a matter of discretion. *See* Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEXAS L. REV. 1033, 1041, 1046-72 (1968).

9 PUB. L. No. 93-52, § 108, 87 Stat. 134 (July 1, 1973), provides:

> Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by the United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

361 F. Supp. 553.

10 Holtzman v. Schlesinger, Docket No. 73-C-537 (E.D.N.Y. 1973), *quoted in* 484 F.2d at 1308: "[T]here is no existing Congressional authority to order military forces into combat in Cambodia or to release bombs over Cambodia, and . . . military activities in Cambodia by American armed forces are unauthorized and unlawful. . . ."

11 *Id.*

12 484 F.2d 1307 (2d Cir. 1973), *rev'g* 361 F. Supp. 553 (E.D.N.Y. 1973). The defendants were enjoined from "participating in any way in military activities in or over Cambodia or releasing any bombs which may fall in Cambodia." *Id.*

china.[13] Judge Judd's order never took effect as the Court of Appeals for the Second Circuit immediately stayed and subsequently dissolved the injunction.[14] Judge Mulligan, writing for the majority,[15] considered the issues of justiciability, congressional authorization and standing.

The court first tackled the question of justiciability. Judge Mulligan was of the view that the threshold question was whether judicial intrusion into the controversy was barred by the political question doctrine.[16] In *Orlando v. Laird*[17] the Second Circuit had previously answered this question in the negative. Relying on *Baker v. Carr*,[18] *Orlando* held that to the extent that congressional approval was necessary to conduct a war, a justiciable issue was present.[19] Since congres-

13 The constitutionality of United States military activities in Indochina had never been adjudicated by the Supreme Court. The Court affirmed without opinion the three-judge court decision in Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd without opinion*, 411 U.S. 911 (1973) which dismissed the complaint because it presented a political question. The Court denied leave to the Commonwealth of Massachusetts to file an original bill contesting the constitutionality of United States military activity in Indochina, Massachusetts v. Laird, 400 U.S. 886 (1970) and has denied certiorari in all other cases in which review of the war was sought.

14 The events which followed the district court decision are documented in 484 F.2d at 1308, and are included for the reader's convenience. The stay was granted by the court of appeals on July 27, 1973 and argument of the appeal was set for August 13, 1973. Mr. Justice Marshall, Circuit Justice for the Second Circuit, denied an application to vacate the stay on August 1, 1973 and noted that the date of argument of the appeal could be advanced. — U.S. — (1973). Argument was advanced to August 8, 1973 on the unopposed motion of the plaintiffs. On August 4, 1973, upon plaintiffs' application, Mr. Justice Douglas issued an order vacating the stay. — U.S. — (1973). Later in the same day, Mr. Justice Marshall, after polling the remaining members of the Court and receiving their unanimous approval, issued an order reinstating the stay and overruling Mr. Justice Douglas. — U.S. — (1973). An August 3, 1973 petition for an en banc hearing was denied on August 6, 1973. The argument of the appeal took place on August 8, 1973 and the decision of the court was announced the same day.

15 Judge Timbers joined Judge Mulligan as the *Holtzman* majority. Judge Oakes dissented.

16 484 F.2d at 1309.

17 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

18 369 U.S. 186 (1962). *See* note 8 *supra*.

19 The *Orlando* court said "The test is whether there is any action by Congress sufficient to authorize or ratify the military activity in question" and concluded that there was "no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war." 443 F.2d at 1042. The court added,

> Beyond determining that there has been *some* mutual participation . . . it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question. The form which congressional authorization should take is one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions.

Id. at 1043.

The court in *Orlando* found sufficient congressional authorization without relying entirely on the Tonkin Gulf Resolution. *Id.* The First Circuit has similarly found sufficient congressional participation to legalize the war. Massachusetts v. Laird, 327 F.

sional authorization involved discernible activity, a determination of whether or not it existed could be reached by applying judicially discoverable and manageable standards. This position was adopted by the *Holtzman* court.[20]

Having concluded that the legality of the war was justiciable to the extent of whether Congress participated in the commitment of military forces, Judge Mulligan turned to the question of whether the court could determine if the participation was sufficient to authorize the action. In ruling that it was not, the court found *DaCosta v. Laird*[21] (*DaCosta I*) in point. In *DaCosta I*, the Second Circuit, per Judge Kaufman, considered that the mutual participation of Congress and the President in winding down the war in Vietnam was a political question.[22] However, in *DaCosta III*[23] the court stated that it did not "pass on the point . . . whether a radical change (as opposed to a winding down) in the character of war operations . . . might be sufficiently measurable judicially to warrant a court's consideration, i.e., might contain a standard which we seek. . . ."[24]

The *Holtzman* plaintiffs, seizing upon this dicta, claimed that "the character of the war operations" had so radically changed so as to require new congressional participation, and that the time was ripe to determine whether "judicially discoverable and manageable standards" existed. They cited, as factors relevent to this determination, prior congressional participation, newly voiced congressional disapproval, the Vietnam Accord and the continued fighting in Cambodia.

District Judge Orrin Judd accepted this interpretation of *DaCosta III*[25] and noted that current congressional participation was questionable in view of Congress' subsequent disapproval of the war expressed by its repeal of the Tonkin Gulf Resolution[26] and enactment of the Mansfield Amendment.[27] He concluded that a radical change in the

Supp. 378 (D. Mass.), *aff'd*, 451 F.2d 26 (1st Cir. 1971). *But see* Mitchell v. Laird, — F.2d — (D.C. Cir. 1973) (initial prosecution of the war may have been illegal).

20 484 F.2d at 1309.

21 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972), wherein the Second Circuit held that the repeal of the Tonkin Gulf Resolution did not *nunc pro tunc* remove congressional participation. *Id.* at 1369.

22 *Id.* at 1370.

23 DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973).

24 *Id.* at 1156.

25 361 F. Supp. at 562.

26 PUB. L. No. 91-672, § 1284 Stat. 2053 (January 12, 1971).

27 Appropriations Authorization-Military Procurement Act of 1972, PUB. L. No. 92-156 § 601(a), 85 Stat. 423 (November 17, 1971). The Mansfield Amendment was a declaration of policy only, without binding effect of law, and provided:

> It is . . . the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina, and to provide for the prompt and orderly withdrawal of all United States military forces at a date

war had occurred and that continued military activity without renewed congressional support was unlawful. This interpretation was rejected by the *Holtzman* majority.

Judge Mulligan stated that whether the negotiated settlement and the return of American forces and prisoners of war was such a change as to require additional approval from Congress was a political question. The court felt that such inquiry "involves diplomatic and military intelligence which is totally absent in the record . . . , and its digestion in any event is beyond judicial management."[28] Thus the court answered the question left open in *DaCosta III*, finding that the significance of a "radical change" in the war was just as much a political question as that of a winding down. Judge Oakes, dissenting, felt there was a radical change in the character of the war which provided the requisite "manageable standard."[29]

Although the court held that whether new congressional participation was required for bombing in Cambodia was a political question, it commented that Congress had in fact approved by appropriation[30] the continued bombing until August 15, 1973. The significance of the appropriation was disputed by the dissent which called it an

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certain, subject to the release of all American prisoners of war . . . and an accounting for all Americans missing in action. . . .

Id. The Amendment urged the President to establish a date for withdrawal of American forces contingent only on the release of prisoners of war and accounting for missing in action, to negotiate a cease-fire with North Vietnam, and to negotiate a safe, phased withdrawal of United States forces in exchange for a phased release of United States prisoners of war concurrent with the United States withdrawal. *See* DaCosta v. Laird 471 F.2d 1146, 1156-57 (2d Cir. 1973). *But see* DaCosta v. Nixon, 55 F.R.D. 145, 146-47, (E.D.N.Y.), *aff'd without opinion*, 456 F.2d 1334 (2d Cir. 1972) (§ 601 has binding legal effect).

28 484 F.2d at 1312. The court cited with approval Mitchell v. Laird, — F.2d — (D.C. Cir. 1973) and DaCosta v. Laird, 471 F.2d 1146, 1157 (2d Cir. 1973), wherein both courts stated that the effect of changed military activities was a political question. 484 F.2d at 1312.

29 484 F.2d at 1315. He felt that under Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), there was a manageable standard. In *Youngstown*, where the President seized privately owned steel mills during the Korean war, the Court held that the seizure was not pursuant to congressional authority, nor did the Constitution grant such power to the President as Commander-in-Chief, nor would it be implied from, or inherent in, aggregate presidential powers granted in article II. *Id.* at 587.

In *Youngstown* there clearly was no congressional authority as contrasted with the uncertainty of congressional participation in *Holtzman*. That the President did not possess power as Commander-in-Chief, even during wartime, over the purely domestic matter of seizing private property located entirely within the United States without congressional approval is to be distinguished from the prosecution of a foreign war arguably supported by Congress and initiated as a result of executive directed foreign policy. *See* Affidavit of William P. Rogers, 484 F.2d at 1310 n.1.

30 484 F.2d at 1313. *Accord*, Drinan v. Nixon, 364 F. Supp. 853 (D. Mass. 1973). *But see* Mitchell v. Laird, — F.2d — (D.C. Cir. 1973).

acknowledgement of the President's power to bomb rather than a grant of authority.[31]

The Second Circuit, notwithstanding its finding that the extent of congressional participation to constitute authorization presented a nonjusticiable political question, considered plaintiffs' standing to bring the suit. The court found that neither Congresswoman Holtzman nor the Air Force officers qualified. With respect to the Air Force officers, the majority felt that the appeal was mooted by their return to the United States, there existing "nothing more than the merest possibility" that they would be ordered to combat again. Mere taxpayer or serviceman status would not suffice; for standing a serviceman must be under orders to fight.[32] As to Congresswoman Holtzman, the majority felt that she stood no better than a mere taxpayer, her congressional vote having not been impaired in any way.[33]

When the bombing of Cambodia ceased on August 15, 1973, overt American military involvement in southeast Asia became a subject for history books.[34] *Holtzman v. Schlesinger* personifies the end of a

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31 484 F.2d at 1317, *quoting* Senator Fullbright:

> The acceptance of an August 15 cut off date should in no way be interpreted as recognition by the committee of the President's authority to engage U.S. forces in hostilities until that date. The view of most members of the committee has been and continues to be that the President does not have such authority in the absence of specific congressional approval.

119 CONG. REC. 12560 (daily ed. June 29, 1973).

It appears that such appropriation and draft extension acts are more the result of "[t]he de facto power of the President to present Congress with the *fait accompli* . . ." than congressional assent to unilaterally initiated presidential war making. Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1776 (1968).

32 484 F.2d at 1315. At the time the suit was commenced, the airmen-plaintiffs were under orders to engage in military activities over Cambodia. They had since been returned to the United States and relieved of this military obligation. *Id. But see* Mitchell v. Laird, — F.2d — (D.C. Cir. 1973); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970).

33 484 F.2d at 1315. *Contra*, Mitchell v. Laird, — F.2d — (D.C. Cir. 1973). *But see* Sierra Club v. Morton, 405 U.S. 727, 732 (1972); Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 635 (1971).

34 As the District of Columbia Circuit noted in *Mitchell v. Laird*:

> *Even if his predecessors had exceeded their constitutional authority*, President Nixon's duty did not go beyond trying, in good faith and to the best of his ability, to bring the war to an end as promptly as was consistent with the safety of those fighting and with a profound concern for the durable interests of the nation — its defense, its honor, its morality. Whether President Nixon did so proceed is a question which at this stage in history a court is incompetent to answer. A court cannot procure the relevant evidence: Some is in the hands of foreign governments, some is privileged. Even if the necessary facts were to be laid before it, a court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith. Otherwise a court would be ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict,

struggle to stop a war which infected the United States. Perhaps now of minimal importance, *Holtzman* will be noteworthy if the United States ever again becomes embroiled in a "Vietnam." The recent passage of the Joint Congressional Resolution On War Powers[35] effects the methodology of the Second Circuit. This law, passed over President Nixon's veto, requires the President to report to Congress within 48 hours after commitment of armed forces to foreign combat. Such combat may be continued for only a 60 day period absent congressional approval with a 30 day extension allowed to permit safe withdrawal. Congress may, within this 90 day period, demand removal of American forces by resolution, and such resolution would not be subject to veto. By requiring affirmative congressional action to extend any troop commitment this law hopefully will provide "judicially discoverable and manageable standards" in the "twilight zone"[36] of shared war-making powers.

FEDERAL ELECTION CAMPAIGN ACT — POLITICAL COMMITTEE

United States v. National Committee for Impeachment

The Federal Election Campaign Act of 1971[1] (FECA) imposes a multitude of registration, reporting and disclosure requirements[2] on

and the scope which in foreign affairs must be allowed to the President if this country is to play a responsible role in the council of the nations.

— F.2d at — (emphasis added).

35 H.R.J. RES. 542, 119 CONG. REC. 20093 (daily ed. Nov. 7, 1973).

36 Regarding the exercise of concurrent or interrelated war powers by the President and Congress, the remarks of Mr. Justice Jackson concurring in *Youngstown* are quite appropriate:

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a *zone of twilight* in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

343 U.S. at 637 (emphasis added).

1 Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. I-IV, 86 Stat. 3 (codified in scattered sections of 2, 18, 47 U.S.C.), *formerly* Federal Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1970. For the legislative history of the Act see 1972 U.S. CODE CONG. & AD. NEWS 1773. A manual of regulations for the Act has been issued by the Comptroller General. *See* 37 Fed. Reg. 6156 *et seq.* (1972).

2 The disclosure requirements of the Act are codified in 2 U.S.C. §§ 431-41, 451-54 (Supp. 1973). Section 443(a) requires any political committee which anticipates receiving contributions of more than $1,000 in a calendar year to file a "statement of organization." Section 443(b) sets forth what must be included in the statement, *e.g.*, the names and addresses of the committee's officers, the relationships of affiliated or connected organizations, and the names and addresses of candidates being supported. Section 434 directs the treasurer of the committee to file and publish financial reports indicating receipts and contributors, stating expenditures and identifying recipient candidates.