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Comment

A Bicentennial View of the Role of Congress, the President, and the Judiciary in Regard to the Power Over War

I. Introduction

Of the principles which have guided this nation since its inception, none is as firmly established in the law as Justice Marshall's oft-quoted pronouncement that the Constitution is "the fundamental and paramount law of the nation."¹ Yet the constitutional provisions concerning the allocation of the war powers² were written in "an age of sailing ships and horse-drawn cannons"³ How applicable are these provisions two hundred years later — in a world of super-power domination and potential nuclear war? Some may contend that the very technology of the nuclear age makes impossible the separation of powers over war intended by the Framers of the Constitution. Yet the awesome reach and potential devastation of modern warfare demand at least as much restraint, surely not less, than that envisioned by those wise draftsmen.

Two hundred years ago, the power to define and initiate war and to determine its scope and duration lay in different hands than the power to conduct its progress. When all those powers come to rest in the hands of one individual, as they do today, it is time to re-examine the Constitution, its original intent, and its contemporary application.

Part II of this Comment begins with the language of the Constitution and then considers the separation of powers over

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

2. To speak of *the* war power would be a misnomer. See, e.g., Casper, *Constitutional Constraints on the Conduct of Foreign Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 486-88 (1975) (listing 27 components or aspects of the power over war).

3. J. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 224 (1986).

war which the Framers intended to foster through its various provisions. Several contests of authority early in our nation's history are examined. These struggles illustrate initial interpretations of the separation and balance of power among the coordinate branches. Part III considers the erosion of congressional power in subsequent years — coincident with the President's increasing ability to initiate and risk war — and analyzes the acquiescence of the judicial branch.

Congress' attempted reassertion of its constitutional authority over war, through the War Powers Resolution, is the subject of Part IV. The subsequent failure of the Resolution to restore the constitutional balance of power is addressed in Part V and is traced to the lack of judicial support for the congressional effort. An analysis follows of the likelihood of any future successful application of the War Powers Resolution after the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*,⁴ which may have invalidated one of its major provisions. Part VI concludes that although the Resolution probably remains unaffected by that decision, the Court will not likely hear any case arising pursuant to the Resolution. Alternative solutions are then considered and Part VII proposes an amendment to the Constitution to restore Congress' constitutional authority over war and to enable judicial intervention in related disputes.

This Comment concludes that the separation of powers over war intended by the Framers no longer exists and that the judiciary will not intervene to restore that intended balance without a constitutional amendment. It suggests that the bicentennial of our Constitution is an appropriate time for the nation to consider and debate such a change.

II. The Framers' Intent: A Balance of Power

A. *Language of the Constitution*

1. *Legislative Power Over War*

Numerous constitutional grants expressly confer upon Congress fundamental powers over war. Congress is specifically

4. 462 U.S. 919 (1983).

granted the power "[t]o declare War"⁵ and a wide range of auxiliary powers to effect the declaration, including the exclusive right to raise funds and control their disbursement.⁶ Only Congress is empowered to "raise and support Armies"⁷ or to "provide and maintain a Navy."⁸ The Constitution additionally grants to Congress the broad power to govern and regulate all land and naval forces,⁹ as well as the authority to provide for the raising and governance of a militia.¹⁰

Congress is also empowered to control a variety of military actions short of, but related to, war. Specifically, the Legislature is given authority in regard to "Letters of Marque and Reprisal, and . . . Rules concerning Captures on Land and Water."¹¹ It can both define and punish piracy,¹² and determine the extent to

5. U.S. CONST. art. I, § 8, cl. 11.

6. *Id.*, cl. 1.

7. *Id.*, cl. 12. Perhaps no other provision of the Constitution so clearly evidences the trust which the Framers of the Constitution were willing to place in Congress, for this was a power greatly feared. *See, e.g.*, J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1177 (1883) (examining the colonists' fear of a standing army and of the potential depletion of the national economy). *Accord*, J. PELTASON, CORWIN & PELTASON'S UNDERSTANDING THE CONSTITUTION 76 (1985).

The full scope of Congress' power under this clause is sweeping indeed. *See, e.g.*, Selective Service Draft Law Cases, 245 U.S. 366 (1918) (power of conscription); *McKinley v. United States*, 249 U.S. 397 (1919) (Congress may provide for the trial and punishment of all military offenses); *Lichter v. United States*, 334 U.S. 742 (1948) (Congress may regulate private industry in time of war). Nevertheless, the Framers' trust was not unlimited and they provided that "no appropriation of Money to that Use shall be for a longer Term than two Years." U.S. CONST. art. I, § 8, cl. 12.

8. U.S. CONST. art. I, § 8, cl. 13. The lack of a temporal limitation on appropriations, similar to that imposed on Congress in relation to the maintenance of armed forces, perhaps reflects that the colonists did not similarly fear the navy as a standing threat to personal liberty.

9. *Id.*, cl. 14. This language appears to be intentionally broad. Note, for example, that Congress, in reliance on this clause, eventually created a third, independent element of national military force. *See* National Security Act of 1947, Pub. L. No. 253, 61 Stat. 495 (1947) (creating the national Air Force).

10. U.S. CONST. art. I, § 8, cls. 15, 16. Under the National Defense Act of 1916, Congress established the National Guard and the National Guard Reserve, and authorized the President to establish fitness guidelines and to establish a wartime draft. Pub. L. No. 85, 39 Stat. 166 (1916).

11. U.S. CONST. art. I, § 8, cl. 11. The intended control, to authorize private individuals to engage in actions against an enemy's ships and property, was eventually banned by the 1856 Pact of Paris. Nevertheless, it is significant that "[t]he purpose of this clause was to transfer to Congress a power that in Great Britain belonged to the King, or the executive branch." J. PELTASON, *supra* note 7, at 75.

12. U.S. CONST. art. I, § 8, cl. 10.

which violations of international law shall be regarded as violations of national law.¹³

2. *Executive Power Over War*

In clear contrast to the numerous express grants of power conferred upon Congress, the war-related powers enumerated in the executive article¹⁴ are few in number and less clearly defined. Initially, article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America."¹⁵ These words have been compared to the purportedly analogous language of article I which states "[a]ll legislative Powers *herein granted* shall be vested in a Congress of the United States . . ."¹⁶ The omission of the words "herein granted" in article II has generated a debate, still unresolved, as to whether the Constitution therefore gives the President "a grant in bulk of all the conceivable executive power . . . [or merely] the generic powers thereafter stated."¹⁷

Equally unclear is the provision that the President be the "Commander in Chief of the Army and Navy of the United States, and of the Militia . . ."¹⁸ which is followed by the additional words "when called into the actual Service of the United States."¹⁹ These words are evidently included as a limitation.²⁰

The President is given substantial authority to conduct the nation's foreign policy, yet even that power is subject to a legislative limitation: the President "shall receive Ambassadors and other public Ministers,"²¹ but his authority to make treaties is "by and with the Advice and Consent of the Senate"²² and is

13. "To define and punish . . . Offences against the Law of Nations." *Id.*

14. U.S. CONST. art. II. Article II was inspired by the New York Constitution of 1777. See THE FEDERALIST No. 69 (A. Hamilton).

15. U.S. CONST. art. II, § 1, cl. 1.

16. *Id.*, art. I, § 1, cl. 1 (emphasis added).

17. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (concluding the latter).

18. U.S. CONST. art. II, § 2, cl. 1.

19. *Id.*

20. It was Congress — not the President — that was expressly empowered "to raise . . . Armies," *id.*, art. I, § 8, cl. 12, to "provide . . . a Navy," *id.*, cl. 13, and to "provide for calling forth the Militia," *id.*, cl. 15. See *supra* notes 7, 8, 10, and accompanying text.

21. U.S. CONST., art. II, § 3, cl. 3.

22. *Id.*, § 2, cl. 2.

conditioned upon the requirement of a two-thirds concurrence of the Senators.²³

Although these constitutional grants of power to the President — which can be characterized as “war powers” — are few and vague, that very lack of definition has contributed to the continual growth of executive power discussed below. Our Constitution has ironically been referred to as one which does not *preclude* Congress from “surrendering . . . [its war power] by allowing the President to assume the initiative on the basis of his vague but potentially expandable powers.”²⁴ Whether or not that expansion of executive power was either foreseen or intended by the Framers, however, cannot be discerned from the language of the Constitution itself. Rather, one must read the Constitution in the context of the era in which it was written.²⁵

B. *The Historical Context*

1. *Background*

When the Framers first met in Philadelphia in May of 1787,²⁶ their view of the world, and of the nature of potential war in that world, was necessarily and markedly different than it would be today.²⁷ Britain was a recently antagonized world power and the United States was a self-liberated nation, in fear of reprisal from other British colonies and of aggression by the nations of Europe.²⁸ The Framers were quite concerned about

23. *Id.*

24. A. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER* 6 (1976).

25. “The Constitution of the United States, the supreme law of the land, is by no means self-explanatory.” J. PELTASON, *supra* note 7, at vii.

26. Actually, there had been a prior, but unsuccessful attempt to hold a constitutional convention. Called by a Virginia delegation which included James Madison, it met in Annapolis, Maryland in 1786. Only five states attended, and the delegates voted to send delegates to Philadelphia in 1787 instead. *TO SECURE THESE BLESSINGS: THE GREAT DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1787* 16 (S. Padover ed. 1970).

27. See, e.g., Javits, *War Powers Reconsidered*, 64 *FOREIGN AFF.* 130 (1985). Javits refers to the Framers as “[t]hose eighteenth-century farmer-politicians” and notes that they “could have had no grasp of the enormous changes and frightening potential of uncontrolled armed conflict in the late twentieth century.” *Id.* at 131.

28. See *THE FEDERALIST* No. 24 (A. Hamilton) (C. Rossiter ed. 1961). Alexander Hamilton warned against “an excess of confidence or security. On one side of us, and stretching far into our rear, are growing settlements subject to the dominion of Britain. On the other side . . . are colonies and establishments subject to the dominion of Spain.” *Id.* at 160-61. See also *id.* No. 3, at 42-43 (J. Jay) (warning of the danger of hostilities by

the potential for attack by native Americans,²⁹ and were equally aware of the danger of disunity among the states, should one or several be attacked.³⁰

In contrast to the concerns of so many contemporary political and constitutional scholars, the Framers were far more anxious about the nation's ability to successfully defend itself than about restraining its ability to wage offensive war.³¹ Nevertheless, contemporaneous writings make clear the nature and the separation of powers over offensive war that they intended.

2. *The Federalist Papers*

That the Framers intended a limited executive role in the power over war is clearly discernible in the writings made in support of the adoption of the Constitution by the states. Alexander Hamilton recognized his countrymen's fear of a strong executive when he alleged that the Constitution's opponents "[c]alculating upon the aversion of the people to monarchy . . . have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President of the United States; not merely as the embryo, but as the full-grown progeny of that de-

Portugal, Spain and Britain); No. 41, at 256 (J. Madison) (listing the provision of security against foreign danger first in his consideration of the necessary powers of central government).

29. See *id.* No. 24, at 161 (A. Hamilton). "The savage tribes on our Western frontier ought to be regarded as our natural enemies . . ." *Id.*

30. In this regard, the Framers feared not only attack by in-land native Americans, but maritime attack as well. James Madison, for example, a resident of the coastal state of Virginia, feared attack by "a foreign enemy, or even . . . pirates and barbarians . . . In the present condition of America, the States more immediately exposed to these calamities have nothing to hope from the phantom of a general government which now exists . . ." *Id.* No. 41, at 261 (J. Madison).

31. See, e.g. M. SHAPIRO & R. TRESOLINI, *AMERICAN CONSTITUTIONAL LAW* 165 (6th ed. 1983) ("The vast powers now exercised by modern Presidents could not have been envisioned by the framers of the Constitution."); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 164 (1978) (Congress increasingly attempting to limit presidential options); F. WORMUTH & E. FIRMAGE, *TO CHAIN THE DOG OF WAR* 268 (1986) ("If the framers were chary of permitting the President to wield muskets and sail ships, surely we must pause to consider the wisdom of allowing him to unilaterally control the vast nuclear arsenal."); Neustadt & Allison, *Afterword to R. KENNEDY, THIRTEEN DAYS* at 109 (1971) [hereinafter Neustadt] (concerning "the respective roles of President and Congress in *making war*" (emphasis added)). See generally J. JAVITS, *WHO MAKES WAR* (1973) (in support of the War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982), of which he was a co-author).

tested parent."³²

Hamilton analyzed the nature of the executive power and its limitations.³³ He characterized the commander in chief power as providing "authority [that] would be nominally the same with that of the king of Great Britian, *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"³⁴ He also alluded to the fact that "several of the States expressly declare their governors to be commanders-in-chief,"³⁵ thus negating the image of sweeping power which the words "Commander in Chief" may seem to hold today. In fact, during New York's state convention for the ratification of the Constitution, an amendment was urged to further weaken the President's role as Commander in Chief by prohibiting him from assuming *personal* command of the armed forces "without the previous desire of the Congress."³⁶ Although the amendment was never adopted by Congress, the intent and distrust underlying its proposal seem clear.

In a subsequent writing, Hamilton rhetorically asked "what would be to be feared from an elective magistrate of four years' duration with the *confined authorities* of a President of the United States?"³⁷ It is clear from Hamilton's other writings, as well, that he considered the President's power to be unquestionably limited.³⁸

James Madison's view of the Constitution's allocation of war powers was tersely, but strongly, stated. He asked whether the power to declare war was a necessary one, and concluded that "[n]o man will answer this question in the negative."³⁹ Whereas actual declarations of war were generally outmoded even prior to the writing of the Constitution,⁴⁰ it may be as-

32. THE FEDERALIST NO. 67, at 407 (A. Hamilton) (C. Rossiter ed. 1961).

33. See *id.*, Nos. 67-77 (A. Hamilton). (emphasis added).

34. *Id.* No. 69, at 417-18 (emphasis added).

35. *Id.* at 418.

36. 1 DEBATES IN THE SEVERAL STATE CONVENTIONS 330 (J. Elliot ed. 1888).

37. THE FEDERALIST NO. 71, at 435 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis added).

38. See, e.g., *id.*, No. 77 (referring, inter alia, to "[t]he only remaining powers of the executive" *Id.* at 463 (emphasis added).

39. *Id.*, No. 41, at 256 (J. Madison).

40. See, e.g., Lofgren, *War-Making Under the Constitution: The Original Under-*

sumed that Madison considered Congress to have plenary power over the *initiation* of war. In fact he concluded that "[t]he existing Confederation, establishes *this power* in the most ample form."⁴¹ This is particularly significant in that under the Articles of Confederation Congress had been granted both legislative and executive powers. The Articles expressly conferred upon Congress "the sole and exclusive right and power of determining on peace and war"⁴² That Madison read the power of declaration broadly is clear in his ensuing discussion of Congress' power of raising and equipping armies and navies. He noted that "[t]his is involved in the foregoing power [of declaring war],"⁴³ and argued the necessity of Congress' "*indefinite power* of raising *troops*, as well as providing fleets; and of maintaining both in *peace*, as well as in war."⁴⁴

In all, no less than twenty-three of the eighty-five Federalist Papers directly addressed questions of power over war and national defense, all seeking to reassure would-be supporters that both Congress and the President were sufficiently limited by the terms of the proposed Constitution.⁴⁵

3. *Convention Debates*

In contrast to the extreme emphasis accorded questions of war in the Federalist Papers, it is remarkable that prior to the adoption of the Constitution only one debate at the Constitutional Convention expressly concerned the separation of war powers. The account of this one debate occupies only two of the almost 2,000 recorded pages of Convention debates.⁴⁶ One may

standing, 81 YALE L.J. 672, 693 (1972) (tracing undeclared hostilities such as the Seven Years War between Britain and France, but which occurred principally in the United States, and the American Revolution itself in relation to French hostilities against Britain).

41. THE FEDERALIST No. 41, at 256 (J. Madison) (C. Rossiter ed. 1961) (emphasis added).

42. ARTS. OF CONFED., art. 9. This language remained unchanged from the very first draft of the Articles. See M. JENSEN, THE ARTICLES OF CONFEDERATION 258 (1948).

43. *Id.*

44. *Id.*

45. See THE FEDERALIST Nos. 3, 4, 6, 8, 14, 16, 22, 23-29, 30, 31, 34, 41, 46, 53, 56, 69, 70.

46. See generally 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318-19 (M. Farrand ed. 1966) [hereinafter RECORDS].

safely draw two conclusions — that the Framers believed the Constitution to be clear and unambiguous in this regard, and that they failed to foresee the ensuing failure of the Constitution to limit the enormous expansion of executive power in relation to war.⁴⁷ The Convention's only debate over the war power well illustrates this view.

Charles Pinckney of South Carolina initiated the debate by questioning the wisdom of delegating to Congress, in article I, § 8, cl. 1, the power to make war.⁴⁸ His concern, however, was merely whether that power ought to lie instead in the Senate, a smaller and presumably more efficient body.⁴⁹ Pierce Butler, also of South Carolina, suggested that the power be vested in the President, "who will not make war but when the Nation will support it;"⁵⁰ but the record indicates not even a second for his proposal.⁵¹

James Madison, joined by Eldridge Gerry of Massachusetts, subsequently moved to "insert '*declare*', striking out '*make*' war; leaving to the Executive [only the] power to repel *sudden* attacks."⁵² Other records of the time indicate that Madison's pub-

47. See, e.g., Lofgren, *supra* note 40 ("Americans originally understood Congress to have at least a coordinate, and probably the dominant, role in initiating all but the most obviously defensive wars, whether declared or not." *Id.* at 701).

48. The Committee of Detail had presented to the delegates its initial draft in which it had granted to Congress, *inter alia*, the power to make war. RECORDS, *supra* note 46, at 181-82. The debate took place on August 17, 1887. *Id.* at 318.

49. "[T]he Legislature's proceedings were too slow. It would meet but once a year. The House of Representatives would be too numerous The Senate would be the best depository" *Id.* at 318.

50. *Id.*

51. *Id.* The view that the public sentiment can or should be a realistic restraint of presidential war-making authority has been espoused by many modern commentators. See, e.g., Leigh, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unwise*, in CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 165, 173 (1984) (arguing that the best alternative lies in the ordinary political process). See also W. MULLEN, *PRESIDENTIAL POWER AND POLITICS* (1976) ("[S]omeone exercises power in part because others empower him or her to act; leadership implies followers." *Id.* at 110.). But see Note, *Garcia v. San Antonio Metropolitan Authority: The Commerce Clause and the Political Process*, 6 PACE L. REV. 599 (1986). ("Given the fact that today Congress appears to respond more to political action groups and other lobbyists than to its members' constituencies, the voice of the latter may go unheard." *Id.* at 636.)

52. RECORDS, *supra* note 46, at 318 (latter emphasis added). Madison's language clearly suggests that the word "declare" was intended not to *limit* Congress to the formality of a declaration, but rather to *limit the executive* to the necessarily rapid initiation of force required by a "sudden attack" upon the nation.

lished Convention journals were not entirely accurate as to initial vote tallies and that there were in fact two votes taken on this proposed substitution.⁵³ Connecticut initially voted in the negative “but, on the remark, by Mr. King,⁵⁴ that ‘make’ war might be understood to ‘conduct’ it, which was an executive function, Mr. Ellsworth⁵⁵ gave up his objection and the vote was changed to *ay*.”⁵⁶

Some delegates would have limited the President even further. Butler, despite his initial hesitation, was not only persuaded to vote for the above substitution, but went on to propose that the delegates “give the Legislature power of peace, as they were to have that of war.”⁵⁷ The motion, however, was defeated, apparently on Ellsworth’s admonition that peace must be “attended with intricate & secret negotiations.”⁵⁸ It seems clear that the delegates did not intend either the foreign affairs power or the commander in chief power to override Congress’ power to determine the initiation and extent of the nation’s involvement in war.

C. *The Intended Struggle for Power*

It is certainly true that there has been no unanimity among constitutional scholars on the intent of the Framers regarding the separation of war powers in the Constitution.⁵⁹ Nevertheless,

53. RECORDS, *supra* note 46, at xvi (stating that Madison “corrected” his original notes before writing his journal). See also 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 439 (J. Elliot ed. 1974) [hereinafter DEBATES] (indicating both tallies).

54. Rufus King of Massachusetts.

55. Oliver Ellsworth of Connecticut.

56. DEBATES, *supra* note 53, at 439.

57. RECORDS, *supra* note 46, at 319.

58. *Id.*

59. For indepth analyses of varying hypotheses, see J. JAVITS, *supra* note 31 (surprisingly unclear intent, perhaps related to the delegates’ limited view of Washington as the nation’s President); W. MULLEN, *supra* note 51 (a strong and dominant presidential role was intended); A. SOFAER, *supra* note 24 (intended, continual conflict between the legislative and executive branches); F. WORMUTH & E. FIRMAGE, *supra* note 31 (absolute congressional power over the initiation of war); Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972) (the role of the President was to be extremely limited); Emerson, *The War Powers Resolution Tested: The President’s Independent Defense Power*, 51 NOTRE DAME L. REV. 187 (1975) (the Framers intended broad presidential power over warmaking); Goldsmith, *Separation of Powers and the Intent of the Founding Fathers*, in CONGRESS, THE PRESIDENT, AND FOREIGN POLICY (1984) (“If there is any aspect of our Constitution where powers and responsibilities are divided but shared, it is certainly

the Framers are acknowledged to have been wise and cautious draftsmen,⁶⁰ and one must strongly suspect that they intended to create the separation of, and struggle for, power, examined in the section below, which immediately followed the adoption of the Constitution.

It is clear that the Constitution was written in an era when war in the context of defense was of primary concern and when the need for a stronger centralized government was becoming steadily more apparent. Yet the very framework of that centralized government, with its interweaving of checks and balances, reflected the Framers' strong distrust of government — *either* in the hands of the executive *or* of the legislature — and their reliance on a separation and balance of power between the President and the Congress.⁶¹ One may reasonably conclude that had the Framers been as concerned about the initiation of war as they were about the conduct of the nation's defense,⁶² they would have desired a similar separation and balance in this regard.

In fact, James Wilson, a major architect of the Constitution, did address the question of initiating war. His remarks, made at

here in what is termed the *war powers*." *Id.* at 8); Leigh, *supra* note 51, at 165 (intended struggle between the branches to be resolved by the political process); Lofgren, *supra* note 40 (Congress' power was intended to be greater than that of the President); Reveley, *The Power to Make War*, in *THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 90-95* (F. Wilcox & R. Frank eds. 1976) (general balance intended, but generally tilting toward Congress).

60. The delegates were men of considerable intellectual capacity. See, e.g., *CONSTITUTIONAL CHAFF — REJECTED SUGGESTIONS OF THE CONSTITUTIONAL CONVENTION OF 1787*, at 158-71 (J. Butzner ed. 1941) (character studies of the other delegates by William Pierce of Georgia).

61. See, e.g., *THE FEDERALIST* No. 9, at 72 (A. Hamilton) (C. Rossiter ed. 1961); *id.*, No. 48, at 308-13 (J. Madison). The Framers viewed the tendency to seek increased power as inevitable and, given a system of competing branches, controllable. Hamilton observed that "[t]he insufficiency of a mere parchment delineation of the boundaries of . . . [the legislative and executive branches] has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense has been inferred and proved." *Id.*, No. 73, at 442 (A. Hamilton). See also *id.*, No. 77, at 464 (A. Hamilton) (chronicling the constitutional safeguards against the usurpation of power by the executive); *id.*, No. 48, at 309 (J. Madison) ("[I]t is against the enterprising ambition of . . . [Congress] that the people ought to indulge all their jealousy and exhaust all their precautions.").

62. See *supra* notes 29-30, 45, and accompanying text. See also *id.*, No. 3 (J. Jay). "Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first." *Id.* at 42.

Pennsylvania's ratification convention, indicate the logic of this conclusion.

This system will not hurry us into war; it is calculated to guard against it. *It will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war is vested in the legislature at large; this declaration must be made with the concurrence of the House of Representatives.* From this circumstance, we may draw a certain conclusion, that nothing but our national interest can draw us into a war.⁶³

D. *The First Contest*

Early contests over the right to initiate war evidenced the intended separation of power between the President and the Congress. Interestingly, though, the first such contest, in 1793, concerned the right of the President to decide *not* to initiate war.⁶⁴ President Washington, in response to a declaration of war by France against Great Britain, publicly and unilaterally declared a position of neutrality by the United States.⁶⁵

James Madison quickly and vehemently opposed Washington's action.⁶⁶ He viewed the President's decision as an invasion of Congress' power, pursuant to article I of the Constitution, to *declare war*,⁶⁷ therefore, according to Madison, the power to decide when *not* to declare war was derived from the same source.⁶⁸

Alexander Hamilton, on the other hand, defended Washington's right to exercise such authority as a natural consequence of

63. 2 M. JENSEN, *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 583 (1976) (emphasis added).

64. The Constitution makes no explicit grant of this power.

65. See 15 *THE PAPERS OF ALEXANDER HAMILTON* 425-32. (H. Syrett ed. 1969) [hereinafter *PAPERS*]. Although France's declaration was made on February 1, Congress adjourned on March 2, ignorant of the news. Washington first learned of the situation in April, during the congressional recess. See also A. SOFAER, *supra* note 24, at 103-04 (chronicling the event).

66. A. SOFAER, *supra* note 24, at 111.

67. U.S. CONST. art. I, § 8, cl. 11.

68. Madison considered this to be a matter of simple logic. See A. SOFAER, *supra* note 24, at 113-16. See also, A. THOMAS & A. THOMAS, JR., *THE WAR MAKING POWERS OF THE PRESIDENT* 10 (1982) [hereinafter *THOMAS*].

his foreign affairs power under article II of the Constitution.⁶⁹

The Legislative Department is not the *organ* of intercourse between the United States and foreign Nations. It is charged neither with *making* nor *interpreting* Treaties.

. . . .

If the Legislature have a right to make war on the one hand - it is on the other the duty of the Executive to preserve peace till war is declared⁷⁰

Hamilton was not alone in his view of the proper separation of power in this seemingly unanticipated context. John Jay, writing to Hamilton about Washington's proclamation, praised America's fortune in having a "Presid[ent] who will do nothing rashly"⁷¹ In like manner, John Quincy Adams lauded Washington for his firm stance against America's involvement in war.⁷²

Despite equally strong support for and against the President's right to decide *not* to initiate war, the issue did not reach the judiciary. When Washington eventually reported to Congress, albeit in large measure an *ex post facto* exercise, he was exceedingly deferential to Congress' right either to uphold, alter, or reverse his proclamation.⁷³ Congress, in turn, praised the President and formally approved his declaration of neutrality.⁷⁴

E. *Judicial Enforcement of the Framers' Intent*

1. *Undeclared War*

Five years after Washington's proclamation of neutrality, President Adams embarked on the nation's first undeclared war since its adoption of the Constitution. The so-called "Naval War" was fought against France in response to France's increas-

69. U.S. CONST. art. II, § 3, cl. 3.

70. PAPERS, *supra* note 65, at 37, 40.

71. *Id.* at 308.

72. 1 THE WRITINGS OF JOHN QUINCY ADAMS 147 (W. Ford ed. 1968). It is possible that Adams' support of Hamilton's position may have been motivated less by constitutional interpretation than by personal bias. Adams was strongly involved in Washington's selection as Commander in Chief of the Continental Army. This role may have led to his position as the nation's first President. J. JAVITS, *supra* note 31, at 25.

73. See A. SOFAER, *supra* note 24, at 115, 116.

74. *Id.* at 116.

ing interference with American shipping.⁷⁵ Congress authorized all necessary financial and military support requested by the President.⁷⁶ One commentator describes Congress' approval of an undeclared war as a "conscious national policy."⁷⁷ This reflects the political realities of America's earlier ties to France and its discomfort with a formal declaration of hostility against a recent ally.⁷⁸

President Adams' authority to initiate and conduct a war which had not been formally declared by Congress was brought before the Supreme Court in *Bas v. Tingy*,⁷⁹ the judiciary's first decision on the separation of powers over war. The case was brought by the owner of an American merchant ship which had been captured by a French privateer and then recaptured by an American warship. The owner was forced to pay salvage costs under various acts of Congress, all of which concerned an existing state of war. The plaintiff alleged that the forced payment was unconstitutional in that a "state of war" could not exist because Congress had never formally *declared* war.

Writing *in seriatim*, the Justices regarded the hostilities against France, and the President's actions in directing those hostilities, as taking place pursuant to an implicit declaration of war by Congress. They variously described the war as an "*imperfect war*"⁸⁰, a "public war,"⁸¹ a "partial war,"⁸² and a war "qualified . . . in the manner prescribed by the constitutional organ of our country."⁸³ Justice Chase emphasized that for political reasons — for example, America's then natural predisposi-

75. France had been a principal ally of the United States throughout America's struggle for independence from Britain, but America — weary of battle — chose to remain neutral in the ensuing war between France and Britain. France, angered by America's neutrality, issued decrees which made American shipping increasingly difficult. Within one year, France had seized more than 300 American ships, mostly for technical violations of previously unenforced treaty provisions, and America responded by arming its vessels and greatly increasing its fleet. For a discussion of the three year period of hostility, see A. SOFAER, *supra* note 24, at 139-61.

76. *Id.* at 144-61.

77. *Id.* at 139.

78. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 45 (1800) (Chase, J.).

79. 4 U.S. (4 Dall.) 37 (1800).

80. *Id.* at 40 (Washington, J.).

81. *Id.*

82. *Id.* at 45 (Chase, J.).

83. *Id.* at 46 (Patterson, J.).

tion toward the French — Congress might consciously wish to avoid a formal declaration. "Congress is empowered to declare a general war, or *Congress* may wage a limited war; limited in place, in objects, and in time."⁸⁴ Thus, the Court effectively upheld the President's right to initiate an undeclared war by granting Congress the right of implicit declaration through its support of the President's actions.⁸⁵

The Court's emphasis on Congress' role in regard to war seemed to shift in *Talbot v. Seeman*,⁸⁶ a case similar to *Bas v. Tingy*, which arose in the same context. The opinion, written by Chief Justice Marshall, states:

The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this enquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.⁸⁷

Yet, despite this apparently sweeping language, in neither *Talbot v. Seeman* nor in *Bas v. Tingy*, did the Court squarely address the type of separation of powers issue which it might have addressed had it been forced to resolve the issue surrounding Washington's proclamation of neutrality in 1793.⁸⁸ It remained for a subsequent decision for the Court to reach the more fundamental questions concerning the separation of powers over war.

2. *A Narrow Reading of Presidential Authority*

A direct legislative-executive conflict arose over an act of Congress which authorized the President, *inter alia*, to instruct captains of American vessels to seize any ship sailing toward a French port.⁸⁹ President Adams subsequently issued orders to

84. *Id.* at 43 (Chase, J.) (emphasis added).

85. *Id.* at 42 (Washington, J.). "What then is the effect of legislative will? In fact and in law we are at war"

86. 5 U.S. (1 Cranch) 1 (1809).

87. *Id.* at 28.

88. See *supra* text accompanying notes 73-74.

89. The pertinent language of the act provided that "if any ship or vessel . . . shall be voluntarily carried or suffered to proceed to any French port or place . . . every such

American captains and directed them as follows:

You are not only to do all in you that lies, to prevent all intercourse, whether direct or circuitous, between the ports of the *United States*, and those of *France* or her dependencies, where the vessels are *apparently as well as really American*, and protected by *American* papers only, but you are to be vigilant that vessels or cargoes really *American*, but covered by *Danish* or other foreign papers, and bound to or from *French* ports, do not escape you.⁹⁰

The owner of a vessel sailing from a French port was seized pursuant to the President's orders. He contended that Adams had overstepped his authority because Congress had explicitly authorized only the seizure of vessels sailing toward French ports. In the case *Little v. Barreme*,⁹¹ Chief Justice Marshall, writing for the Court, agreed with the shipowner. Marshall, considering Adams' right to issue such orders, implied that normally Adams would *probably* have such authority pursuant to his power as Commander in Chief of the Navy:

It is by no means clear that the president of the *United States* . . . who is commander in chief of the armies and navies of the *United States*, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication, *American* vessels which were forfeited by being engaged in this illicit commerce.⁹²

Yet Marshall went on to observe that "the legislature seemed to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a *French* port."⁹³

The Court held that the President's actions were made subsequent to a narrow grant of authority by Congress and were, therefore, limited by that express grant.⁹⁴ That the Court did so

ship or vessel, together with her cargo, shall be forfeited . . . and shall be liable to be seized . . ." Act of Feb. 9, 1799, ch. 2, § 1, 1 Stat. 613, 615 (1799).

90. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178 (1804).

91. 6 U.S. (2 Cranch) 170 (1804).

92. *Id.* at 177.

93. *Id.* at 177-78.

94. *Id.* at 178.

without further explanation implies a fundamental assumption that Congress' power over war is greater than that of the President, even in matters that arguably fall within the domain of his power as Commander in Chief.⁹⁵

It seems clear that in the years following the adoption of the Constitution, the judiciary did not hesitate to address the questions raised by the separation of war powers created by the Framers. The Court upheld the President's authority under his foreign affairs and commander in chief powers,⁹⁶ but subordinated that authority to Congress' exercise of *its* power — not only as to its right to declare and delineate the bounds of hostilities,⁹⁷ but even as to its authority to control the conduct of the hostilities.⁹⁸ Yet, by upholding the President's right to fight an undeclared war, albeit with the conscious consent of the Congress,⁹⁹ the Court paved the way for the expansion of executive power discussed below.

III. The Shift Toward Greater Executive Power

Despite the deference initially accorded Congress in its right to exercise its war powers during the nation's early years,¹⁰⁰ Presidents became increasingly bold in the next century and a half. Nearly as many major wars were undertaken *without* any congressional declaration as *with* one.¹⁰¹ Indeed, despite a history of almost continuous use of military force abroad,¹⁰² only

95. This assumption is supported by the Court's assertion that Congress' narrow grant of authority was ill-advised and compared poorly to Adams' wiser, albeit insupportable, directive:

It was so obvious, that if only vessels sailing to a *French* port could be seized on the high seas, that the law would be very often evaded, that this act of congress appears to have received a different construction from the executive of the *United States*; a construction much better calculated to give it effect.

Id. at 178.

96. *Bas v. Tingy*, *supra* note 79; *Talbot v. Seeman*, *supra* note 86.

97. *See supra* text accompanying note 87.

98. *See supra* notes 89-91 and accompanying text.

99. *See supra* notes 77-78 and accompanying text.

100. *See, e.g., supra* note 73 and accompanying text.

101. The major undeclared wars were the First Barbary War (the war with Tripoli) of 1801-1805, the Second Barbary War of 1815, the American-Mexican War of 1846-1848, and the Korean War of 1897-1898. For an account of each of these wars, see generally J. JAVITS, *supra* note 31.

102. *See infra* notes 104-106, 108.

five wars have been declared since the adoption of the Constitution.¹⁰³

It is in these allegedly minor, but increasingly numerous, uses of force against other nations that the shift of war power toward the executive branch is most clearly evident. By 1850, Presidents had unilaterally initiated the use of force against other nations no less than twenty-seven times.¹⁰⁴ By 1950, there had been more than one hundred *additional* executive initiatives, as Presidents sent forces all over the world with increasing frequency.¹⁰⁵

A. *Claims of Executive Authority*

The many uses of military force initiated by the executive have been categorized and distinguished in innumerable ways, both by commentators and by the Presidents who authorized them.¹⁰⁶ Senator Jacob Javits referred to this scenario

103. These were the War of 1812 against Britain, the Mexican War of 1846-1848, the Spanish-American War of 1898, and the First and Second World Wars. THOMAS, *supra* note 68, at 10-12.

104. Actually, there were 36 distinct uses of military force but several of these involved what was in essence a continuation of an earlier action. See HOUSE COMM. ON FOREIGN AFF., BACKGROUND INFORMATION ON THE USE OF UNITED STATES ARMED FORCES IN FOREIGN COUNTRIES, H. R. DOC. NO. 16, 91st Cong., 2d Sess. 50 (1970) [hereinafter BACKGROUND INFORMATION].

105. Africa, Antigua, Argentina, Bahamas, Bermuda, Brazil, British Guiana, Chile, China, Colombia, Costa Rica, Cuba, Dominican Republic, Egypt, Fiji, Formosa, Germany, Greenland, Guatemala, Haiti, Hawaii, Honduras, Iceland, Jamaica, Japan, Korea, Mexico, Morocco, Netherlands, Newfoundland, Nicaragua, Panama, Paraguay, Philippines, Samoa, Siberia, Soviet Russia, St. Lucia, Syria, Trinidad, Turkey, and Uruguay have all experienced the engagement of American forces solely by presidential initiative. *Id.* at 51-57.

106. One author lists nine classifications into which presidentially initiated actions can be categorized:

1. Covert intelligence operations and clandestine paramilitary operations
2. Diplomatic actions that imply subsequent military operations, e.g., severing diplomatic relations
3. Deployment of armed forces in nonhostile situations, e.g., rotation of troops to meet alliance commitments
4. Mobilization of military forces, e.g., call up of army reserves
5. Deployment of armed forces in hostile situations, e.g., commitment of armed forces to combat zones
6. Limited military engagements, e.g., protection of U.S. citizens, property, and public ships, seizures, and reprisals
7. Limited military interventions, e.g., civil commotions, claims settlements, border disputes, and preemption of third-party interventions

disparagingly:

We have had "police actions"; we have had "surgical strikes"; we have had "invitations to assist". We have had, in other words, a bad case of euphemism-itis. For war is war; and the loss of life, the expenditure of treasure and the agony of the people . . . is occasioned by acts of war and not by anything else.¹⁰⁷

Yet as Presidents have employed a varied vocabulary to describe their initiation of military force, so have they alleged various claims of constitutional justification. Frequent claims of right have been the real or alleged protection of American citizens overseas,¹⁰⁸ or that *apparently offensive* military actions are actually responses to perceived threat and are made in the national self-defense.¹⁰⁹ Constitutionally, the claims of executive authority fall within the encompassing view that the President's commander in chief, foreign relations, and executive powers combine to create inherent constitutional authority to act as he sees fit in the defense of the nation or of its interests.¹¹⁰

Perhaps the most pervasive claim of executive authority is made pursuant to the President's treatymaking power,¹¹¹ as discussed below. In this context, it is easy to see why the rapid growth of international commerce and relations would hasten the shift of power over war from the legislative to the executive branch.

8. Material wars, i.e., undeclared wars: the Naval War with France, the Barbary Wars, the Civil War, the Korean War, and the Vietnam War

9. Publicly declared wars: the War of 1812, the Mexican War of 1846-48, the Spanish-American War of 1898, World War One, and World War Two.

E. KEYNES, UNDECLARED WAR 91 (1982).

107. Javits, *supra* note 27, at 132-33.

108. In 1854, for example, a small force was sent to Greytown, Nicaragua to protect an American company's property and personnel from feared civil disturbances. An initially minor incident led to the town's complete destruction. American forces were again deployed in Nicaragua, on similar grounds, in 1909, 1912, and 1927. Many other countries experienced the presence of American troops based on claims of protectionism. See C. PYLE & R. PROUS, *THE PRESIDENT, CONGRESS AND THE CONSTITUTION* 302-304, 311 (1984) [hereinafter C. PYLE]. See also THOMAS, *supra* note 68, at 16-17.

109. Actually, this justification was asserted as early as 1801, when President Jefferson sent warships to Tripoli to protect American merchants against an anticipated attack. See THOMAS, *supra* note 68, at 31-32.

110. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J. concurring).

111. U.S. CONST. art. II, § 2, cl. 2.

B. Congressional Acquiescence

As the power to initiate the use of military force increasingly shifted toward the President, Congress, in turn, became increasingly acquiescent.

1. Declaration of War

Although Congress apparently retained the narrow authority to issue a formal declaration of war, even that power, if it can be called such, was rarely used. As noted above, Congress has declared war only five times throughout a history of military intervention.¹¹² Remarkably, in *only one* of those five instances did Congress *actually* initiate the war.¹¹³ It did so in 1812 over the objections of President Madison.¹¹⁴ Since that time, Congress has never once initiated the use of force. Even its other four "declarations of war" were in reality declarations made in response to a state of war which had already existed.¹¹⁵

2. Congress' Failure to Assert its Prerogatives

Constitutionally, Congress was hardly limited in its ability to restrain the President from his use of military force. In addition to the explicitly granted war powers,¹¹⁶ Congress can, of course, vote to terminate war.¹¹⁷ It can generally frustrate the President — by denying military and civilian appointments, for example¹¹⁸ — and can effectively obstruct the President through various types of limiting legislation.¹¹⁹ Nevertheless, Congress'

112. See *supra* notes 101-106, 108.

113. Congress declared war against Great Britain, stating "[t]hat war be, and the same is hereby declared to exist." Act of June 18, 1812, ch. 102, 2 Stat. 755 (1812).

114. THOMAS, *supra* note 68, at 10.

115. The declaration of war against Mexico, for example, noted that "whereas, by act of the Republic of Mexico, a state of war exists . . ." Act of May 13, 1846, ch. 16, 9 Stat. 9 (1846). Similarly, the declaration of war against Spain began, as did the earlier declaration against Britain, "war be, and the same is hereby declared to exist," but added "and that war has existed since the twenty-first day of April . . ." Act of April 25, 1898, ch. 189, 30 Stat. 364 (1898). Similar language and circumstances underlie the two World War declarations. Act of April 6, 1917, ch. 1, 40 Stat. 1 (1917); Act of Dec. 11, 1941, chs. 564-65, 55 Stat. 796, 797 (1941).

116. See *supra* note 5 and accompanying text.

117. U.S. CONST. art. I, § 8.

118. *Id.* § 2, cl. 2.

119. For example, Congress can cut funding for defense spending and can focus po-

response to the increasing frequency of Presidential initiative, when not actually supportive, was at least one of passive acceptance.¹²⁰

It can be argued, of course, that Congress' subsequent support, or at least its passive acquiescence, is tantamount to an implicit declaration of war by Congress. This would, in fact, appear to follow the reasoning of the Court in *Bas v. Tingy*.¹²¹ However, Congress' acquiescence may have been more a result of political reality than of its conscious constitutional will.

Many commentators feel that the strongest reason for the shift of power toward the executive branch, and Congress' acquiescence in that shift, is simply the continuous growth and increasing complexity of international relations — a field in which the President clearly predominates¹²² — and the concurrent growth in the complexity of domestic affairs to which Congress alone must respond. Tuchman, for example, writes that "as the country has moved into a dominant world position and the domestic areas of federal function have multiplied and grown more complex, the presidency has steadily extended its reach, while the Congress has abdicated in proportion"¹²³

The fact of the matter is that presidential initiatives have generally been popular at the time, even if later discredited,¹²⁴ and Congress has always been a political body. The Framers felt

litical pressure on the executive through the use of investigative and oversight committees. See, e.g., BACKGROUND INFORMATION, *supra* note 104, at 30-31 (detailing Congress' constitutional and political prerogatives).

120. Only once during the entire period of expansion of presidential power did Congress formally react to an executive initiative, but it was well after the fact. Although Congress declared war against Mexico in 1846, it later learned that it had done so in response to a covert and deceitful instigation of hostilities by the President. Congress subsequently voted to officially censure President Polk. For an account of the incident, see THOMAS, *supra* note 68, at 11.

Conceivably, Congress could even have used its power of impeachment in response to such a situation. U.S. CONST. art. I, §§ 2, 3; art. II, § 4. Most commentators, however, feel that impeachment is a drastic action — far too dangerous a step to be undertaken without the most extreme provocation. See, e.g., Israel, *Preface* to H. GARZA, WATERGATE INVESTIGATION INDEX (1985).

121. 4 U.S. (4 Dall.) 37 (1800). See *supra* text accompanying notes 79-85.

122. U.S. CONST. art. II, § 2, cl. 2; § 3, cl. 3.

123. Tuchman, *Foreword* to J. JAVITS, *supra* note 31, at vi-vii.

124. See, e.g., *supra* note 120.

confident that giving the power of the purse to Congress would provide ample control over the President. Yet as one commentator has observed, "[h]istory provides little support for the effectiveness of the check that Jefferson applauded Once into war, Congress has generally supported the President."¹²⁵

It has also been suggested that the shift of power may have been a function of the large size of Congress and of the increasing ease with which Presidents were able to act unilaterally in a changing world.¹²⁶ Some commentators have suggested that Congress grew uncomfortable with a power which, although separate under the Constitution, came to be viewed as an extension of foreign policy.¹²⁷

Most likely, the assumption of power by the executive branch, with the passive concurrence of the Legislature, was the result of many factors — some simple and others complex — as the world increasingly changed in ways which the Framers could not have foreseen.¹²⁸ It did not take place, however, without the conscious concurrence of the judiciary.

C. *Judicial Retreat*

Throughout the century and a half of growth of executive power, the judiciary retreated from its initial scrutiny of executive abuse and protection of Congress' authority. Its retreat paralleled Congress' passivity throughout.

125. C. PYLE, *supra* note 108, at 287.

126. See Neustadt, *supra* note 31, suggesting that the President has become "more dependent on Executive officials for advice as well as execution than our Constitution makers could have anticipated

"New checks and balances replace the old." *Id.* at 118. In analyzing why Presidents "have shied away from Congress in making decisions about war," secrecy and flexibility are considered to be paramount factors. *Id.* at 140.

127. E.g., Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12, 38 (1976). Sofaer states that "[t]he notion that Congress should become more involved in making and implementing foreign policy is unassailable in theory. But Congress has consciously chosen other roles for itself" *Id.*

128. See *supra* notes 27-28, 31. One may argue that if the Framers failed to foresee the nature of a new and different role, then the desire to retain the separation of power they envisioned may be inappropriate. The events of the Vietnam era, however, discussed in the text below, indicate the continuing wisdom of their original intent.

1. *A Forerunner of the Political Question Doctrine*

Only two decades after its restrictive reading of executive authority in the 1804 case, *Little v. Barreme*,¹²⁹ the Court had already abandoned its earlier willingness to actively resolve issues relating to the separation of powers over war. In *Martin v. Mott*,¹³⁰ the Court considered the judgment of a court martial which resulted from the complainant's failure to obey an executive order calling forth the militia in New York State. Although the case did not concern the use of military force abroad, it is strikingly analogous to the Court's Vietnam-era decisions discussed below.

Initially, the Court noted that "[t]he Constitution declares that Congress shall have power 'to provide for calling forth the militia'"¹³¹ Pursuant to an act of Congress,¹³² the President was empowered to call forth the militia in "cases of actual invasion, or of imminent danger of invasion."¹³³ The question raised here was whether the President acted within the scope of that congressional delegation; that is, whether there was *in fact* an imminent danger of invasion.¹³⁴

The Court recognized that the power to call forth the military was not one taken lightly by the Framers:

The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion.¹³⁵

The Court asserted that the true issue, then, was "by whom is the inquiry to be judged of [sic] and decided? Is the President

129. 6 U.S. (2 Cranch) 170 (1804).

130. 25 U.S. (12 Wheat.) 19 (1827).

131. *Id.* at 28-29 (quoting U.S. CONST. art. I, § 8, cl. 15).

132. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424 (1795). This act repealed an earlier law, Act of May 2, 1792, ch. 28, 1 Stat. 264 (1792), but the differences in the prior law concerned only provisions relating to the commission and pay of troops and officers. *Id.*, § 4.

133. *Martin v. Mott*, 25 U.S. (12 Wheat.) at 29.

134. *Id.* at 29-30.

135. *Id.* at 29.

the sole and exclusive judge whether the exigency has arisen . . . ?"¹³⁶ The Court concluded that he was precisely that.

The Court's rationale was primarily that "[w]henever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts . . . the statute constitutes him the sole and exclusive judge of the existence of those facts."¹³⁷ This reasoning would eventually become a substantial part of the now frequently employed political question doctrine.¹³⁸

Actually, the act in question in *Mott*, which purportedly granted such broad discretion to the President, is susceptible to other interpretations.¹³⁹ The act provided:

[W]henever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth *such number of the militia* of the state, or states . . . *as he may judge necessary* . . . and to issue orders . . . as he shall think proper.¹⁴⁰

The discretionary power, then, may be seen to relate primarily to his commander in chief power.

It is true that the act clearly intends, by its absence of any contrary provision, that the President shall also *initiate* the order to call forth the militia. This is especially clear in light of the subsequent clause which, in contrast, empowers the President to call forth the militia to suppress an intrastate insurrection *only*

136. *Id.* at 29-30.

137. *Id.* at 31-32.

138. The doctrine, in its broadest sense, came to mean that certain cases are not properly resolved by the judiciary because there exists:

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 pronouncement by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 71-79 (1978) (discussing the doctrine in its constitutional context).

139. The Supreme Court overturned the decisions of the courts below, neither of which read the President's authority as broadly.

140. Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424 (1795) (emphasis added).

"on application of the legislature of such state, or of the [state's] executive, [when the legislature cannot be convened]" ¹⁴¹ Although the President's judgment, regarding the number of troops raised and the orders given to them, may be beyond the Court's authority, it does not necessarily follow that his judgment in determining that an emergency existed is beyond the review of the Court. No language in the statute indicates that this should be so.

Perhaps recognizing the weakness of its rationale, the Court suggested:

The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil. ¹⁴²

It may well be that early preparation is *wise*, but upholding the activation of the militia on such grounds is a rather broad interpretation of Congress' actual grant of power to call forth the militia "whenever the United States *shall be* invaded, or be in *imminent* danger of invasion" ¹⁴³

In *Little v. Barreme* ¹⁴⁴ the Court had stated what it believed would be a *wiser* and more cautious grant of power by Congress to the President, ¹⁴⁵ but had nevertheless conceded Congress' authority to act as it saw fit and had upheld its narrow grant of authority. ¹⁴⁶ In *Mott*, the Court retreated from its earlier role in preventing executive abuse of power and instead expressed a trust — with which the Framers surely would have disagreed — that "the danger [of misconduct] must be remote . . . [because of] the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interest" ¹⁴⁷ Additionally, the Court asserted that

141. *Id.* at § 2.

142. *Martin v. Mott*, 25 U.S. (12 Wheat.) at 29.

143. Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424 (1795) (emphasis added).

144. 6 U.S. (2 Cranch) 170 (1804).

145. See *supra* notes 89-95 and accompanying text.

146. The Court interpreted a congressional act authorizing the seizure of ships sailing to France, as effectively denying executive authority to seize ships returning from France. See *supra* note 93 and accompanying text.

147. *Martin v. Mott*, 25 U.S. (12 Wheat.) at 32.

"the frequency of elections, and the watchfulness of the representatives of the nation, carry with them *all the checks* which can be useful to guard against usurpation or wanton tyranny."¹⁴⁸

2. *A Narrow Reading of Congressional Authority*

The Court's deference to presidential authority and its retreat from support of Congress' constitutional role continued in subsequent years. In *The Prize Cases*,¹⁴⁹ the Court responded to claims made by ship owners damaged by President Lincoln's blockade of southern ports in 1861. As owners of vessels, whose cargoes were seized in the course of conflict, they claimed restitution.¹⁵⁰ The government contended that the President's proclamation of a blockade constituted the initiation of war and, therefore, the normal guarantees of commerce were suspended.¹⁵¹ The owners conceded that the President had legally exercised his emergency powers pursuant to an authorizing act of Congress,¹⁵² but contended that only Congress could formally declare and initiate a state of war — which it had not done prior to the blockade and which it failed to do when it reconvened after the initiation of hostilities.¹⁵³

The Court looked not so much to the Constitution as to what it saw as the logic of the situation:

However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.¹⁵⁴

Yet the Court clearly recognized the absence of Congress' intended role:

148. *Id.*

149. 67 U.S. (2 Black) 635 (1863). The so-called *Prize Cases* were actually a compilation of four separate cases — *The Brig Army Warwick*, *The Schooner Crenshaw*, *The Barque Hiawatha*, and *the Schooner Brillante* — but all were related by several common issues, among them the technical existence of a state of war.

150. *Id.* at 637-38.

151. *Id.* at 650-55.

152. See *supra* notes 132-133 and accompanying text.

153. *The Prize Cases*, *supra* note 149, at 639-50.

154. *Id.* at 669.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral*."¹⁵⁵

Surprisingly, the Court cited the Mexican War of 1846-1848 as precedent, in that the President had acted unilaterally but had been "vindicated" by Congress when it *subsequently* undertook a formal declaration of war.¹⁵⁶ The Court failed to note that Congress shortly thereafter had censured the President for his actions when it learned of the allegedly deceitful manner in which he had precipitated the entire event.¹⁵⁷ Furthermore, in the instant case, Lincoln's blockade was *not* followed by any formal congressional declaration.

The Court's holding was by no means unanimous. Four Justices joined in a strong dissent and urged the Court's return to the Framers' intended separation of war powers:

This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war: and hence the same code which has annexed to the existence of a war all these disturbing consequences has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State.

This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country.

By our Constitution this power is lodged in Congress. Congress shall have power of the Country "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."¹⁵⁸

The dissenting Justices recognized the President's authority to meet threats of imminent danger either from abroad or within pursuant to his executive and commander in chief powers.¹⁵⁹

155. *Id.* at 668.

156. *Id.*

157. *See supra* note 120.

158. *The Prize Cases*, *supra* note 149, at 688 (Nelson, J., dissenting).

159. *Id.* at 690-91.

"The whole military and naval power is put under the control of the President to meet the emergency."¹⁶⁰ In contrast, however, the legal and technical initiation of war rests only with "Congress, who can, if it be deemed necessary, bring into operation the war power, and thus change the nature and character of the contest."¹⁶¹ "Congress alone can determine whether war exists or should be declared"¹⁶² Nevertheless, the majority apparently remained unpersuaded in this viewpoint and the Court thereby further retreated from its earlier recognition¹⁶³ of the fundamental separation of war powers pursuant to articles I and II of the Constitution.

A decade later, in *The Protector*,¹⁶⁴ the composition of the Court had changed,¹⁶⁵ and the majority view was strengthened. The Court was faced with the issue of determining the running of statutes of limitation which were to be delineated in relation to formal declarations of the initiation and termination of war.¹⁶⁶ Having already decided that Lincoln's announcement of the blockade constituted the beginning of war, the Court held that the executive proclamations initiating and later terminating the blockade were equivalent to formal declarations of the initiation and termination of war.¹⁶⁷ Contrary to its lengthy opinion in *The Prize Cases*, this holding was brief and was issued without dissent.¹⁶⁸ It must have been increasingly clear to any legislators concerned with the loss of Congress' constitutional authority over war that if relief were to be found, it would not be through the judiciary.

Following the Civil War, the nation healed its wounds and again turned its attention outward. As American forces inter-

160. *Id.* at 692.

161. *Id.*

162. *Id.* at 693.

163. See *Little v. Barreme*, *supra* notes 90-95 and accompanying text.

164. 79 U.S. (12 Wall.) 700 (1871).

165. See *infra* note 168.

166. 79 U.S. at 700-01.

167. *Id.* at 702.

168. The *Protector* holding constitutes only two pages in the official reporter, compared to 27 pages in *The Prize Cases*, not including the dispositions of the four individual cases. The constitution of the Court itself had changed in the intervening years with the death of four Justices. IV THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, THEIR LIVES AND MAJOR OPINIONS, at 3220-24 (L. Friedman & F. Israel, eds. 1969).

vened in dozens of countries by the start of World War I, and throughout the world by the start of World War II,¹⁶⁹ the judiciary's silence and Congress' passivity enabled the continued expansion of the executive power over war.

IV. An Attempt to Restore the Separation and Balance of Power

By the victorious conclusion of World War II, the nation's acceptance of an extremely powerful President stood in stark contrast to the Framers' mistrust of an overly strong executive branch.¹⁷⁰ Yet it was the rapidly changing state of the world thereafter which led to the revitalization of a long-dormant debate between Congress and the President over the right to initiate war.

A. Background

1. Widespread International Involvement

Following World War II, the United States was left with a large, permanent military establishment with foreign bases throughout much of the world.¹⁷¹ It became a world power with a might surely unimagined even by John Jay who had prophetically written that "the time may come, if we are wise, when the fleets of America may engage attention."¹⁷²

As international tensions flared around the globe, the United States engaged in a widespread network of alliances through collective self-defense treaty commitments. The Senate, approving every treaty proposed, gave broad authority to the President to maintain and defend our relations with a total of forty-three nations.¹⁷³ The treaties generally contained language

169. See *supra* note 105 and accompanying text.

170. Jacob Javits wrote that "[t]he Second World War consolidated the popular attitude toward presidential leadership." J. JAVITS, *supra* note 31, at 237. Corwin noted "the immense reinforcement that recognized 'emergency' is capable of bringing to presidential leadership" E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 312 (R. Bland, T. Hindson & J. Peltason rev. ed. 1940) (5th ed. 1984).

171. THOMAS, *supra* note 68, at 118-19.

172. *THE FEDERALIST* No. 4, at 48 (J. Jay) (C. Rossiter ed. 1961).

173. SENATE COMM. ON FOREIGN REL., *WAR POWERS*, S. REP. NO. 606, 92d Cong., 2d Sess. 31 (1972) (examining the treaties and the conditions under which they were entered into and enacted).

calling upon each signator nation to act "in accordance with its constitutional process,"¹⁷⁴ but that language was never legally challenged as to its implication of the necessity for further Congressional assent.¹⁷⁵

Initially, as presidential power increased, only a few Members of Congress began to challenge executive authority or even to raise the constitutional issues. Senator Guy Gillette of Iowa, for example, voted against the NATO Alliance only because he feared a corresponding increase in presidential authority.¹⁷⁶ Senator Robert Taft of New York, who favored strong international alliances, nevertheless foresaw and warned against the resulting growth of executive power over the use of military force.¹⁷⁷ Such Congressmen were, however, part of a then small and unsuccessful minority.

By 1951, the United States had become engaged in a major undeclared military action in Korea, absent any official congressional declaration or authorization. President Truman based his authority on a United Nations initiative — which, not coincidentally, was itself initiated by the United States.¹⁷⁸ He invoked his constitutional executive and commander in chief powers and, in support of his actions, issued a memorandum illustrating an unbroken history of executive military initiative.¹⁷⁹

Within the next decade, as criticism mounted in Congress,¹⁸⁰ a majority nevertheless supported further executive military initiatives through congressional resolutions. The Formosa Resolution of 1955 not only gave the President full authority to employ armed forces for the protection of Formosa, but left the termination of the resolution itself to the judgment of the President.¹⁸¹ Although the Middle East Resolution of 1957 originally required the President to report to Congress biannually¹⁸² — in

174. *Id.* (quoting from Art. I, § 1 of the SEATO Treaty).

175. The question was certainly raised from time to time, but "[t]here was no authoritative answer." *Id.*

176. J. JAVITS, *supra* note 31, at 246.

177. *Id.*

178. 24 DEP'T. OF ST. BULL. No. 604, at 168-69, 198 (1951).

179. 23 DEP'T. OF ST. BULL. No. 576, at 173-79 (1950).

180. See J. JAVITS, *supra* note 31, at 241-52 (chronicling the debates over passage of NATO and its aftermath).

181. Act of Jan. 29, 1955, Pub. L. No. 84-4, 69 Stat. 7 (1955).

182. Act of Mar. 9, 1957, Pub. L. No. 85-7, 71 Stat. 5 (1957).

apparent deference to the small but growing number of concerned Members of Congress — it was subsequently amended to grant him full and absolute discretion in that regard.¹⁸³

2. *Cuban Missile Crisis: A Turning Point*

In 1962, Congress became alarmed at reports of planned Cuban intervention throughout the southern hemisphere and, shortly thereafter, at secret intelligence reports indicating the buildup of Soviet missiles in Cuba.¹⁸⁴ Congress issued a resolution which indicated its determination to prevent Cuba, by any necessary means, from engaging in acts of subversion or aggression, but did not authorize any unilateral action by the President.¹⁸⁵ Yet, one month later, President Kennedy ordered a total blockade of Cuba, directly challenged the Soviet Union, and thereby precipitated the nation's first threat of global nuclear war — under “the authority entrusted to me by the Constitution, *as endorsed by the Resolution of the Congress . . .*”¹⁸⁶ Despite the success of Kennedy's immensely risky action,¹⁸⁷ it may well be that the seeds of discontent over presidential war-making and war-risking, expressed so strongly in the Vietnam era which followed, were rooted in this crisis.

3. *Gulf of Tonkin Resolution and Its Repeal: Congressional Revolt*

Two years later, in 1964, in response to a continuing and expanding war in Southeast Asia, Congress passed the Gulf of Tonkin Resolution, granting the President full military authority and discretion to respond to Communist aggression in the area.¹⁸⁸ Under this broad grant of authority, President Johnson began the commitment of more than five hundred thousand

183. 22 U.S.C. § 1964 (1982).

184. For a detailed account of the Cuban missile crisis, see R. KENNEDY, *THIRTEEN DAYS* (1971). The book also provides an insight into President Kennedy's attitudes toward what he regarded to be the appropriate role of Congress (very limited).

185. S.J. Res. 230, 76 Stat. 697 (1962).

186. Address to the nation by President Kennedy (Oct. 22, 1962), *reprinted in* R. KENNEDY, *supra* note 184, at 153, 156 (emphasis added).

187. The Soviet Union did finally back down on the very brink of a full military super-power confrontation. See R. KENNEDY, *supra* note 184, at 87-88.

188. H.J. Res. 1145, 78 Stat. 384 (1964).

Americans to an undeclared war in Vietnam and the long overdue debate on the power to initiate war was begun in earnest.¹⁸⁹

As the Southeast Asian conflict expanded, so did the debate over the President's authority to commit the nation to war. Numerous bills were introduced to cut off funding for Southeast Asian operations, but, in fear of undermining our already committed troops, they were always defeated.¹⁹⁰

The war continued, the debate continued, and in 1970 Congress repealed the Gulf of Tonkin Resolution.¹⁹¹ Nevertheless, the war in Vietnam was not terminated until 1973, and bombing in neighboring Cambodia continued. An increasingly frustrated Congress began to debate what was to become the landmark War Powers Resolution.¹⁹²

B. War Powers Resolution

The War Powers Resolution was Congress' response to a war which it never declared, but which proved to be the longest and most costly war in our nation's history.¹⁹³ It was the first attempt by Congress to formally and unequivocally reassert the

189. For an account of the build-up and growing unrest under the Gulf of Tonkin Resolution, see, J. JAVITS, *supra* note 31, at 253-61.

190. See THOMAS, *supra* note 68, at 120. "Congress continued to appropriate money . . . implicitly acknowledging that once American troops were committed in war, Congress had little choice but to support them. The power to cut off appropriations seemed too drastic to be used as an effective tool to circumscribe presidential power." *Id.*

191. Actually, the repeal was passed as a rider to the Foreign Military Sales Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971), perhaps reflecting Congress' continuing inability to squarely address the issue. President Nixon stated that he had no objection to the rider, because he had "the constitutional right — not only the right but the responsibility — to use his powers to protect American forces when they are engaged in military actions." N.Y. Times, July 2, 1970, at A10, col. 2. The President signed the Sales Act, but affirmed his earlier opinion of the repeal of the Tonkin Gulf Resolution by asserting that he had not relied upon the Resolution in claiming authority to conduct the war. N.Y. Times, Jan. 1, 1971, at A1, col. 8.

192. See 50 U.S.C. §§ 1541-1548 (1982). President Nixon vetoed the Resolution, but Congress overrode his veto. H.J. Res. 542, § 7, 87 Stat. 555, 560 (1973). For an account of the genesis of the War Powers Resolution, see Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 AM. J. INT'L L. 605, 611-14 (1977).

193. Although never declared, the war involved the commitment of a half million American troops to a foreign nation, bombing raids which exceeded the scope of all the aerial bombing of World War II, and the loss of 50,000 American lives. See J. JAVITS, *supra* note 31, at 259.

separation and balance of the war powers created by the drafters of the Constitution nearly two centuries earlier:

It is the purpose of this [joint resolution] to fulfill the intent of the Framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.¹⁹⁴

The Resolution undertook to expressly delineate and confine the President's commander in chief power:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions or its armed forces.¹⁹⁵

The War Powers Resolution established various safeguards to enforce its sense of the proper separation of power between Congress and the President.

1. *The Consultation Requirement*

Congress expressly asserted its right to participate fully in all decisions involving military initiatives. The consultation provision of the Resolution requires that "[t]he President in every possible instance shall consult with Congress *before* introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated."¹⁹⁶ Even after such consultation has taken place, the President must "consult regularly with the Congress until . . . Forces are no longer engaged . . . or have been removed . . ."¹⁹⁷ Congress thereby asserted its right not only to participate in ini-

194. 50 U.S.C. § 1541(a) (1982).

195. *Id.* § 1541(c).

196. *Id.* § 1542 (emphasis added).

197. *Id.*

tial decisionmaking, but to be continually involved in any ongoing military situation.

2. *The Reporting Requirement*

The Resolution contains a provision which establishes a forty-eight hour reporting requirement. The requirement is triggered by any substantial or significant employment of military force absent a congressional declaration of war.¹⁹⁸ The President is then ordered to report the nature of the employment, including his estimate of the "scope and duration of the hostilities or involvement."¹⁹⁹ Furthermore, he must assert the constitutional and legislative justification for his actions.²⁰⁰

The "reporting" provision specifies three circumstances in which the President will be required to fulfill its conditions: the introduction of force

- (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
- (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair or training of such forces; or
- (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation²⁰¹

Additionally, the provisions require that the President must provide any other information requested by Congress "in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad."²⁰²

3. *The "Sixty-day Clock"*

The importance of the reporting requirement is that it triggers a strict temporal limitation. Within sixty days after the submission of the report or the requirement that it be submit-

198. *Id.* § 1543.

199. *Id.* § 1543 (a)(A),(C).

200. *Id.* § 1543 (B).

201. *Id.* § 1543 (a).

202. *Id.* § 1543 (b).

ted, whichever comes first, "the President shall terminate any use of United States Armed Forces with respect to which such report was [or should have been] submitted" ²⁰³

Only three circumstances would permit the President to continue an on-going military action: if Congress were to declare war or otherwise expressly authorize executive action; if Congress were to extend the sixty-day period; or if Congress were unable to act due to an actual attack upon the United States. ²⁰⁴ Additionally, the President may briefly extend the "sixty-day clock" to permit the safe and orderly withdrawal of American troops. ²⁰⁵

4. *The Right to Order Removal of Forces*

The strongest provision of the War Powers Resolution provides that, notwithstanding the sixty-day requirement, Congress may at any time order the President to remove armed forces. ²⁰⁶ As discussed below, the wording of this provision now casts doubt on its continued validity — in fact, on the continued validity of the entire Resolution.

It is clear that Congress intended a strong reaffirmation of its constitutional right to initiate and terminate war and to participate meaningfully in the conduct of war. That it has not succeeded is not so much an indictment of its drafting ability as it is the result of the Court's unwillingness to enforce Congress' intent to restore a balance of power.

V. Continued Frustration of the Framers' Intent

Despite Congress' avowed desire "to fulfill the intent of the framers of the Constitution . . . and insure . . . the collective judgment of both the Congress and the President," ²⁰⁷ its enact-

203. *Id.* § 1544(b).

204. *Id.*

205. The President is granted the right to extend the period to not more than 90 days if he certifies that "unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces." *Id.* Congress was intent upon avoiding another Vietnam-type situation in which the presence of American forces leads to the alleged necessity of continuing military support in a typical "catch 22" scenario.

206. *Id.* § 1541(c).

207. *Id.* § 1541(a).

ment of the War Powers Resolution did little or nothing to stem the shift of power over war from Congress to the President. Jacob Javits, an author of the Resolution, never relented in his support of the intent of the Resolution, but did freely admit to its failure.²⁰⁸ In the first ten years following its enactment, foreign military involvement continued in the Caribbean, Latin America and the Middle East.²⁰⁹ Presidents *reported* to Congress on six occasions — but not once did they *consult* with Congress prior to the initiation of military action.²¹⁰

One may infer that Congress substantially retreated from its assertion of constitutional authority, but should not conclude that it did so with unanimity. Several congressional leaders, frustrated with their fellow legislators' failure to challenge the President, asserted their grievances through the judicial branch. They did so without success, as the judiciary repeatedly asserted the doctrine of nonjusticiability²¹¹ and effectively relinquished the role which the courts had embraced in the nation's earlier years.

208. See Javits, *supra* note 27.

The fact is that the last three Presidents — Messrs. Ford, Carter and Reagan — have consulted with the Congress on occasion, sometimes reluctantly and even grudgingly; the consultations have varied greatly in quality . . . Also, the record shows that presidents took military measures without the effective prior consultation with Congress that is required under the resolution.

Id. at 134.

209. President Ford's actions in the Mayaguez incident of 1975 led to the loss of 40 marines' lives, in an ill-fated and unnecessary rescue attempt. President Carter attempted, but failed, to secure the release of American hostages held in Iran. President Reagan sent marines to Beirut in the midst of military hostilities and political chaos. See *id.* at 134-35.

210. For an account of these incidents, see Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1420-21 (1984).

211. The doctrine of justiciability is highly complex and far too broad for separate consideration within this Comment which, in the text below, considers only specific instances of its use. In its simplest sense, the doctrine refers to the process whereby "federal courts decide whether they would be acting appropriately if they resolved the question which the litigants press upon them." L. TRIBE, *supra* note 31, at 53. For a thorough exposition on the nature and exercise of the doctrine, see *id.* at 52-114.

A. *El Salvador*

1. *Background*

In 1981 and 1982, public concern mounted over what many feared was a Vietnam-type buildup of "military advisors" in El Salvador.²¹² When a reporter asked the President why advisors were photographed carrying M-16 assault weapons, he answered "[t]he only thing I can assume is that they were for personal protection"²¹³

As our involvement progressed, the only formal action taken by Congress was an attempt to condition financial aid to El Salvador on semi-annual certifications by the State Department that the El Salvadoran government was progressing in its recognition of human rights.²¹⁴ As many had feared, the number of "advisors" did in fact increase substantially as American involvement continued in subsequent years and American soldiers were directly attacked.²¹⁵ Despite these events, which clearly met the criteria of the War Powers Resolution, the President did not comply with it and Congress did not invoke it.²¹⁶ Dissenters in Congress united to seek relief through the judicial branch.

2. *Crockett v. Reagan*

In *Crockett v. Reagan*,²¹⁷ twenty-nine Members of Congress sought a declaratory judgment that President Reagan had supplied military equipment and aid to El Salvador in violation of the War Powers Resolution.²¹⁸ The District Court of the District

212. American forces were first employed in November of 1979 according to government allegations. See *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

213. Exchange with Reporters on the Situation in El Salvador and Budget Issues, 1 PUB. PAPERS 174 (Feb. 12, 1982).

214. International Security and Development Cooperation Act, Pub. L. No. 97-113, 95 Stat. 1519, 1555-57 (codified as amended in scattered sections of 22 U.S.C.) (1981). The law expired on October 1, 1983 and an extension was killed by the President's pocket veto.

215. N.Y. Times, Feb. 27, 1984, at A3, col. 1; *id.*, Mar. 30, 1984, at A1, col. 1; *id.*, Mar. 31, 1984, at A1, col. 5.

216. An effort to prohibit the further use of troops without the approval of Congress was defeated. *Id.*, Apr. 3, 1984, at A6, col. 1.

217. 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

218. The suit also alleged violations of the Foreign Assistance Act, 22 U.S.C. § 2304

of Columbia dismissed the action. Its dismissal was affirmed on appeal and the Supreme Court subsequently denied certiorari.²¹⁹

a. *Impracticality of Factfinding*

The court noted that apart from potential disagreement between the parties over the meaning of the words "imminent involvement in hostilities" as used by the War Powers Resolution,²²⁰ there was a real and serious discrepancy as to the facts regarding the alleged employment of armed forces in El Salvador.²²¹

The plaintiff Members of Congress asserted that American military personnel were aiding El Salvador's ruling junta²²² in its war against an insurgent movement.²²³ They further alleged that American personnel were present in areas of heavy combat, and cited a report by the General Accounting Office that American forces had been fired upon.²²⁴ The defendant Reagan administration, however, denied that American forces were militarily involved in either exercises or in planning activity. The government contended that the forces "have the sole function of training Salvadoran military personnel so as to create a self-training capability in particular skills"²²⁵

The court concluded that "the factfinding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-justiciable."²²⁶ The court conjectured that

[e]ven if the plaintiffs could introduce admissible evidence concerning the state of hostilities in various geographical areas in El Salvador where U.S. forces are stationed and the exact nature of

(1982). 558 F. Supp. 902. This claim, which was dismissed by the court in its equitable discretion, is not considered here as it is outside the scope of this Comment.

219. 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

220. *See supra* note 196 and accompanying text.

221. *Crockett*, 558 F. Supp. at 897-98.

222. "Junta" refers to the Salvadoran Revolutionary Government Junta. *Id.* at 895.

223. "Insurgent movement" refers to the Democratic Revolutionary Front and the Faribundo Marti National Liberation Front (FMLN). *Id.*

224. *Id.* at 897.

225. *Id.*

226. *Id.* at 898.

U.S. participation in the conflict . . . the Court no doubt would be presented with conflicting evidence on those issues by defendants.²²⁷

The court had noted earlier in its opinion that the government had submitted a declaration by the Director of the Defense Security Assistance Agency, General Graves, "not exactly claiming that American military personnel have never been exposed to hostile fire" ²²⁸ It is at least arguable that the government would not, or more likely could not, have denied that American forces were being fired upon. Despite the court's lengthy discussion of the parties' contrary contentions concerning the reason for the presence of American forces in El Salvador, ²²⁹ the War Powers Resolution is operational merely upon the introduction of forces into "hostilities or into situations where imminent involvement in hostilities is clearly indicated" ²³⁰ Yet the court declined to reach this question. ²³¹

b. *Judicial Interpretation of the Reporting Requirement*

In addition to their allegation that the President had illegally introduced forces into El Salvador, the plaintiffs sought a declaration from the court that the President had violated the reporting provision of the War Powers Resolution. ²³² They further alleged that "whether or not he makes the report, the 60-day period begins to run from the time the report *should have been submitted*" ²³³ and that a court "may order the President to make the report or to withdraw the forces." ²³⁴

The actual wording of the provision at issue is "[w]ithin sixty calendar days after a report is submitted or *is required to*

227. *Id.*

228. *Id.* at 897.

229. *Id.* at 896-900.

230. See *supra* notes 194-195 and accompanying text.

231. The court did, however, consider whether the introduction of forces into El Salvador had been exercised pursuant to "specific statutory authorization," as alleged by the government. See *supra* note 195 and accompanying text. The court did not regard earlier congressional legislation, as constituting specific authorization within the meaning of the War Powers Resolution. See *supra* note 214 and accompanying text. See *Crockett*, 558 F. Supp. at 896.

232. *Crockett*, 558 F. Supp. at 901.

233. *Id.* at 900 (emphasis added).

234. *Id.*

be submitted . . .”²³⁵ The court considered whether this language intended mandatory withdrawal after a report had merely been *implicitly* required by the nature of the ongoing situation, or rather *expressly* required by vote of Congress or by a court mandate.²³⁶

The court looked to what it considered to be the relevant purposes of the Resolution — to inform and involve the Congress — and to the drafting committees’ debates. It concluded that “when a report has not been filed, it is consistent with the purposes and structure of the WPR to require further congressional action before the automatic termination provision operates.”²³⁷

Principally, the court noted that “the majority of Congress might not be of the opinion that a specific authorization is necessary for continued involvement . . .”²³⁸ Yet, the express language of the Resolution, *to which the court does not refer*, limits the Executive to the exercise of his commander in chief authority in two situations: congressional authorization — through a declaration of war or by specific statutory authorization — or in a national emergency precipitated by an attack upon the United States.²³⁹ It does not allow the President to act upon the silent, but presumed, consent of Congress.

Neither did the court look to the language either immediately preceding the sixty-day clock provision — which specifies the nature of the “requirement” at issue — or immediately following the provision — which specifies three express exceptions.²⁴⁰

Although the court quoted the sixty-day clock reporting provision as reading “as is required to be submitted . . .,”²⁴¹ the omitted language, which reads “pursuant to [50 U.S.C.] section 1543(a)(1)”²⁴² is never addressed by the court. The relevant section mandates that the President “*shall*” submit [a report]

235. 50 U.S.C. § 1544(b) (1982).

236. *Crockett*, 558 F. Supp. at 901.

237. *Id.*

238. *Id.*

239. 50 U.S.C. § 1541(c) (1982).

240. *See infra* note 245.

241. *Crockett*, 558 F. Supp. at 900.

242. 50 U.S.C. § 1544(b) (1982).

within 48 hours . . .”²⁴³ and the triggering event is indeed one defined by the situation — the introduction of forces into ongoing or imminent hostilities — not by congressional action.²⁴⁴ The court also failed to address the relevance of the three exceptions which immediately follow the termination requirement:

[T]he President shall terminate any use of United States Armed Forces . . . unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.²⁴⁵

The enumerated exceptions do not include the implied consent of Congress through inaction; in fact, the third exception would strongly weigh against any such presumption of intent.

The plaintiffs had contended that the War Powers Resolution was meant to be “[f]ully self-executing, designed as it is to prevent involvement in military actions without positive action by Congress.”²⁴⁶ The court’s holding in *Crockett v. Reagan* essentially strengthens the Executive by leaving to his discretion the necessity of reporting to Congress and thereby triggering the withdrawal requirement.²⁴⁷ Had Congress in fact voted to require the President to report, its right to invoke the Resolution, given the disputed facts of the case, would presumably still have led to a nonjusticiable question.

B. *Nicaragua*

1. *Background*

America’s involvement in El Salvador was paralleled by its initial support and subsequent rejection of a Nicaraguan (Sandanista) government. The Sandanistas received America’s support in their overthrow of the ruling Samoja dictatorship, but lost favor when they openly aided the insurgents in El Sal-

243. *Id.* § 1543(a) (emphasis added).

244. *Id.*

245. *Id.* § 1544(b).

246. *Crockett*, 558 F. Supp. at 900.

247. 50 U.S.C. § 1544(b) (1982).

vador.²⁴⁸ Once again the United States government denied any direct military involvement and Congress failed to invoke the War Powers Resolution.²⁴⁹ As in the case of El Salvador, Members of Congress sought redress through the judicial branch, and again were denied relief.

2. Sanchez-Espinoza v. Reagan

In *Sanchez-Espinoza v. Reagan*,²⁵⁰ twelve Members of Congress²⁵¹ sued to "stop an alleged undeclared war waged by the federal defendants against the people and government of Nicaragua,"²⁵² claiming "violations of their authority to declare war under . . . the Constitution . . . and the War Powers Resolution"²⁵³ The district court dismissed the action by invoking the doctrine of "political questions."²⁵⁴ The doctrine holds that an issue is improper for judicial review if 1) its resolution is constitutionally committed to a coordinate branch; or 2) a court lacks manageable standards for resolving the issue; or 3) its resolution would constitute a lack of respect for, or cause embarrassment to, a coordinate branch.²⁵⁵

248. See generally Case Concerning Military and Paramilitary Activities In and Against Nicaragua 1984, I.C.J. 392 (Nicar. v. U.S.) [hereinafter *Nicar.*] (a case before the World Court in which the United States declined to participate and in which its actions were condemned as violating international law); Cole, *Challenging Covert War: The Politics of the Political Question Doctrine*, 26 HARV. INT'L L.J. 155 (1985) [hereinafter *Cole*] (chronicling United States involvement in Central America); Note, *Applying the Critical Jurisprudence of International Law to the Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, 71 VA. L. REV. 1183, 1194-95 (1985) (discussing the American presence in Nicaragua).

249. One should not assume, however, that Congress approved of the President's actions. See *infra* note 260 and accompanying text.

250. 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

251. Actually, the 12 congressional plaintiffs joined two Florida residents and 12 non-resident Nicaraguan aliens to create a broader base for their arguments. *Sanchez-Espinoza*, 568 F. Supp. at 598. The court, however, treated each group of plaintiffs independently in regard to each of the claims asserted. The issues raised by the non-congressional plaintiffs are not dealt with here as they are beyond the scope of this Comment.

252. *Id.* at 598.

253. *Id.*

254. *Id.* at 599.

255. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (describing the components of the political question doctrine which are summarized here). See also *Powell v. McCormack*, 395 U.S. 486, 518-19 (1969) (quoting the *Baker* criteria). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW ch. 2 § IV, E (2d ed. 1983) (discussing the doctrine of political questions).

a. *Respect for Coordinate Branches*

The court found that it lacked "judicially discoverable and manageable standards for resolving the dispute presented,"²⁵⁶ as it had in *Crockett v. Reagan*.²⁵⁷ Principally, however, the court expressed concern that any decision would show a lack of respect for a coordinate branch or would create "embarrassment from multifarious pronouncements by various departments on one question."²⁵⁸ The court noted:

President Reagan has stated on numerous occasions, to the Congress and to the public at large, that he is *not* violating the spirit or the letter of . . . statutes, in Nicaragua. By all media accounts, members of both Houses of Congress strenuously disagree with the President's assertion. Were this Court to decide . . . one or both of the coordinate branches would be justifiably offended.²⁵⁹

Thus the court left the resolution of the issue to Congress and the President. Yet Congress had already tried, albeit unsuccessfully, to restrict the President's actions.²⁶⁰ In fact, the court's alternative basis for dismissal, as discussed below, implied that

256. *Sanchez-Espinoza*, 568 F. Supp. at 600.

257. 558 F. Supp. at 898. See *supra* text accompanying note 226.

258. *Sanchez-Espinoza*, 568 F. Supp. at 600.

259. *Id.*

260. Congress had taken numerous steps to attempt to restrict the President's actions in Nicaragua. Initially, it passed the Boland Amendment, which forbade either financial or military assistance to Nicaraguan insurgents. Continuing Appropriations Act of 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865. Nevertheless, the Amendment was unsuccessful in stopping the covert war, as noted in a report by the House Intelligence Committee. H.R. REP. No. 122, 98th Cong., 1st Sess., pt. 1 (1983). Subsequently, the House of Representatives passed two bills prohibiting all support for any nature of military or paramilitary Nicaraguan operations, but they were not then supported in the Senate. 129 CONG. REC. H5881 (daily ed. Oct. 20, 1983); 129 CONG. REC. H8426 (daily ed. Jul. 28, 1983). As Nicaraguan actions continued and intensified, however, both the House and Senate voted to condemn the President's mining of Nicaraguan harbors. 130 CONG. REC. S4205 (daily ed. April 10, 1984); 130 CONG. REC. H2920-21 (daily ed. April 12, 1984). Shortly thereafter, the Senate supported a House vote to deny the President's request for increased funding for covert Nicaraguan activities. 42 CONG. Q. 1554 (June 25, 1984).

It is true that some of these actions were taken after the district court's consideration of *Sanchez-Espinoza*. Nevertheless, they were all taken prior to the appellate review and, as such, were all relevant and cognizable on appeal. See, e.g., *Sierra Club v. Calloway*, 499 F.2d 982, 989 (5th Cir. 1974) (appellate consideration of committee hearings and reports subsequent to the consideration of the case in chief); *Rothenberg v. Security Mgmt. Co.*, 667 F.2d 958, 961 n.8 (11th Cir. 1982) (duty of appellate court to consider subsequent relevant developments).

Congress *did not* attempt to restrict executive encroachment on its constitutional power to initiate war.

b. *Doctrine of Equitable Discretion*

The doctrine of equitable or remedial discretion enables a court to avoid a separation of powers issue which it believes might be alternatively resolved within a coordinate branch:

The most satisfactory means of translating our separation-of-powers concerns into principled decision-making is through a doctrine of circumscribed equitable discretion. Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's claim.²⁶¹

The court asserted that here the congressional plaintiffs' "primary avenue of relief"²⁶² is through the legislative process. It expressed its concern that by reaching a judicial resolution, it might thwart "Congress's will by allowing . . . plaintiff[s] to circumvent the process of democratic decisionmaking."²⁶³ The court failed to take notice of the fact that the War Powers Resolution itself was drafted to redress an inequitable separation of powers²⁶⁴ and that the congressional plaintiffs were seeking judicial enforcement of the legislative process.

The court's apparent restraint was not a neutral stance.

[W]here a President's actions fundamentally challenge the structure of government, millions of dollars are spent, large numbers of lives lost, and neither functional nor constitutional bases for political question dismissal exists, the prudential concerns for "respect" and "embarrassment" can hold little sway. Most importantly, judicial restraint does not merely avoid the issue; it necessarily sanctions the President's actions, by leaving the unconstitutional status quo unaltered.²⁶⁵

261. *Sanchez-Espinoza*, 568 F. Supp. at 601 n.5 (quoting *Riegle v. Federal Open Mkt. Comm.*, 656 F. 2d 873, 881 (D.C. Cir. 1981)).

262. *Sanchez-Espinoza*, 568 F. Supp. at 601 n.5.

263. *Id.* (quoting *Riegle*, 656 F.2d at 881).

264. See *supra* text accompanying note 194.

265. Cole, *supra* note 248, at 171-72. The author worked at the Center for Constitutional Rights, counsel for the plaintiffs in *Sanchez-Espinoza*.

Further, and bolder, executive initiatives proved the truth of this assertion.

C. Grenada

1. Background

On October 25, 1983, nearly two thousand U. S. Marines and Army Rangers invaded the island nation of Grenada. In five days, the island was militarily secured.²⁶⁶ The President notified Congress of the invasion, but did so only after it was underway: "In accordance with my desire that the Congress be informed on this matter, and consistent with the War Powers Resolution, I am providing this report on this deployment of the United States Armed Forces."²⁶⁷ Yet no mention was made of prior consultation, as required by the War Powers Resolution,²⁶⁸ nor did the President concede to Congress' authority to activate the Resolution's "sixty-day clock."²⁶⁹ To the contrary, President Reagan's letter to Congress expressly stated that "it is not possible to predict the duration of the temporary presence" and contained the ambiguous assertion that "forces will remain only so long as their presence is required."²⁷⁰

Both the Senate and the House individually attempted to invoke the time limitation, but Congress was unable to enact any invoking legislation.²⁷¹ Quite possibly, Congress' inability to force the withdrawal of troops reflected the fact that is was faced with a *fait accompli*. Once again, individual Members of Congress sought judicial intervention.

266. For a detailed account of the invasion and an analysis of the relevant issues of international law, see Joyner, *Reflections on Lawfulness of Invasion*, 78 AM. J. INT'L L. 131 (1984).

267. H.R.J. Res. 402, 98th Cong., 1st Sess. 38 (1983).

268. See *supra* notes 196-197 and accompanying text.

269. See *supra* notes 203-205 and accompanying text.

270. H.R.J. Res. 402 *supra* note 267, at 39.

271. See 129 CONG. REC. H8,884 (daily ed. Oct. 31, 1983) (debate on a time limitation amendment to H.R.J. Res. 402, 98th Cong., 1st Sess. (1983), adopted by the House, but subsequently rejected by the Senate); 129 CONG. REC. S14,868-903 (daily ed. Oct. 28, 1983) (adopting a similar amendment to a debt ceiling bill which was subsequently defeated).

2. Conyers v. Reagan

In *Conyers v. Reagan*,²⁷² eleven congressional plaintiffs sought both declaratory and injunctive relief. They alleged that the President had violated Congress' constitutional authority to initiate war and sought a judicial mandate directing the withdrawal of all military forces from Grenada.²⁷³ Again, the judiciary effectively affirmed the President's unilateral exercise of the war power by dismissing the congressional plaintiffs' action.²⁷⁴

Unlike the previous actions into which the court refused to intercede, here there could be no claim of judicial impracticality of factfinding nor could the court claim reluctance to impede an ongoing, sensitive operation. The invasion — a clear and public violation of the War Powers Resolution and Congress' constitutional authority — was completed long before the court issued its ruling.²⁷⁵ The court relied almost entirely on what it asserted to be alternative legislative remedies.

a. Availability of Alternative Remedies

As it did in *Sanchez-Espinoza*, the court asserted the doctrine of circumscribed equitable discretion,²⁷⁶ leaving Congress to exhaust its own remedies before seeking judicial intervention. In *Conyers*, the court specified what it believed to be the available legislative remedies: "The War Powers Resolution, 50 U.S.C. §§ 1541 *et seq.*, appropriations legislations, independent legislation or even impeachment."²⁷⁷ The court concluded that "[i]f plaintiffs are successful in persuading their colleagues about the wrongfulness of the President's actions, they will be provided the remedy they presently seek from this Court."²⁷⁸

The court did not address the fact that the President's invasion of Grenada, without prior congressional consultation, had already violated the War Powers Resolution.²⁷⁹ Nor did the

272. 578 F. Supp. 324 (D.D.C. 1984), *appeal dismissed*, 765 F.2d 1124 (D.C. Cir. 1985).

273. *Conyers*, 578 F. Supp. at 326.

274. *Id.* at 327.

275. *See supra* note 266.

276. *Conyers*, 578 F. Supp. at 326.

277. *Id.* at 327.

278. *Id.*

279. *See supra* note 195 and accompanying text.

court take notice of the futility of congressional actions in inhibiting executive initiatives.²⁸⁰ As to the court's suggestion that Congress might even resort to impeachment, many commentators have suggested that impeachment is a process fraught with danger and would potentially threaten not only the balance of power between coordinate branches, but the very fabric of the Constitution itself.²⁸¹ It has also been observed that a congressional impeachment proceeding against a President for violation of Congress' war power would "represent adjudication by an interested party of his own cause."²⁸² Thus, the court left Congress to exhaust solutions that were arguably unnecessary, ineffectual, or inappropriate.

b. *Embarrassment of a Coordinate Branch*

The court did note that two of the congressional plaintiffs had failed in an attempt to initiate legislation condemning the President's actions in Grenada.²⁸³ While it is possible that Congress' failure to vote a formal condemnation reflected political reality rather than a consideration of constitutional issues, the court argued that by deciding the legality of the executive initiative, it "would unnecessarily and unwisely interfere with the legislative process and raise significant separation of powers concerns."²⁸⁴ Yet this judicial reluctance to decide a separation of powers issue is not always so evident, as indicated below.

VI. Viability of the War Powers Resolution

Although the judiciary has been reluctant to decide the separation of powers issue inherent in the constitutional division of

280. See, e.g., *supra* note 260 and accompanying text.

281. See, e.g., R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 300 (1973); P. HOFFER & N. HULL, *IMPEACHMENT IN AMERICA, 1635-1805*, at 264-65 (1984); J. LABOWITZ, *PRESIDENTIAL IMPEACHMENT* 257 (1978).

282. Berger, *Presidential War Powers* in *THE POWERS OF THE PRESIDENCY: ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES OF AMERICA* 41, 54 (1975).

283. Actually, the initiative was rejected by the House Committee on Foreign Affairs and was not reported to the full House for a vote. *Conyers*, 578 F. Supp. at 327. Therefore, although Congress never voted for the proposed condemnation, it would be inaccurate to assert that Congress supported the President's initiative.

284. *Id.*

war powers, it did act decisively in regard to the validity of legislative vetoes of executive agency actions.²⁸⁵ The Supreme Court's invalidation of the legislative veto in *Immigration and Naturalization Service v. Chadha*²⁸⁶ has put into issue the continued validity of the War Powers Resolution which itself contains a legislative veto provision.²⁸⁷ However, one must carefully consider the focus of *Immigration and Naturalization Service v. Chadha* before concluding that its holding would in fact invalidate either the entire Resolution or even its legislative veto provision.

A. Immigration and Naturalization Service v. Chadha

At issue in *Chadha* was the constitutional validity of a section of the Immigration and Naturalization Act²⁸⁸ that authorized either House of Congress to overturn the orders of the Attorney General suspending the deportation of particular aliens. The Court held that the legislative veto violated both the bicameralism²⁸⁹ and presentment²⁹⁰ requirements of the Constitution.

Because the War Powers Resolution requires a concurrent resolution of both Houses of Congress²⁹¹ to terminate hostilities, bicameralism is not at issue. Nevertheless, the Court's belief that the presentment requirement alone would invalidate a leg-

285. The legislative veto has most typically been employed when Congress has chosen to "delegate broad powers of domestic initiative to the President or to various agencies, subject to a veto power exercisable by Congress as a whole, by one House, or by a committee." L. TRIBE, *supra* note 31, at 161. See also, J. BOLTON, *THE LEGISLATIVE VETO: UNSEPARATING THE POWERS* (1977).

286. 462 U.S. 919 (1983).

287. "[A]t 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 of specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution." 50 U.S.C. § 1544(c) (1982).

288. 8 U.S.C. §§ 1101-1503, 1254(c)(2) (1982).

289. Bicameralism refers to "the division of a legislative body into two chambers, as in the United States government (Senate and House)." BLACK'S LAW DICTIONARY 147 (5th ed. 1979). U.S. CONST. art. I § 1. To become a law, a bill must "have passed the House of Representatives and the Senate . . ." *Id.* § 7, cl. 2 (emphasis added). See *Chadha*, 462 U.S. at 948-51.

290. Presentment refers to the requirement that legislation be submitted to the President for approval before it becomes law. U.S. CONST. art. I § 7, cls. 2, 3. See *infra* text accompanying note 294. See also *Chadha*, 462 U.S. at 946-48.

291. 50 U.S.C. § 1544(c) (1982).

islative veto provision was made clear in a decision which immediately followed *Chadha*. In a memorandum decision, the Court affirmed a lower court holding which had applied the *Chadha* rationale to a two-House veto.²⁹²

1. *The Presentment Requirement of the Constitution*

The *Chadha* Court asserted that the presentment requirement of the Constitution reflected the universal desire of the Framers and was of particular importance to them in assuring a system of checks and balances.²⁹³ The Constitution provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States

Every Order, Resolution, or Vote to Which the Concurrence of the Senate and House of Representatives may be necessary . . . 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, according to the Rules and Limitations prescribed in the Case of a Bill.²⁹⁴

2. *The Separation of Powers Issue*

The *Chadha* Court held that these provisions "are integral parts of the constitutional design for the separation of powers."²⁹⁵ Presentment gives the President "a constitutional and effectual power of self-defence."²⁹⁶ It protects the nation against "whatever propensity Congress might have to enact oppressive,

292. *United States House of Representatives v. FTC*, 463 U.S. 1216 (1983). The Court upheld the lower court's invalidation of § 21(a) of the Federal Trade Commission Improvement Act of 1980, 15 U.S.C. § 57a-1(a) (1982), which provided that an FTC trade regulation shall become effective unless disapproved by *both* the Senate *and* the House of Representatives. The fact that both Houses retain the veto power, thereby avoiding any violation of the Constitution's requirement for bicameralism, *supra* note 289, did not deter the court of appeals from holding that the legislative veto nevertheless violated "the principles of separation of powers established in . . . the Constitution." *Consumers Union v. FTC*, 691 F.2d 575, 577 (D.C. Cir. 1982).

293. 462 U.S. at 946-47.

294. U.S. CONST. art. I, § 7, cls. 2-3.

295. 462 U.S. at 946.

296. *Id.* at 947 (quoting *THE FEDERALIST* No. 73 at 458 (A. Hamilton) (H. Lodge ed. 1888)).

improvident, or ill-considered measures.”²⁹⁷ Ultimately, it “serves the important purpose of assuring that a ‘national’ perspective is grafted on the legislative process.”²⁹⁸

The Court concluded that it must act to ensure the Framers’ intended separation of powers:

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.²⁹⁹

It concluded that every act of Congress which is “essentially legislative in purpose and effect”³⁰⁰ must be presented for presidential veto unless it is expressly exempted from presentment by the Constitution.³⁰¹

3. *An Act of Legislative Character*

In invalidating the legislative veto in the Immigration and Naturalization Act,³⁰² the Court began with the presumption that all actions of Congress are legislative in character.³⁰³ It then considered the specific nature of the Act and veto at issue. It found, *inter alia*, that in suspending Chadha’s deportation, the Attorney General had acted pursuant to a delegation of legislative power.³⁰⁴ “Congress must abide by its delegation of author-

297. *Chadha*, 462 U.S. at 947-48.

298. *Id.* at 948. The implication here is that the presidential perspective is necessarily broader than that of individual members of Congress who may be beholden to local interests and supporters.

299. *Id.* at 951.

300. *Id.* at 952.

301. The Court asserts that only four provisions in the Constitution expressly establish the right of one House to act without the requirement of presentment. *Id.* at 954-55. The House of Representatives has plenary power to initiate impeachments. U.S. CONST. art. I, § 2, cl. 5. The Senate has plenary power to conduct impeachment trials, approve or disapprove presidential appointments and ratify treaties negotiated by the President. U.S. CONST. art. I, § 3, cl. 6; art. II, § 2, cl. 2.

302. *See supra* note 288.

303. *Chadha*, 462 U.S. at 951-52.

304. *Id.* at 954-55.

ity until that delegation is legislatively altered or revoked.”³⁰⁵ In other words, Congress has acted to delegate authority through a legislative act and the President, pursuant to *his* constitutional authority,³⁰⁶ has consented to that delegation. For Congress now to alter that delegation, by vetoing specific actions of the delegatee, would be tantamount to amending the legislation — this time, without allowing the President the exercise of his authority.

Nevertheless, the very nature of an invalid legislative veto — that it seeks to alter or revoke a prior delegation without the constitutionally mandated legislative process — has led many commentators to suggest that *Chadha* is inapplicable to the War Powers Resolution.

B. *Chadha and the War Powers Resolution*

The War Powers Resolution provides:

Notwithstanding subsection (b) [the “sixty-day clock” provision³⁰⁷], 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*.³⁰⁸

Whether or not the War Powers Resolution would withstand a constitutional test is dependent upon two factors — the effect of its severability provision³⁰⁹ and the applicability of the *Chadha* rationale to this particular concurrent resolution.

1. *The Severability Provision*

The War Powers Resolution contains standard severability language expressing Congress’ intent that the remainder of the resolution remain in effect despite the possible invalidation of any of its provisions or applications.³¹⁰ It is unlikely that the

305. *Id.* at 955.

306. *See supra* notes 290, 294, and accompanying text.

307. 50 U.S.C. § 1544(b) (1982). *See supra* notes 203-205 and accompanying text.

308. *Id.* § 1544(c) (emphasis added).

309. *Id.* § 1548.

310. The Resolution provides that “[i]f any provision of this [joint resolution 50 U.S.C. §§ 1541-1546(a)] or the application thereof to any person or circumstance is held

Court would find the entire resolution invalid even were it to invalidate the concurrent resolution provision.

In *Chadha*, the Court held that it was not necessary to consider the entirety of the Immigration and Naturalization Act because the "language [of the severability clause] is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act . . . to depend upon whether the . . . clause [at issue] was invalid."³¹¹ The language used in the War Powers Resolution is virtually identical and the same presumption must arise. The requirements for consultation *with* Congress³¹² and for reporting *to* Congress³¹³ may clearly stand alone even given the invalidation of the concurrent resolution provision. It is not at all clear, however, that the concurrent resolution provision would itself be invalidated.

2. *The Concurrent Resolution Provision*

Many commentators have argued that the concurrent resolution provision of the War Powers Resolution³¹⁴ is not of the same nature as the legislative veto invalidated by *Chadha*.³¹⁵ The principal argument in this regard is that Congress was not seeking to retain a veto power over a previously delegated authority, thereby denying to the President his right to approve or disapprove the altered delegation.³¹⁶ To the contrary, the Congress was asserting that when the President initiates war "without inherent power to do so, [he] is exercising a power that the Constitution gives exclusively to Congress, *without* the authority

invalid, the remainder of the [joint resolution] and the application of such provision to any other person or circumstance shall not be affected thereby." *Id.*

311. 462 U.S. at 932.

312. See *supra* notes 196-197 and accompanying text.

313. See *supra* notes 198-202 and accompanying text.

314. See *supra* note 308 and accompanying text.

315. See, e.g., Statement of Cornelius B. Kennedy, Senior Conference Fellow, Administrative Conference of the United States, in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: LEGISLATIVE VETO OF AGENCY RULES AFTER *INS v. Chadha*, app. A, at 2 (1983) (arguing that *Chadha* and its progeny should be read narrowly and that each law in question will be judged on its individual merits); Javits, *supra* note 27, at 138 (arguing that *Chadha* does not apply); accord, Comment, *The Concurrent Resolution Provision of the War Powers Resolution: Immigration and Naturalization Service v. Chadha and the Sources of Presidential Warmaking Power*, 45 OHIO ST. L. J. 983 (1984).

316. See *supra* text accompanying notes 293-294 (discussing constitutional presentment requirements); see also, *supra* text accompanying note 306.

of a legislative delegation."³¹⁷

A second, related argument is that a concurrent resolution by Congress to end a President's military initiative is not an attempt to create new legislation, while avoiding the requirement of presentment. Rather, it is an act of Congress "dispelling an assumption that legislation was intended by Congress."³¹⁸ In essence, commentators are suggesting that the concurrent resolution provision does not violate any constitutional separation of powers, but merely reasserts an already intended constitutional division.

Not all commentators agree, however. Some view the *Chadha* decision in its most sweeping possible aspect.³¹⁹ Ultimately, though, the constitutionality of the concurrent resolution — or even the entire War Powers Resolution — may be a moot issue, if the judiciary continues to dismiss any related case under the political question doctrine.

C. *The Likelihood of Continued Judicial Abstention*

1. *Judicial Intervention in Separation of Powers Controversies*

In *Marbury v. Madison*,³²⁰ the Supreme Court asserted its authority as ultimate interpreter of the Constitution.³²¹ In *Baker*

317. Comment, *The Concurrent Resolution Provision of the War Powers Resolution: Immigration and Naturalization Service v. Chadha and the Sources of Presidential Warmaking Power*, 45 OHIO ST. L.J. 983, 988 (1984) (emphasis added).

318. *Id.* at 999.

319. See, e.g., B. CRAIG, *THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION* (1983). "Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history." *Id.* at 166.

320. 5 U.S. (1 Cranch) 137 (1803).

321. The court stated:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

Id. at 177-78.

v. Carr,³²² however, the Court considered the process whereby that interpretation includes a decision as to "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" ³²³ The *Baker* Court reviewed decisions in various areas of controversy³²⁴ to demonstrate that the finding of a political question "is itself a delicate exercise in constitutional interpretation."³²⁵

To find a case nonjusticiable under the political question doctrine, there must be

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.³²⁶

The Court concludes, however, that absent the clear presence of these formulations, "there should be no dismissal for nonjusticiability on the grounds of a political question's presence."³²⁷

The Court has made limited use of the doctrine, perhaps in recognition of the fact that, unlike dismissals on grounds of standing, ripeness, or mootness, a dismissal on political question nonjusticiability entirely removes an issue from the sphere of judicially controllable action.³²⁸ However, the potential for embarrassment of, or seeming lack of respect for, a coordinate branch has not stopped the Court from holding legislative or executive actions to be unconstitutional.

322. 369 U.S. 186 (1961).

323. *Id.* at 211.

324. *Id.* at 211-17.

325. *Id.* at 211.

326. *Id.* at 217.

327. *Id.*

328. See Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J., 517, 537 (1966).

In *Powell v. McCormack*,³²⁹ for example, the Court denied Congress' authority to refuse to seat a duly elected representative. It reiterated the validity of its *Baker* criteria, but nevertheless found that "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts avoiding their constitutional responsibility."³³⁰ Similarly, in *United States v. Brown*,³³¹ the Court denied Congress' authority to pass legislation which it deemed violative of the Constitution, stating that the "Court is always reluctant to declare that an Act of Congress violates the Constitution, but in this case we have no alternative."³³²

Nor has the executive branch escaped the corrective attention of the judiciary branch. When President Truman issued an executive order directing the Secretary of Commerce to seize and operate the nation's steel mills — claiming authority in relation to the national defense — the Court held his order to be unconstitutional.³³³

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.³³⁴

The Court, concluding that "[i]t is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated for concern for the Nation's well-being . . ."³³⁵ nevertheless considered the issue to be justiciable. This contrasts sharply with the Court's dismissal of war powers cases.

329. 395 U.S. 486 (1968).

330. *Id.* at 549.

331. 381 U.S. 437 (1965).

332. *Id.* at 462.

333. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

334. *Id.* at 613-14 (Frankfurter, J., concurring) (quoting *Meyers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)).

335. *Id.* at 614.

2. *The War Power: Judicial Deference*

In the war powers cases discussed above — *Crockett*, *Sanchez-Espinoza*, and *Conyers* — the judiciary's general reluctance to resolve separation of powers issues led to dismissal of the cases on various but related grounds.³³⁶ Yet each case was essentially different. In *Crockett*,³³⁷ the court stressed the impracticality of fact-finding given the debated hostilities in El Salvador.³³⁸ In *Conyers*, however, the occurrence of hostilities was beyond dispute.³³⁹ Despite this fact, the court dismissed the action, noting that the congressional plaintiffs had failed to persuade the entire Congress to their cause.³⁴⁰

The fact that the plaintiffs were Members of Congress, rather than the Congress itself, was a common and arguably decisive factor. The judiciary has generally shown greater deference to the executive branch when it has been challenged by individual members of the legislature.

In congressional lawsuits against the Executive Branch, a concern for the separation of powers has led this court consistently to dismiss actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process.³⁴¹

The cases brought under the War Powers Resolution, however, did not seek to overturn the results of the legislative process, but rather to gain judicial enforcement of a legislative act — a resolution that asserts what Congress believes to be its constitutional authority. The courts have decided other issues — impoundment cases, for example — brought by third parties who claimed the violation of congressional prerogatives.³⁴² While not congressional plaintiffs, they were equally entitled to seek alternative legislative remedies rather than judicial relief.

336. See *supra* notes 217-284 and accompanying text.

337. 558 F. Supp. 893 (D.D.C. 1982).

338. See *supra* notes 217-231 and accompanying text.

339. See *supra* note 266 and accompanying text.

340. See *supra* notes 277-278 and accompanying text.

341. *Barnes v. Kline*, 759 F.2d 21, 28 (D.C. Cir. 1985).

342. The cases are collected in Mikva & Hertz, *Impoundment of Funds — The Courts, The Congress and The President: A Constitutional Triangle*, 69 Nw. U.L. Rev. 335, 346 n.53 (1974).

It would seem that the courts are reluctant to decide a potentially divisive separation of powers issue brought by individual congressional plaintiffs and would defer instead to the implied, although possibly misread, contrary will of the Legislature.³⁴³ Yet it is not the duty of the courts to enforce the law, but merely to "say what the law is."³⁴⁴ If the judicial branch were to interpret executive prerogatives contrary to the majority view of Congress, Congress remains free to enact, revoke, or alter legislation to effect its intent. It seems likely that given future cases like *Crockett*, *Sanchez-Espinoza*, or *Conyers*, judicial relief will not be available.

VII. Alternative Solutions: Implications for the Future

Given both the unlikelihood of judicial intervention in separation of war powers cases, and the growth of international commerce and communication, it is doubtful that the shift toward greater presidential war-making power will cease. In 1793, Washington himself did not know of France's war against Great Britain until one month after its commencement.³⁴⁵ Today, when a President publicly announces either the threat or the commencement of a military action, the entire world, along with Congress, has been immediately notified. When President Kennedy announced a blockade of Cuba — precipitating an international nuclear crisis — only "[t]wo hours before his decision was announced to the world, congressional leaders were informed that the United States was responding to the Soviet missiles with a naval quarantine."³⁴⁶

The Nation and the world have changed drastically since the Framers penned the Constitution, but their concern that there be a separation of powers over war — requiring the collective judgment of two coordinate branches — is all the more valid today.

If this increasing executive assertiveness reflects the burdensome nature of the Presidency, it is, nevertheless, one of the terrible ironies of American history that as war has become more destruc-

343. See, e.g., *supra* notes 283-285 and accompanying text.

344. See *supra* note 321.

345. See *supra* note 65.

346. Neustadt, *supra* note 31, at 109.

tive, less humane and less controllable, the power of decision over war has become increasingly concentrated in the hands of one American.³⁴⁷

Absent some extraordinary action, it is most unlikely that the intent of the Framers will once again be given effect.

A. *Laissez-Faire: The Road to Executive Autonomy*

Congress' unwillingness or inability to strongly assert its constitutional authority over war and the judiciary's reluctance to decide the inherent separation of powers issue, virtually dictate executive autonomy in regard to the initiation or risk of war. The telecommunication technologies which enable the President to instantaneously notify the world of his actions or intentions, also enable him to mold public consensus. Presidents tend to be forceful persons and, as such, their actions will usually engender public support.³⁴⁸ It is inconceivable that the Framers could have envisioned our nuclear capability. If the President's finger rests on the nuclear button, who truly has the power to declare war?³⁴⁹

One commentator suggests that "[o]ur Constitution offers the nation and the world some protection . . . through the dispensation of the power to declare and make war, but that protection is only as strong as the will of the legislative and judicial branches to invoke and enforce it."³⁵⁰ The War Powers Resolution was such an attempt by the Legislature, but its constitutionality has yet to be acknowledged by any President, affirmed by the judiciary, or actively asserted by the very branch which enacted it. It is unlikely that it will stem the tide of executive power over war.

347. J. JAVITS, *supra* note 31, at 273.

348. See F. WORMUTH & E. FIRMAGE, *supra* note 31, at 279-92 (exploring the nature of this technological and political phenomenon).

349. Professor Wormuth, *supra*, argues that "such [nuclear] technology demands more restraint, not less, on the way we go to war." *Preface* to F. WORMUTH & E. FIRMAGE, *supra* note 31, at viii.

350. F. WORMUTH & E. FIRMAGE, *supra* note 31, at 292.

B. *Strengthening the War Powers Resolution: An Act of Futility*

Some commentators have suggested that Congress redraft or amend the War Powers Resolution.³⁵¹ Yet, assuming *arguendo* that Congress could, and would, enact a stronger resolution, it would still beg the real issue. Senator Javits himself conceded the inherent weakness of any such congressional "improvement" of the resolution which he authored. "Congressional will is the issue. It is much more difficult for 535 individuals to sustain a single cause of action than it is for a determined president to have his way."³⁵²

As Presidents continue to disregard the War Powers Resolution, individual Members of Congress have sought, but been denied, judicial support.³⁵³ Even were the entire Congress to attempt to enforce the resolution, it is not at all certain that the judiciary would declare its constitutionality. Many commentators have suggested that an attempt at congressional enforcement would be a futile exercise, lacking judicial support.

Presidents Nixon, Ford, and Reagan have all asserted that the act is unconstitutional, arguing that it ties the hands of the president.

....

The logical solution would be to put the question before the . . . Supreme Court However, there is at least one obstacle . . . the 'political question' doctrine of the Court.³⁵⁴

The current language of the War Powers Resolution affords Congress a sufficiently forceful assertion of the separation of power over war envisioned by the Framers. In the final analysis, however, either the Congress or individual Members of Congress must be able to look to the judicial branch to support the Reso-

351. See, e.g., The Final Report of the 1975 Conference on Advocacy, THE POWERS OF THE PRESIDENCY: ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES OF AMERICA, Recommendation Nos. 10-13, 17, 18, at 19-22, 26-27.

352. Javits, *supra* note 27, at 139.

353. See *supra* notes 217-247, 250-265, 272-284, and accompanying text.

354. F. FRIENDLY & M. ELLIOTT, THE CONSTITUTION, THAT DELICATE BALANCE 279-80 (1984). See also, L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 284-325 (1985). Although the War Powers Resolution of 1973 overcame a veto, it has not survived doubts about its quality and effectiveness." *Id.* at 309.

lution and to "say what the law is."³⁵⁵

C. *Proposed Amendment to the Constitution*

1. *The Need for an Amendment*

The Court's reluctance to resolve a separation of powers issue between the authority of Congress and the President to initiate and control war is understandable. The Constitution vests certain general powers in the executive branch and other, specific powers in the legislative branch — clearly intending a struggle between the two coordinate branches.³⁵⁶ Yet, that intended struggle presupposed an equal strength which has ceased to exist in an age of instantaneous warfare and nuclear technology, with "the President as a king-general who exercises prerogative or discretionary power to make foreign policy, [and] initiate war"³⁵⁷ Somehow we must enable the judiciary to resolve issues concerning the separation of powers over war and thereby adapt the Framers' intention to the exigencies of modern warfare.

Nearly a century ago, former Supreme Court Justice Samuel Freeman Miller wrote that "[o]f the judicial department of the Government the Supreme Court is the head and representative, and to it must come for final decision all the great legal questions which may arise under the Constitution"³⁵⁸ Surely, the right of the Congress to share with the President the power over war, and to temper the potentially far-reaching actions of one individual, is one of the great legal issues of our time. If the judicial branch is unable to find within the Constitution the authority to address that issue, then perhaps it is time to amend the Constitution accordingly.

355. See *supra* note 321.

356. See *supra* notes 1-25 and accompanying text.

357. E. KEYNES, UNDECLARED WAR 2 (1982). Keynes goes on to note that in contrast to this modern view of presidential power, "the Framers had a limited conception of executive authority." *Id.*

358. S. MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 376 (1893).

2. *The Language of the Amendment*

This author proposes the addition of but one phrase to the Commander in Chief clause of the Constitution.³⁵⁹ After the words "Commander in Chief," these words may be added: "subject to any and all reasonable restrictions which may be imposed by Congress."

The additional language would almost certainly have two distinct and beneficial effects. First, and foremost, it would make judicial intervention more likely. By vesting in Congress a constitutional right to define the President's commander in chief authority, it might lessen the Court's reluctance to consider challenges to executive authority over the initiation or risk of war.³⁶⁰ Second, it would tend to restore the struggle for power envisioned by the Framers by allowing the judicial branch to define the word "reasonable."³⁶¹ The use of such an intentionally broad word would enable the courts to adapt what they perceive to be constitutional intent to continually changing situations.

3. *The Likelihood of Success*

Although Justice Miller believed it was the duty and privilege of the Court to decide all great legal questions, he was well aware of its limitations. He referred to the judiciary as "by far the feeblest branch of department of the Government. It must rely upon the confidence and respect of the public for its just weight and influence"³⁶² The proposed amendment would signal the Court that the nation desires its active participation in the restoration of balance between the executive and legislative branches over the power to risk and initiate war.

Whether such an amendment might gain national accept-

359. U.S. CONST. art. II, § 2, cl. 1.

360. Any similar restriction of the "executive power," *id.* § 1, cl. 1, would clearly be overbroad and unmanageable. Without such a restriction, the President might still claim a constitutional basis for unilateral action, but that claim would be seriously weakened by the added constitutional restraint on his Commander in Chief power.

361. Just as it is not desirable to have all power over war in the hands of the President, neither should we seek to allow Congress to gain plenary control. The desired separation and balance of power is a struggle between the two coordinate branches, with judicial intervention to adapt the struggle to ever-changing needs and exigencies. See *supra* notes 59-63 and accompanying text.

362. S. MILLER, *supra* note 358, at 418.

ance³⁶³ and, if so, whether it would truly be as effective as suggested here, are difficult questions certainly open to conjecture and debate. One might also question whether Congress would even vote to propose such an amendment.³⁶⁴ It was only *after* a protracted and costly war that Congress acted to attempt to restore a constitutional balance of power.³⁶⁵ It may be that another crisis must occur before Congress will again attempt to regain its constitutional authority over war. The so-called "Iran-Contra" affair may be that crisis,³⁶⁶ or it may be the next executive response to terrorism.³⁶⁷

These questions undoubtedly require a considered and lengthy analysis which would cloud the focus of this Comment. Accordingly, their consideration is left to any who may find merit in the proposed amendment.

VIII. Conclusion

As we celebrate our Constitution's bicentennial, it is clear that the power to initiate and risk war has moved steadily and inexorably into the hands of the President alone.³⁶⁸ Following a period of national upheaval, Congress passed legislation reasserting its constitutional authority over war.³⁶⁹ Since that time, however, Congress has lacked either the will or the capacity to

363. The amendment would require ratification by 38 ("three-fourths of the several") states. U.S. CONST. art. V.

364. "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . ." *Id.*

365. See *supra* notes 188-206 and accompanying text.

366. See, e.g., N.Y. Times, Mar. 2, 1987, at A16, col. 1 (editorial opinion that if any good is to come of the Iran-Contra affair, it will be the reaffirmation of law and limits on executive authority).

367. In 1986, President Reagan, without the consent or knowledge of the Congress, ordered military strikes against Libya in response to claims of Libyan-backed terrorism. Congress applauded the President's actions — despite what congressional leaders conceded to be a lack of compliance with the War Powers Resolution. N.Y. Times, Mar. 25, 1986, at A11, col. 1. See also, N.Y. Times, Apr. 15, 1986, at A1, col. 6 (describing congressional support for a subsequent direct air attack on Libya which almost assassinated Libyan leader Qaddafi and did seriously injure his children). Congress' support of such executive initiatives probably reflected the utter frustration of American citizens continually threatened with and exposed to terrorist attacks abroad. Had the military initiatives led to a larger conflict, one may question whether Congress would have been as supportive.

368. See *supra* notes 101-128, 348-350, and accompanying text.

369. See *supra* notes 176-206 and accompanying text.

assert its authority and only a few, individual Members of Congress have attempted to do what the Congress would not. Those individuals have faced a judicial branch unwilling to aid in the restoration of a balance of power, holding instead to a doctrine of nonjusticiability.³⁷⁰ A constitutional amendment would enable the judiciary to decide questions of warmaking and might well spur Congress to greater action in fulfilling its intended role.

For better or worse, we live in a nuclear age. The stakes of war are not those of an earlier age, when we could engage in a war and, subsequently regretting the action, reprimand the President and pay reparations to a country unjustly harmed.³⁷¹ Today, the President is in control of a vast and frightening arsenal of power — one which many believe is powerful enough to cause the actual extinction of the human race.³⁷² The Framers' intended separation of power over war is no longer merely desirable — it is crucial.

Surely the wisdom of the Framers is unassailable: deliberation and debate are essential before this nation commits itself to those initial steps toward nuclear war which once taken, may not be retraceable. Congressional powers over the conduct of foreign relations, and ultimately, the war power, must be invoked before the state becomes committed to a course of conduct that is deterministic and irreversible, a course that allows no alternative to nuclear war.³⁷³

The bicentennial of our Constitution is a most appropriate time to increase the nation's awareness that a major shift of constitutional power, although unintended by the Framers, has nonetheless occurred. The proposed amendment would afford a timely national debate over a crucial constitutional issue. "It is not as if the Framers did not foresee that the fledgling, seacoast nation would cover the continent and from time to time need to change the Constitution. For in article V they provided a process of amendment"³⁷⁴ To breathe new life into our Constitution

370. See *supra* notes 217-246, 250-265, 272-282, and accompanying text.

371. See *supra* note 120 and accompanying text.

372. See, e.g., F. WORMUTH & E. FIRMAGE, *supra* note 31, at 269-70 (discussing the likely biological and climatological effects of a nuclear exchange).

373. *Id.* at 272.

374. R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 91 (1971).

through such an amendment — and to seek the nation's consideration of its language and intent — would afford the finest possible celebration of its two-hundredth anniversary.

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