



1987

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## Recommended Citation

Mikva, Abner J. (1987) "The Political Question Revisited: War Powers and the "Zone of Twilight"," *Kentucky Law Journal*: Vol. 76 : Iss. 2, Article 2.

Available at: <https://uknowledge.uky.edu/klj/vol76/iss2/2>

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# The Political Question Revisited: War Powers and the "Zone of Twilight"\*

BY ABNER J. MIKVA\*\*

## I

Let me begin by sketching a perhaps familiar picture of a President's use of war powers. The international situation is tense, and the world economy is shaky. In a distant region where militarism has long been brewing, a country is mesmerized by a charismatic leader who seized power preaching greatness through war. This country is already at war with neighbors, but it now seems on the verge of attacking an important American trading partner and perhaps eventually America itself. The dilemma for the United States is clear: to do nothing means that America's strategic interests will suffer, but to enter the hostilities risks escalating them considerably. On the home front, Americans are in an isolationist mood. They are still weary from the nation's last war and reluctant to commit to another military encounter overseas. Congress, echoing this national sentiment, is cautious. Yet the President feels that America's strategic interests require it to come to the assistance of the imperiled nation. Without the approval of Congress, the President simply begins to offer aid. He begins by reflagging some much-needed destroyer ships, which he hopes will keep the enemy at bay. The national debate is furious. Many Americans support the President's actions as necessary to protect American strategic interests. Others warn that the nation is being dragged into war. Congressmen complain bitterly that they were not consulted.

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\* The Roy and Virginia Ray Lecture, University of Kentucky College of Law, November 5, 1987.

\*\* Circuit Judge, U.S. Court of Appeals, District of Columbia Circuit, Washington, D.C. The numbered footnotes contain only citations to cases and other authorities. Nothing of substance can be found in the footnotes. See Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985).

Any similarities to current events in the Persian Gulf notwithstanding, the setting is 1941, the President is Roosevelt, and the issue is Roosevelt's transfer of old United States naval destroyers to help England ward off the Third Reich. Roosevelt acted not only without congressional consent, but in the face of a series of Neutrality Acts that expressed Congress's will that America not transport arms or become involved in the growing hostilities. As the situation in Europe worsened, of course, Congress soon came around to the President's viewpoint and passed the Lend-Lease Act, which authorized the sort of transfers of armaments that Roosevelt had begun on his own. Roosevelt's actions in 1941 raised for many people—as similar events do today—the question of how far the President's war powers extend in the absence of congressional authorization.

Disputes like the one between Roosevelt and the Congress have raged since the earliest days of our republic. History teaches us that Congress has three choices in the face of a presidential exercise of war powers. First, Congress can simply decide that the President has not exceeded his authority as commander-in-chief and do nothing. Second, Congress can enact some form of limitation on the President's activities. If Congress chooses this option, its arsenal is wide: Congress may take any measure from registering mild disapproval to cutting off funding entirely for particular military ventures. Finally, a third option—the use of which has proliferated since the Vietnam War—is that Congress can decline to act itself but turn to the judicial branch for a ruling that the President has exceeded his constitutional powers.

This third option is my topic today. As a federal judge, I come here to recommend that we not make the courts the arbiters of these disputes. I believe that questions of military deployment are best settled by the interplay of the political branches. Courts have jurisprudential doctrines available—notably the political question doctrine and the standing requirement—to avoid taking on such cases when they want to avoid them. I will suggest that courts should step carefully when they walk through what Justice Jackson has called the “zone of twilight”—that area in which the President's authority is unclear, and Congress has not indicated whether or not it approves of the President's actions. I believe that when courts are con-

fronted with litigation over the extent of the President's war power, they should stay out of the dispute unless it has been shown that the dispute is one that the political branches cannot resolve on their own.

## II

The rationale for keeping the courts out of the process of determining the nation's military actions begins, as it must, with the text of the Constitution. The war power occupies a unique netherworld in the constitutional scheme. Of all the major powers enumerated in the Constitution, it is perhaps the least clearly allocated: unlike the other specifically enumerated powers, it is neither granted exclusively to one branch, nor neatly divided between two.

The Founders were perfectly capable of making clear and exclusive allocations of power to a single branch of government when they so desired. Article I vests in Congress alone the "Power To lay and collect Taxes, Duties, Imposts and Excises."<sup>1</sup> Article II states that "[t]he executive Power shall be vested in a President of the United States of America."<sup>2</sup> Article III places the judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>3</sup> Each of these grants of power is made simply and unconditionally. At the other extreme, the Constitution rigidly divides other powers between branches. The power to make treaties, for example, is divided between the legislative and executive branches with procedural clarity: article II accords the President the power to make treaties "by and with the Advice and Consent of the Senate" and "provided two thirds of the Senators present concur."<sup>4</sup> The appointment of judges and ambassadors is similarly divided between the legislative and the executive branches.<sup>5</sup>

The allocation of the war power fits neither of these two models. Like the power to make treaties, the Constitution vests

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<sup>1</sup> U.S. CONST. art. I, § 8.

<sup>2</sup> *Id.* at art. II, § 1.

<sup>3</sup> *Id.* at art. III, § 1.

<sup>4</sup> *Id.* at art. II, § 2.

<sup>5</sup> *Id.*

the war power in both the legislative and executive branches. Like the exclusive allocations of power, however, it vests the war power in seemingly absolute terms. The President is made the "Commander in Chief of the Army and Navy of the United States,"<sup>6</sup> and Congress is given the power "[t]o declare War" and to "provide for the common Defense."<sup>7</sup> Unlike in the case of treaties, no neat procedure is established for how the two branches are to work in concert on the question of war powers.

The Founders did not place the war powers in this tenuous position by accident. Rather, the manner in which it is allocated shows every sign of a careful balancing of competing concerns. The reasons that the Founders wanted to separate powers are discussed at length in *The Federalist Papers*. As Madison explained in *Federalist 47*, the Constitution divides powers among branches because "[t]he accumulation of all powers in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>8</sup> The Founders certainly were not blind to the potential for tyranny inherent in the war power. James Wilson, second only to Madison in his role as a drafter of the Constitution, told the Constitutional Convention that Congress was given the power to declare war to ensure that the "system will not hurry us into war" and to ensure that no "single man [can] involve us in such distress."<sup>9</sup>

Yet the Founders also were not blind to the unique countervailing rationale for not dividing the war power rigidly and for not tying the President's hands excessively. They were well aware that war cannot be fought by committee and that the common defense may require an uncommon degree of presidential authority. As Hamilton wrote in *Federalist 74*, "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."<sup>10</sup> In examining the scope of the President's

<sup>6</sup> *Id.* at art. II, § 2.

<sup>7</sup> *Id.* at art. I, § 8.

<sup>8</sup> THE FEDERALIST NO. 47, at 301 (J. Madison) (New Am. Libr. ed. 1961) (McLean ed. 1788).

<sup>9</sup> 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 583 (M. Jensen ed. 1976).

<sup>10</sup> THE FEDERALIST NO. 74, *supra* note 8, at 447 (A. Hamilton).

authority to make war, advocates of a broad presidential war power have made much of the fact that the Founders—on a motion by James Madison and Elbridge Gerry—changed the constitutional allocation to Congress from the power to “make” war to the power to “declare” war, presumably endorsing a broader presidential role and a narrower role for Congress.<sup>11</sup>

Justice Jackson exaggerated only a little when he cautioned that in interpreting the respective war powers of Congress and the President, “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”<sup>12</sup> Nevertheless, if we can divine little from the text of the Constitution, I think we can divine this: by dividing the war power unclearly between Congress and the executive, the Constitution leaves the precise details of how military operations will be carried out to be determined by the political give-and-take between the President and the Congress. I submit that determining the parameters of this give-and-take is what courts do worst and what the political process does best.

### III

Throughout American history, the give-and-take between Congress and the President has generally worked fairly well. When the President and Congress have differed on whether to use military force, it has usually been Congress that has been the more reluctant. On numerous occasions in which a President has sought prior congressional approval for a military action, Congress has declined to give its approval, and the proposed action was abandoned. Notably, President Buchanan made eight unsuccessful requests to Congress for authority to use force in Latin America before abandoning his efforts.<sup>13</sup>

The reason the war powers question is contentious at all, however, is that on other occasions the “give-and-take” has

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<sup>11</sup> W REVELEY, *WAR POWERS OF THE PRESIDENT AND CONGRESS* 82-83 (1981).

<sup>12</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

<sup>13</sup> W REVELEY, *supra* note 11, at 121-22.

turned almost exclusively into "take" by the President with very little "give." For example, in 1900, President McKinley sent 5,000 troops and naval forces into China to suppress the Boxer Rebellion. Although the campaign involved military intervention in the domestic politics of another state and numerous casualties, President McKinley maintained throughout that it did not require a congressional declaration of war.<sup>14</sup> In 1926, Calvin Coolidge sent 5,000 troops to suppress a guerilla war against a pro-American regime in Nicaragua and made the same claim.<sup>15</sup>

Of course, the military incursion that most forcefully raised the question of when the President exceeds his war power was the Vietnam War. Now is not the time to go into the details of that dispute, but it is worth noting that the battles of that era led Congress to attempt something it had never tried before: a statutory delineation of procedures to be used by the President and by Congress in deciding when to engage in hostilities.

The War Powers Resolution gets far better press than it deserves. It was weakly written by Congress and has been even more weakly enforced. One of the War Powers Resolution's strongest proponents, Senator Jacob Javits, described it as "a methodology by which the collective judgment of Congress and the President could be rendered on the question whether to risk or initiate conflict."<sup>16</sup> I am afraid that that description somewhat overstates the case. In reality, the Resolution is an abject example of a statute that is full of sound and fury and signifies very little. When it was being drafted, those Senators who fought to have the Resolution clearly spell out the limits of the President's war powers were defeated. The Resolution begins by conceding extremely broad war powers to the President: until its sixty-day limitation kicks in, the discretion left to the President to dispatch troops is considerable. The consultation and informational sections are equally feckless. Consultation in advance of commencing hostilities is not made a blanket rule; the statute gives the President a sizeable loophole in requiring consultation only "in every possible instance." The written report require-

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<sup>14</sup> *Id.* at 146.

<sup>15</sup> *Id.* at 147.

<sup>16</sup> Javits & Wheeler, Book Review, 57 N.Y.U. L. REV. 848, 853 (1982).

ment is such that Presidents can easily fulfill their obligations under it while providing Congress with little useful information about the hostilities.<sup>17</sup>

That the Resolution is weakly enforced was vividly demonstrated only this autumn. It is notable that, with all of the hostilities that have occurred in the Persian Gulf in the past four months, Congress has still steadfastly declined to invoke its provisions.

#### IV

The disputes over the Vietnam War left a second important legacy in the war powers area: the lawsuit, often filed with at least one Congressman as a plaintiff, asking the courts to intervene in limiting a President's use of the war power. More than twenty such suits were filed during the Vietnam War. With the exception of one district court, quickly reversed on appeal, every court faced with the question of the war's legality declined to decide it. Some of the courts held that Congress had authorized the war, either by voting for military appropriations or by enactments like the Tonkin Gulf Resolution and extensions of the draft. The vast majority of the courts that heard these cases found that various jurisprudential doctrines precluded them from reaching the merits. Most frequently, they held that the issue presented was a nonjusticiable political question. Less often, they held that the plaintiffs before them lacked standing to bring the claim.<sup>18</sup>

The theory behind the political question doctrine, that some political disputes are not justiciable, has a long and honorable tradition. As early as 1801, the Supreme Court held in *United States v The Schooner Peggy*<sup>19</sup> that it would not involve itself in a case over whether the United States had violated a treaty with France when it seized a particular schooner on the high seas off the coast of Haiti. Chief Justice Marshall wrote for the Court that "if the nation has given up the vested rights of its

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<sup>17</sup> See Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1982)).

<sup>18</sup> See W REVELEY, *supra* note 11, at 212-17.

<sup>19</sup> 5 U.S. (1 Cranch) 102 (1801).



citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation."<sup>20</sup> Since that time, courts have applied the doctrine in a wide variety of areas, from the Supreme Court's holding in 1849 in *Luther v. Borden*<sup>21</sup> that whether a state has a republican government as promised by article IV, section 4 is a political question, to my own court's holding a few years ago in *Vander Jagt v O'Neil*<sup>22</sup> that a variation of the doctrine precludes review of the House Democratic leadership's method of making committee assignments.

Over the years, the political question doctrine has had particular resiliency in cases involving foreign policy. In the early years of this century, the Supreme Court declared of foreign policy that "what may be done in the exercise of this political power is not subject to judicial inquiry or decision."<sup>23</sup> The Court has since rejected this absolutist approach. In *Baker v Carr*,<sup>24</sup> Justice Brennan, writing for the Court, explicitly disclaimed previous "sweeping statements to the effect that all questions touching foreign relations are political questions."<sup>25</sup> Nevertheless, as the Supreme Court itself demonstrated eleven years after *Baker*, in dismissing the plaintiffs' claim in *Gilligan v Morgan*,<sup>26</sup> a Vietnam-era challenge to the training of the Ohio National Guard, the doctrine retains particular force in the military context.

The question of standing is in many ways closely related to the political question doctrine. The theory behind standing is slightly different: it is not that the issues in the case are not the sort judges should decide, but rather that the party bringing the suit does not have sufficient personal interest in the suit to bring it. In its narrow sense, standing is simply a jurisprudential device to ensure that a court settles only real cases and controversies with parties on both sides who have a genuine stake in the

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<sup>20</sup> *Id.* at 110.

<sup>21</sup> 48 U.S. (7 How.) 1 (1849).

<sup>22</sup> 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983).

<sup>23</sup> *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

<sup>24</sup> 369 U.S. 186 (1962).

<sup>25</sup> *Id.* at 211.

<sup>26</sup> 413 U.S. 1 (1973).

outcome of the dispute. Standing begins to resemble the political question doctrine, however, when taken to an extreme—that is, in those cases in which courts have stated or strongly implied that there may be some alleged wrongs that no one has standing to challenge.

In 1974, in *Schlesinger v. Reservists Committee to Stop the War*,<sup>27</sup> the Supreme Court held that a group of citizens lacked standing to challenge a Congressman's membership in the Armed Forces Reserve as a violation of the article I, section 6 incompatibility clause. In so holding, the Court stated that the "generalized interest" of all citizens in constitutional governance is "too abstract" to create a concrete injury.<sup>28</sup> Almost forty years before, the Court had applied similar principles in *Ex parte Levitt*<sup>29</sup> to find that an individual citizen lacked standing to challenge, on ineligibility clause grounds, Justice Black's ascension to the Supreme Court bench. In an analysis that is highly germane to the war powers context, the *Schlesinger* Court stated that such "citizen standing," if recognized, would have no logical limits, and would "distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'"<sup>30</sup> Instead, the Court stated that the absence of a litigant with standing to challenge a particular action gives support to the argument that the subject matter is committed to the surveillance of Congress and ultimately to the political process.

In light of the problems with citizen standing, members of Congress have occasionally resorted to another tack: asserting special congressional standing to challenge unconstitutional actions. The Supreme Court has recognized that Congressmen may in some cases have special standing to challenge an unconstitutional action. In one case, *Coleman v. Miller*,<sup>31</sup> the Supreme Court held that a group of Kansas legislators had standing to challenge the right of the state's lieutenant governor to break tie votes in the state senate. The *Coleman* case turned, however, on

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<sup>27</sup> 418 U.S. 208 (1974).

<sup>28</sup> *Id.* at 227.

<sup>29</sup> 302 U.S. 633 (1937).

<sup>30</sup> *Schlesinger*, 418 U.S. at 222.

<sup>31</sup> 307 U.S. 433 (1939).

the legislators' particular interest in "maintaining the effectiveness of their votes."<sup>32</sup> In another case, *Kennedy v. Sampson*,<sup>33</sup> my own court used the same principle to hold that Senator Edward Kennedy had standing to challenge the constitutionality of the procedure by which President Nixon pocket-vetoed a bill for which Kennedy had voted. Congressional standing has never been extended beyond this narrow area of cases in which legislators are suing to maintain the effectiveness of their individual votes.

The limits of the congressional standing are well described in a case to which I am particularly partial: *McClure v. Carter*,<sup>34</sup> the decision which allowed me to remain on the bench. In *McClure*, a special three-judge district court held that a Senator who was challenging my appointment to the bench based on the emoluments clause did not have standing. Judge Betty Fletcher, writing for the court, noted that the Senate had every opportunity to consider the emoluments clause issue when it voted to confirm me and that it still voted to confirm. The court then distinguished *Coleman*, stating: "[t]hat [Senator McClure] and like-minded senators did not prevail in the Senate does not mean that the effectiveness of [his] vote was impaired within the meaning of *Coleman v. Miller*. It means merely that he was on the losing side."<sup>35</sup>

Actually, the congressional standing issue in *McClure* had an additional twist because of a special jurisdictional statute under which Senator McClure sued. I do not think I am being paranoid when I say that this statute is probably as close as Congress has ever come to enacting a bill of attainder. The statute, which was passed as a rider to an appropriations bill in 1979, gave members of Congress standing in a particularly narrow set of cases: challenges under the emoluments clause to the appointment of judges elevated to the District of Columbia Circuit Court of Appeals during the 96th Congress.<sup>36</sup> Needless

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<sup>32</sup> *Id.* at 438.

<sup>33</sup> 511 F.2d 430 (D.C. Cir. 1974).

<sup>34</sup> 513 F Supp. 265 (D. Idaho) (special three-judge district court), *aff'd*, *McClure v. Reagan*, 454 U.S. 1025 (1981).

<sup>35</sup> *Id.* at 270.

<sup>36</sup> Pub. L. No. 96-86, § 101(c), 93 Stat. 656, 657-58 (1979) (not codified).

to say, the law has never been used to challenge the appointment of anyone but me. Nevertheless, despite the statute, the *McClure* court found that Senator McClure did not have standing. Judge Fletcher noted that jurisprudential doctrines like standing have an important role in fixing the lines between the branches of the government, and cannot be abandoned simply because Congress passes a statute. The court stated that even with such a law in place, courts will not take on powers and responsibilities that rightfully belong to the other two branches.

Taken together, the political question doctrine and the standing requirement provide two bases for courts to decline judicial review in the war powers context. I will not discuss the details of when a court should utilize which doctrine. Although either doctrine may be grounds for a court to decline to review a war powers case, clearly each entails a different doctrinal inquiry before a court can reach that conclusion. The Supreme Court gave useful guidance in *Schlesinger*, however, when it noted that “[t]he more sensitive and complex task of determining whether a particular issue presents a political question causes courts to turn initially, although not invariably, to the question of standing to sue.”<sup>37</sup>

## V

Clearly if a court wishes to avoid deciding a war powers question, it has the doctrinal tools to do so. The difficult question is when the courts should resort to using them. I believe that courts should in general be reluctant to step into the war powers area. Justice Frankfurter issued a much-needed reminder when he wrote in the steel seizure case that “[t]he Framers did not make the judiciary the overseer of our government.”<sup>38</sup> The President, Congressmen, and judges have all taken the same oath to uphold the Constitution; no reason exists for judges to step in and decide disputes between the other two branches when political avenues exist for those branches to settle the matters themselves. The Founders skillfully allocated powers between the

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<sup>37</sup> *Schlesinger*, 418 U.S. at 215.

<sup>38</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

President and Congress so that, when disputes arise, each branch has powerful weapons with which to induce the other to cooperate. I believe that courts should step in only when that political process breaks down.

The key question then becomes when the political process may be said to have broken down. I do not subscribe to the view propounded by my colleague Judge Bork that courts need never involve themselves in disagreements between the Congress and the President simply because Congress has the power to impeach. The threat of impeachment is clearly too blunt a weapon to rely on to settle any disputes but the most extreme ones. Rather, I believe that Justice Powell enunciated a wise test in his discussion of ripeness in his concurrence in *Goldwater v Carter*,<sup>39</sup> a suit by a number of Congressmen claiming that President Carter's termination of our treaty with Taiwan "deprived them of their constitutional role with respect to a change in the supreme law of the land."<sup>40</sup> Justice Powell noted that "[d]ifferences between the President and the Congress are commonplace in our system" and that these disputes usually "turn on political rather than legal considerations." He stated that the test of whether a court hears such a case should be whether each branch has asserted its constitutional authority—or, as he put it, whether the political branches have reached a "constitutional impasse."<sup>41</sup>

Justice Powell's "constitutional impasse" test harkens back to a seminal set of distinctions made by Justice Jackson in his concurring opinion in the steel seizure case. Justice Jackson stated that disputes between the President and Congress that come before the courts can be divided into three broad categories. The President's authority is at its greatest, Jackson wrote, when he is acting pursuant to an express or implied authorization from Congress.<sup>42</sup> By contrast, his power is at its lowest ebb when he takes measures that are incompatible with Congress's express or implied will.<sup>43</sup> Finally, there are those actions taken in what

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<sup>39</sup> 444 U.S. 996 (1979).

<sup>40</sup> *Id.* at 997-98 (Powell, J., concurring).

<sup>41</sup> *Id.* at 997

<sup>42</sup> *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

<sup>43</sup> *Id.* at 637-38.

Justice Jackson called “the zone of twilight”—when the president acts, in the absence of either a Congressional grant or denial of authority in those areas in which Congress and the President have concurrent power or in which the distribution is uncertain. Justice Jackson advised that, when a President acts in this “zone of twilight,” it is important for a court to scrutinize Congress’s posture. He noted that “congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, . . . independent presidential responsibility.”<sup>44</sup>

Taken together, the approaches of Justice Powell and Justice Jackson counsel a careful scrutiny of the words and the deeds of Congress when reviewing a President’s actions in this “zone of twilight.” They instruct courts to examine closely whether Congress has unsuccessfully attempted to assert its constitutional authority to stop the President’s actions. Applied to the President’s war powers, this constitutional impasse approach would carve out a carefully circumscribed but nevertheless very real role for judicial review of presidential war powers.

Lawsuits that ask courts to halt ongoing hostilities will have trouble meeting this test. Because war is expensive, it is extremely difficult for a President to engage in real hostilities when Congress is resolved to stop him. At the point at which a constitutional impasse occurs, Congress can simply cut off funding for any military use of which it does not approve. This was the problem with the well-meaning attempts to get the courts to declare the Vietnam War to be illegal. No constitutional impasse existed; the President was acting, and although Congress had never declared war outright, it clearly lacked either the will or the courage to use its considerable powers to halt the hostilities. Toward the end of the war, Senator Gaylord Nelson—a cosponsor of the War Powers Resolution—lamented the highly deferential attitude Congress had taken to the military actions throughout most of the war. He recalled in 1969,

In the six years that I have been in the Senate, no military budget has been subjected by the Congress—or by the public either—to really critical evaluation. We have passed seventy-billion-dollar military budgets after ten minutes or an hour of

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<sup>44</sup> *Id.* at 637

discussion on the theory that the military knew best and that we were dealing with purely technical military matters and not political ones. This has been our great mistake.<sup>45</sup>

Yet the courts cannot be expected to make Congress scrutinize its votes more than it does or, worse still, to act under the assumption that Congress does not fully consider the consequences of its actions. As Congress continued to pass military appropriations throughout the Vietnam War, a court could only conclude that it was not willing to press the President to halt hostilities. Ultimately, of course, Congress did cut off funding for the war. In the spring of 1975, President Ford went to Congress with a strongly-worded request for further aid, and one fateful evening, Congress simply said no, abruptly ending its financing of the Vietnam War.

The courts have a potentially larger role in the lawsuits that have emerged over the President's failure to abide by the War Powers Resolution's requirement of notice and consultation with Congress. Requests for information are more likely to end up in a constitutional impasse than requests for withdrawal of troops or supplies. The funds cut-off that may be effective in troop deployment cases is a much harder weapon for Congress to use in notice cases: when hostilities appear to be imminent, Congress is unlikely to tie a President's hands in advance and perhaps compromise national security simply to make the point that it wants to be consulted. With Congress's options thus limited, a constitutional impasse is more likely, and the case for judicial intervention is stronger, than in disputes over troop deployment. Certainly, difficulties exist with the judiciary acting even in such cases. For example, as a practical matter, it is questionable whether the slow pace of litigation is best suited to resolving pressing questions over the extent of the President's day-to-day sharing of information with Congress. Like impeachment, full-scale litigation may prove to be too blunt a weapon for taking on the problem of presidential consultation with Congress.

Lawsuits over the President's failure to consult with Congress will also raise the difficult question of who has standing to bring the suit. It seems unlikely that in such a case any one member

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<sup>45</sup> AMERICAN MILITARISM 1970 19-20 (E. Knoll & J. McFadden eds. 1969).

of Congress would be able to show that his individual vote had been diminished in the particular, procedural way required by *Coleman v Miller*<sup>46</sup> Yet without such an individualized claim, the notion of a single member of Congress pressing a conflict between article I and article II in federal court remains unsettling. Perhaps, in cases of true constitutional impasse, we should think about expanding our ideas about who is the proper party to bring such a suit. Just as in some European countries mechanisms exist for the legislature as a body to bring suit, we may want to consider the idea of creating some kind of standing for Congress itself. In the constitutional impasse context, this could perhaps entail giving standing to the congressional leadership to represent the interests of the body as a whole in the impasse. These and other issues of war power litigation remain to be refined by the courts.

## VI

Plutarch wrote two millennia ago that “the law speaks too softly to be heard amid the din of arms.”<sup>47</sup> If that was once true, it is a tribute to our country and our Constitution that it is not true today. The problem with the judiciary controlling the war power in America now is not that it speaks too softly but rather that it may not always have something to say. It is not immediately clear what legal doctrine would tell a court how to evaluate actions like that of President Roosevelt in early 1941—how to state precisely how far Roosevelt could go, but no farther, in the absence of explicit congressional approval. Nevertheless, the time may come when a true constitutional impasse occurs. The courts may be asked not to enter a “zone of twilight,” in which Congress has remained silent, but to enter a real dispute in which the President and Congress disagree about the war power, and each has acted to the limit of its authority. If and when such a true constitutional impasse occurs between the political branches on the war powers question, the courts will have their strongest claim for entering into the dispute. The

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<sup>46</sup> 307 U.S. 433 (1939).

<sup>47</sup> PLUTARCH, *Lives*, “Caus Marius.”



law does not speak too softly today to be heard amid the din of arms—the law is just saving its voice.

There can be no doubt that as the courts debate whether to enter into the disputes between the executive branch and Congress, the losers in such disputes will complain bitterly of the role of the courts. If a real impasse exists that threatens the continuity of an orderly and a lawful government, it is less dangerous for the courts to act than to let the dispute be resolved by the choosing up of sides by the Air Force or the Army. But when no such impasse exists, and when the two political branches have not exhausted their own powers to settle the matter, the courts are well advised to take a page from Congress—and do nothing.