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THE JUDICIARY AND PRESIDENTIAL POWER IN FOREIGN AFFAIRS:

A CRITIQUE

David Gray Adler*

The unmistakable trend toward executive domination of U.S. foreign affairs in the past sixty years represents a dramatic departure from the basic scheme of the Constitution.¹ The constitutional blueprint assigns to Congress senior status in a partnership with the President to conduct foreign policy. It also gives Congress the sole and exclusive authority over the ultimate foreign relations power: the authority to initiate war. The President is vested with modest authority in this realm and is clearly only of secondary importance. In light of this constitutional design, commentators have wondered at the causes and sources of this radical shift in foreign affairs powers from Congress to the President.²

Although a satisfactory explanation for the radical shift in power is perhaps elusive, the growth of presidential power in foreign relations has fed considerably on judicial decisions that are doubtful and fragile. An exhaustive explanation, which has so far escaped the effort of others, is beyond the scope of this article. The aim of the first section is to examine the judiciary's contribution to executive hegemony in the area of foreign affairs as manifested in Supreme Court rulings regarding executive agreements, travel abroad, the war power, and treaty termination.

In the second section of this article, I provide a brief explanation of the policy underlying the Constitutional Convention's allocation of

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¹ For a discussion of this trend from a sharply critical perspective, see DAVID GRAY ADLER, *THE CONSTITUTION AND THE TERMINATION OF TREATIES* (1986) [hereinafter ADLER, *TERMINATION*]; Adler, *The Constitution and Presidential Warmaking*, *POLITICAL SCIENCE QUARTERLY*, Spring 1988 at 103 [hereinafter Adler, *Warmaking*]; RAOUL B. ERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* (1974) [hereinafter BERGER]; ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (1986); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995).

² For differing explanations, see Ira Katznelson & Kenneth Prewitt, *Constitutionalism, Class and the Limits of Choice in U.S. Foreign Policy*, in *CAPITALISM AND STATE IN U.S.-LATIN AMERICAN RELATIONS* 25 (Richard Fagan ed., 1979); THEODORE LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* (1985); PHILIP KURLAND, *WATERGATE AND THE CONSTITUTION* (1978); LESLIE GELB & RICHARD BETTS, *THE IRONY OF VIETNAM: THE SYSTEM WORKED* (1979). See also authors cited *supra* note 1.

foreign affairs powers and argue that those values are as relevant and compelling today as they were two centuries ago. In the third section, I contend that a wide gulf has developed in the past fifty years between constitutional theory and governmental practice in the conduct of foreign policy. The Court has greatly facilitated the growth of presidential power in foreign affairs in three interconnected but somewhat different ways by: (1) adhering to the sole-organ doctrine as propounded in the 1036 case of *United States v. Curtiss-Wright Export Corp.*, (2) invoking the political question doctrine and other nonjusticiable grounds, and (3) inferring congressional approval of presidential action by virtue of congressional inaction or silence.³ I then offer an explanation of the Court's willingness to increase presidential foreign affairs powers well beyond constitutional boundaries. For a variety of reasons, the Court views its role in this area as a support function for policies already established. In this regard the judiciary has become an arm of the executive branch. Finally, I conclude with the argument that to maintain the integrity of the Constitution, the Court must police constitutional boundaries to ensure that fundamental alterations in our governmental system will occur only through the process of constitutional amendment. The judicial branch may not abdicate its function "to say what the law is."⁴

The Constitution and the Conduct of Foreign Policy

The Constitution envisions the conduct of foreign policy as a partnership between the President and Congress. Perhaps surprisingly, the Constitution assigns Congress the role of senior partner. This assignment reflects, first, the overwhelming preference of both the framers at the Constitutional Convention and the ratifiers in state conventions for collective decision-making in both foreign and domestic affairs. Second, this assignment of powers reflects their equally adamant opposition to unilateral executive control of U.S. foreign policy. This constitutional arrangement is evidenced by specific, unambiguous textual language, almost undisputed arguments by framers and ratifiers, and by logical-structural inferences from the doctrine of separation of powers.⁵

The constitutional assignment of powers, moreover, is compelling and relevant for twentieth century America for at least three reasons. First, separation of powers issues are perennial, for they require consideration of the proper repository of power. Contemporary questions about the allocation of power between the President and Congress in foreign affairs are largely the same as those addressed two centuries ago. Second, the logic of collective decisionmaking in the realm of foreign relations is as

³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁵ See ADLER, *TERMINATION*, *supra* note 1, at 84-148.

sound today as it was in the founding period. Third, although the world and the role of the United States in international relations have changed considerably over the past 200 years, most questions of foreign affairs still involve routine policy formulation and do not place a premium on immediate responsive action.

The preference for collective, rather than individual, decisionmaking runs throughout those provisions of the Constitution that govern the conduct of foreign policy. Congress, as a collective governing body, derives broad and exclusive powers from Article I to regulate foreign commerce and to initiate all hostilities on behalf of the United States, including war. As Article II indicates, the President shares with the Senate the treaty-making power and the power to appoint ambassadors. Only two powers in foreign relations are assigned exclusively to the President. First, he is commander-in-chief, but he acts in this capacity by and under the authority of Congress. As Alexander Hamilton and James Iredell argued, the President, in this capacity, is merely first admiral or general of the armed forces, after war has been authorized by Congress or in the event of a sudden attack against the United States.⁶ Secondly, the President has the power to receive ambassadors. Hamilton, James Madison, and Thomas Jefferson agreed that this clerk-like function was purely ceremonial in character. Although this function has come to entail recognition of states at international law, which carries with it certain legal implications, this founding trio contended that the duty of recognizing states was more conveniently placed in the hands of the executive than in the legislature.⁷ These two powers exhaust the textual grant of authority to the President regarding foreign affairs jurisdiction. The President's constitutional authority pales in comparison to the powers of Congress.

This Constitutional preference for shared decisionmaking is emphasized again in the construction of the shared treaty power: "He shall have Power, by and with the Advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."⁸ The compelling simplicity and clarity of the plain words of this clause leave no room to doubt its meaning.⁹ There is no other clause that even

⁶ For a discussion of the commander-in-chief clause, see Adler, *Warmaking*, *supra* note 1, at 8-13; BERGER, *supra* note 1, at 60-64.

⁷ See Hamilton's explanation in THE FEDERALIST No. 69, at 451 (Alexander Hamilton) (Edward M. Earle ed., 1937). Madison's remarks may be found in THE LETTERS OF PACIFICUS AND HELVIDIUS 76-77 (Richard Loss ed., 1976). See Adler, *The President's Recognition Power*, 25 PRESIDENTIAL STUDIES QUARTERLY 267 (Spring 1995).

⁸ U.S. CONST. art. II, § 2, cl. 2.

⁹ Such a straight-forward, textualist approach provides a basis which, in the words of Professor Philip Bobbit, is readily apprehendable by the people at large, namely, given common-language meaning to constitutional provisions. PHILIP BOBBITT,

intimates a presidential power to make agreements with foreign nations. Therefore, as Hamilton argued, the treaty power constitutes the principal vehicle for conducting U.S. foreign relations.¹⁰ In fact, there was no hint at the Constitutional Convention of an exclusive Presidential power to make foreign policy. To the contrary, all the arguments of the framers and ratifiers were to the effect that the Senate and President, which Hamilton and Madison described as a "fourth branch of government" in their capacity as treaty maker,¹¹ are to manage concerns with foreign nations.¹² While a number of factors contributed to this decision,¹³ the pervasive fear of unbridled executive power loomed largest.¹⁴ Hamilton's statement fairly represents these sentiments:

The history of human conduct does not warrant that exalted opinion of human nature which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and

CONSTITUTIONAL FATE 31 (1982). The significance of the plain meaning of the words should not be underestimated. As Justice Joseph Story observed,

Constitutions . . . are instruments of a particular nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understanding. The people make them; the people adopt them; the people must be supposed to read them . . . and cannot be presumed to admit in them any recondite meaning.

Id. at 25-26.

¹⁰ THE FEDERALIST No. 75 (Alexander Hamilton).

¹¹ ADLER, TERMINATION, *supra* note 1, at 93.

¹² For similar remarks, see *id.* at 291, 323. Senator Rufus King, one of the framers, stated in Congress in 1818 that, "To the validity of all . . . proceedings in the management of foreign affairs; the constitutional advice and consent of the Senate are indispensable." 31 ANNALS OF CONG. 106-07 (1818). See also ADLER, TERMINATION, *supra* note 1, at 84-148.

¹³ For example, it was argued in the Constitutional Convention that the various political, economic, and security interests of the states could be protected only if each state had an equal voice in the treaty-making process. See ADLER, TERMINATION, *supra* note 1, at 84-88.

¹⁴ In the North Carolina Ratifying Convention, William Davie, one of the framers, indicated that the jealousy of executive power, which has shown itself so strongly in all the American governments, would not admit of lodging the treaty powers in the President alone. 4 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 120 (2d ed. 1836). In order to allay fears that the Convention had created an embryonic monarchy, Hamilton launched into a minute analysis of presidential power in The Federalist No. 69, and advised that nothing was to be feared from an executive with the confined authorities of the President. Fear of a return of Executive authority like that exercised by the Royal Governors or by the King had been ever present in the States from the beginning of the Revolution. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 173 (1947).

circumstanced as would be a President of the United States.¹⁵

The widespread fear of executive power that precluded presidential control of foreign policy also greatly influenced the Convention's design of the War Clause. Article I, section 8, paragraph 11 states: "The Congress shall have Power . . . To declare War."¹⁶ The plain meaning of the clause is buttressed by the unanimous agreement among both framers and ratifiers that Congress was granted the sole and exclusive authority to initiate war. The warmaking power, which was viewed as a legislative power by Madison and Wilson, among others, was specifically withheld from the President.¹⁷ James Wilson, second only to Madison as an architect of the Constitution, summed up the values and concerns underlying the war clause for the Pennsylvania Ratifying Convention:

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 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 war.¹⁸

No member of the Constitutional Convention and no member of any state ratifying convention ever attributed a different meaning to the War Clause.¹⁹

¹⁵ THE FEDERALIST No. 75, at 487 (Alexander Hamilton) (Edward M. Earle ed., 1937).

¹⁶ U.S. CONST. art. I, § 8, cl. 1, 11.

¹⁷ When the framers were discussing the repository of the war power, they considered a proposal to give the national executive the executive powers of the Continental Congress. But concern was expressed that this power would include the power of war, which would make the executive a monarchy. James Wilson sought to allay such concerns in stating, "Making peace and war are generally determined by Writers on the Laws of Nations to be legislative powers." He added that "the Prerogatives of the British Monarchy" are not "a proper guide in defining the executive powers. Some of the prerogatives were of a legislative nature. Among others that of war and peace." 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 65-66, 73-74 (1911). Madison agreed with Wilson. *See id.* at 70. For discussion of the allocation of the war power and the President's authority to repel attacks against the United States, *see* Adler, *Warmaking*, *supra* note 1, at 3-13.

¹⁸ ELLIOT, *supra* note 14, vol. 2, at 528.

¹⁹ For statements in the state ratifying conventions, *see* Adler, *Warmaking*, *supra* note 1, at 5. For example, James Iredell stated in North Carolina, "The President has not the power of declaring war by his own authority . . . Those powers are vested in other hands. The power of declaring war is expressly given to Congress." And Charles Pickney, a delegate in Philadelphia, told the South Carolina Ratifying Convention that the President's powers did not permit him to declare war. ELLIOT, *supra* note 14, vol. 4, at

This undisputed interpretation draws further support from early judicial decisions, the views of eminent treatise writers, and from nineteenth-century practice. I have discussed these factors elsewhere; here the barest review must suffice.²⁰ The meaning of the War Clause was put beyond doubt by several early judicial decisions. No court since has departed from this early view. In 1800, in *Bas v. Tingy*, the Supreme Court held that it is for Congress alone to declare either an “imperfect” (limited) war or a “perfect” (general) war.²¹ In 1801, in *Talbot v. Seeman*, Chief Justice John Marshall, a member of the Virginia Ratifying Convention, stated that the “whole powers of war [are], by the Constitution of the United States, vested in [C]ongress. . . .”²² In *Little v. Barreme*, decided in 1804, Marshall concluded that President John Adams’ instructions to seize ships were in conflict with an act of Congress and were therefore illegal.²³ In 1806, in *United States v. Smith*, the question of whether the President may initiate hostilities was decided by Justice William Paterson, riding circuit, who wrote for himself and District Judge Tallmadge: “Does he [the President] possess the power of making war? That power is exclusively vested in Congress . . . It is the exclusive province of Congress to change a state of peace into a state of war.”²⁴ In 1863, the *Prize Cases* presented the Court with its first opportunity to consider the power of the President to respond to sudden attacks.²⁵ Justice Robert C. Grier delivered the opinion of the Court:

By the Constitution, Congress alone has the power to declare a natural or foreign war . . . 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.”²⁶

These judicial decisions established the constitutional fact that it is for Congress alone to initiate hostilities, whether in the form of general or

107, 108, 287. Hamilton, moreover, had stated flatly that “the declaring of war . . . by the Constitution . . . would appertain to the legislature.” THE FEDERALIST No. 69, at 448.

²⁰ See Adler, *Warmaking*, *supra* note 1, at 3-29.

²¹ *Bas v. Tingy*, 4 U.S. (4 Dall.) 378 (1800).

²² *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

²³ *Little v. Barreme*, 4 U.S. (4 Dall.) 37, 40-43, 45-46 (1800); 1 U.S. (1 Cranch) 1, 28 (1801); 2 U.S. (2 Cranch) 170, 177-78 (1804).

²⁴ *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16342).

²⁵ *Prize Cases*, 67 U.S. 635, 668 (1863).

²⁶ *Id.*

limited war; the President, in his capacity as commander-in-chief, is granted only the power to repel sudden attacks against the United States.²⁷

The Convention's attachment to collective judgment and its decision to create a structure of shared power in foreign affairs provided, in the words of Wilson, "a security to the people," for it was a cardinal tenet of republican ideology that the conjoined wisdom of many is superior to that of one.²⁸ The emphasis on group decisionmaking came, of course, at the expense of unilateral executive authority. This hardly posed a difficult choice, however; for the framers and ratifiers held a pervasive distrust of executive power, a deeply held suspicion that dated to colonial times.²⁹ As a result of this aversion to executive authority, the Convention placed control of foreign policy beyond the unilateral capacity of the President. Furthermore, as Madison said, the Convention "defined and confined" the authority of the President so that a power not granted could not be assumed.³⁰

The structure of shared powers in foreign relations serves to deter abuse of power, misguided policies, irrational action, and unaccountable behavior.³¹ As a fundamental matter, emphasis on joint policymaking permits the airing of sundry political, social, and economic values and concerns. Such a structure wisely ensures that the ultimate policies will not merely reflect the private preferences or the short-term political interests of the President.³²

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²⁸ Some academics and various Presidents—Truman, Johnson, Nixon, Ford, Carter, and Reagan—have invoked the commander-in-chief clause as a source of independent presidential warmaking authority. There is no merit to these claims. The Supreme Court never has held that this clause is a foundation of warmaking power for the President, and there is no foundation for the view in either the Constitutional Convention or the state ratifying conventions. See Adler, *Warmaking*, *supra* note 1, at 8-13, 28-29.

²⁹ ELLIOT, *supra* note 14, vol. 2, at 507. In the First Congress, Roger Sherman, who had been a delegate in Philadelphia, argued in defense of the shared powers arrangement in foreign affairs and stated: The more wisdom there is employed, the greater security there is that the public business will be done. 1 ANNALS OF CONG. 1805 (1789). This statement echoed the sentiment expressed by Benjamin Franklin at the close of the Constitutional Convention when he urged the delegates to set aside their remaining differences in favor of the collective judgment. FARRAND, *supra* note 17, vol. 2, at 641-43. For discussion of republicanism, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 1-124 (1968).

³¹ Dread of executive power surfaced repeatedly in the various conventions; see FARRAND, *supra* note 17, vol. 1, at 66, 83, 90, 101, 113, 119, 153, 425; *id.* vol. 2, at 35-36, 101, 278, 513, 632, 640; ELLIOT, *supra* note 14, vol. 3, at 58, 60; *id.* vol. 4, at 311. This fear had been common among the colonists. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 4 (3d ed., N.Y. Univ. Press 1948).

³² FARRAND, *supra* note 17, vol. 1, at 70. The Convention participants believed the enumeration of presidential powers was essential. See also BERGER, *supra* note 1, at 49-59.

Of course, this arrangement has come under fire in the postwar period on a number of policy grounds. Some have argued, for example, that fundamental political and technological changes in the character of international relations and the position of the United States in the world have rendered obsolete an eighteenth century document designed for a peripheral, small state in the European system of diplomatic relations. Moreover, it has been asserted that quick action and a single, authoritative voice are necessary to deal with an increasingly complex, interdependent, and technologically linked world capable of almost instantaneous massive destruction. Extollers of presidential dominance also have contended that only the President has the qualitative information, the expertise, and the capacity to act with the necessary dispatch to conduct U.S. foreign policy.³³

These policy arguments have been reviewed, and discredited, elsewhere; space limitations here permit only a brief commentary.³⁴ Above all else, the implications of U.S. power and action in the twentieth century have brought about an even greater need for institutional accountability and collective judgment than existed two hundred years ago. The devastating, incomprehensible destruction of nuclear war and the possible extermination of the human race demonstrate the need for joint participation in any decision to initiate war. Moreover, most of the disputes at stake between the executive and legislative branches in foreign affairs have virtually nothing to do with the need for rapid response to crisis. Rather, they are concerned only with routine policy formulation and execution, a classic example of the authority exercised under the separation of powers doctrine.³⁵

Nevertheless, these joint functions have been fused by the executive branch and have become increasingly unilateral, secretive, insulated from public debate, and hence unaccountable.³⁶ In the wake of Vietnam, Watergate, and the Iran-contra scandal, unilateral executive behavior has become ever more difficult to defend. Scholarly appraisals have destroyed arguments about intrinsic executive expertise and wisdom in foreign affairs and the alleged superiority of information available to the

³³ GELB & BETTS, *supra* note 2, at 363; Mulford Q. Sibley, *Can Foreign Policy Be Democratic?*, in READINGS IN AMERICAN FOREIGN POLICY, 20-28 (Robert Goldwin & Harry Clor eds. 2d ed., 1971). *See generally* ROBERT DAHL, CONGRESS AND FOREIGN POLICY (1950); ADLER, TERMINATION, *supra* note 1, at 344-55.

³⁴ DAHL, *supra* note 31, at 181; Francis D. Wormuth, *The Presidency as an Ideal Type*, in ESSAYS IN LAW AND POLITICS 200-01 (D. Nelson & R. Sklar eds., 1978).

³⁵ *See, e.g.*, Eugene Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833 (1972); William P. Rogers, *Congress, the President, and War Powers*, 59 CAL. L. REV. 1194 (1971).

³⁶ *See generally* SCHLESINGER, *supra* note 1; WORMUTH & FIRMAGE, *supra* note 1, at 344-62; MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990); JOHN HART ELY, WAR AND RESPONSIBILITY (1993).

President.³⁷ Moreover, the inattentiveness of presidents to important details and the effects of "groupthink" that have dramatized and exacerbated the relative inexperience of various presidents in international relations have also devalued the extollers' arguments. Finally, foreign policies, like domestic policies, are reflections of values. Against the strength of democratic principles, recent occupants of the White House have failed to demonstrate the superiority of their values in comparison to those of the American people and their representatives in Congress.

The assumption of foreign affairs powers by recent presidents represents a fundamental alteration of the Constitution that is both imprudent and dangerous. We turn now to an examination of the judiciary's contribution to executive hegemony in foreign affairs.

I. The Judiciary and Foreign Affairs The Influence of Curtiss-Wright

There can be little doubt that the opinion in *United States v. Curtiss-Wright Export Corp.* in 1936 has been the Court's principal contribution to the growth of executive power over foreign affairs.³⁸ The Court's declaration that the President is the "sole organ of the federal government in the field of international relations" is a powerful, albeit unfortunate, legacy of the case.³⁹ Even when the sole organ doctrine has not been invoked by name, its spirit, indeed its talismanic aura, has provided a common thread in a pattern of cases that have exalted presidential power above constitutional norms.

The domination of *Curtiss-Wright* is reflected in the fact that it is quite likely the most frequently cited case involving the allocation of foreign affairs powers.⁴⁰ The Court's opinion possesses uncommon significance in spite of the fact that the case raised merely the narrow question of the constitutionality of a joint resolution that authorized the President to halt the sale of arms to Bolivia and Paraguay, then involved in armed conflict in the Chaco, in order to help stop the fighting. In an opinion by Justice George Sutherland, the Court upheld the delegation of power against the charge that it was unduly broad. If Justice Sutherland had confined his remarks to this issue, *Curtiss-Wright* would have been overshadowed by *Panama Refining Co. v. Ryan* and would never have surfaced in the tables

³⁷ See, e.g., John Linarelli, *International Trade Relations and Separation of Powers Under the United States Constitution*, 13 DICK. J. INT'L L. 203, 229 (1995).

³⁸ See, e.g., Brian Schoenborn, *Public Participation in Trade Negotiations: Open Agreements, Openly Arrived At?*, 4 MINN. J. GLOBAL TRADE 103, 104 (1995).

³⁹ This view, as Schlesinger observed, went down in flames in Vietnam. Schlesinger, *supra* note 1, at 282.

⁴⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

of contents of undergraduate textbooks.⁴¹ But Sutherland strayed from the issue and, in some ill-considered dicta, imparted an unhappy legacy: the chimerical idea that authority in foreign affairs was essentially an executive power, which he explained “as the very delicate, plenary, and exclusive power of the President as the sole organ of the federal government in the field of international relations, a power which does not require as a basis for its exercise an act of Congress.”⁴²

Let us consider the historical context from which Sutherland extracted the sole organ doctrine. In short, Sutherland greatly expanded on Congressman John Marshall's speech in 1800 in which he noted, “The President is the sole organ of the nation in its external relations . . . Of consequence, the demand of a foreign nation can only be made on him.”⁴³ Marshall was defending the decision of President John Adams to surrender to British officials a British deserter, Jonathan Robbins, in accordance with the Jay Treaty. The Robbins affair involved a demand upon the United States, according to Marshall, and it required a response from the President on behalf of the American people. At no point in his speech did Marshall argue that the President's exclusive authority to communicate with foreign nations included a power to formulate or develop policy. Professor Edward S. Corwin properly concluded, “Clearly, what Marshall had foremost in mind was simply the President's role as instrument of communication with other governments.”⁴⁴ This point of procedure had been acknowledged in 1793 by then Secretary of State Thomas Jefferson, and this view had not been challenged.⁴⁵ Thus, it was Sutherland who infused a purely communicative role with a substantive policymaking function and thereby manufactured a great power out of the Marshallian sole organ doctrine. To have done this, as McDougal and Riesman observed, was to confuse the “organ” with the “organ grinder” and effectively undermine the constitutional design for collective decisionmaking in foreign affairs.⁴⁶

Curtiss-Wright, then, was a radical, path-breaking case. Despite the fact that exclusive presidential authority was a product of Justice Sutherland's imagination, and despite the fact that Sutherland's rhetoric has been dismissed as “dictum,” it has nevertheless enjoyed a long life.⁴⁷ For more than fifty years now, the Court has trotted out the sole organ doctrine whenever it has required a rationale to support a constitutionally

⁴¹ *Id.* at 320.

⁴² For some of the evidence, see Charles Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 3-5 (1973).

⁴³ *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

⁴⁴ *Curtiss-Wright*, 299 U.S. at 320.

⁴⁵ 10 ANNALS OF CONG. 613-14 (1800).

⁴⁶ CORWIN, *supra* note 29, at 216.

⁴⁷ 6 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 451 (Paul Ford ed. 1895).

doubtful presidential action in foreign affairs. On such occasions, and they have been numerous, the ghost of *Curtiss-Wright* has been made to walk again. Even the most cursory review of the cases in which it has been invoked makes clear that the essence of this “spirit” is great “deference to executive judgment in this vast external realm” of foreign relations.⁴⁸

This deference is perhaps attributable to the effects of “court-positivism.” According to this doctrine, the Court’s decisions are treated “as a given, to be explained, manipulated, and systematized, but criticized only within narrow limits.”⁴⁹ This doctrine culminates in the view that the Constitution means what the justices say it means. The tendency, therefore, is to treat as “oracles” the few cases that have dotted an otherwise barren constitutional landscape. Professor Gerhard Casper has described court positivism thus: “It has also the paradoxical effect of assigning a disproportionate importance to the few ‘legal’ precedents that do exist. Absent the continuous consideration and reconsideration of rules and principles, a few oracles have led to the emergence of a constitutional mythology that does not bear close analysis.”⁵⁰ For all its shortcomings, *Curtiss-Wright* has assumed the status of an oracle. It has led the judiciary to defer to executive judgment in cases involving executive agreements, travel abroad, treaty termination, and the war power. Of course, these judicial decisions have also drawn on the political question doctrine, grounds of nonjusticiability and on the silence and inaction of Congress. But the spirit of *Curtiss-Wright* is pervasive.

Executive Agreements

Since *Curtiss-Wright*, presidents have utilized executive agreements as the primary means of dominating the conduct of foreign policy.⁵¹ This practice, which has resulted in a flood of unilateral presidential agreements, precludes a role for the Senate; therefore, executive agreements subvert the basic constitutional scheme established in Philadelphia.⁵² The structural design of the Treaty Clause, as we have

⁴⁸ Raoul Berger, *The President’s Unilateral Termination of the Taiwan Treaty*, 75 *Nw. U.L. Rev.* 577, 591 (1980).

⁴⁹ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 n.2 (1952) (Jackson, J., concurring) (dismissing Sutherland’s theory as dictum). For discussion of the sole organ doctrine, see Adler, *Warmaking*, *supra* note 1, at 29-35; Lofgren, *supra* note 38, at 29-35; BERGER, *supra* note 1, at 100-08.

⁵⁰ *Regan v. Wald*, 468 U.S. 221, 243 (1984) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)); see, e.g., *Haig v. Agee*, 453 U.S. 280 (1981); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Goldwater v. Carter*, 444 U.S. 996 (1979); *Zemel v. Rusk*, 381 U.S. 1 (1965); *United States v. Belmont*, 301 U.S. 324 (1937).

⁵¹ H. Jefferson Powell, *Constitutional Choices*, 80 *Nw. U. L. Rev.* 1128, 1136 (1985) (book review).

⁵² Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 *Chi. L. Rev.* 463, 475 (1976). With respect to the

seen, was to preclude the President from entering the field of foreign affairs without the participation of the Senate. Fear of the abuse of power dissuaded the framers from vesting the executive with such unilateral authority.⁵³

There was no doubt among the framers and ratifiers that the treaty making power was omniscient in foreign affairs; its authority covered the field. As explained by Hamilton:

From the best opportunity of knowing the fact, I aver, that it was understood by all to be the intent of the provision to give that power the most ample latitude--to render it competent to all the stipulations which the exigencies of national affairs might require; competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and every other species of convention usual among nations . . . And it was emphatically for this reason that it was so carefully guarded; the cooperation of two-thirds of the Senate with the President, being required to make any treaty whatever.⁵⁴

The text of the Constitution makes no mention of executive agreements. Moreover, there was no reference to them in the Constitutional Convention or in the state ratifying conventions. The Federalist papers likewise are silent on the subject. There is, then, no support in the architecture of the Constitution for executive agreements. Yet their usage has flourished since 1936. Presidents claim independent constitutional power to make them,⁵⁵ and the judiciary has sustained such presidential claims of authority.⁵⁶ The ultimate task, then, is to determine the source from which the President derives the power to make executive agreements.

conduct of foreign policy and its relationship to the Constitution, Casper observed that the "relative scarcity of case law in the field has made it easier for judges to engage in unchecked flights of fancy, which in turn have facilitated the creation of a constitutional mythology. In that mythology, the role of Zeus is usually assigned to the President." *Id.* at 477.

⁵³ "The Office of Legal Advisor of the State Department reports 368 treaties and 5,590 other international agreements concluded by the United States between January 1, 1946 and April 1, 1972." LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 420 n.1 (Minicola ed., Foundation Press 1972). See also Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

⁵⁴ See, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 886 (1995).

⁵⁵ William Davie, a framer from North Carolina, stated that "jealousy" of executive power would not permit a grant of treaty power to the President alone. See ELLIOT, *supra* note 14, vol. 4, at 120.

⁵⁶ THE FEDERALIST No. 75, at 486-87 (Alexander Hamilton) (Edward M. Earle ed. 1937) (emphasis added).

An examination of the leading cases involving executive agreements discloses judicial reliance on two constitutional grounds: the sole organ doctrine and the recognition power of the President.⁵⁷ However, neither of these grounds is tenable. In *United States v. Belmont*, Justice Sutherland upheld the validity of an executive agreement that President Franklin D. Roosevelt negotiated with the Soviet Union in 1933 involving the assignment of assets in both countries.⁵⁸ The Court took judicial notice that the Litvinov Assignment--an agreement on property claims between Franklin Roosevelt and Maxim Litvinov--was executed in conjunction with the 1933 recognition of the Soviet government. The Court concluded that the pact derived its force both from the President's status as sole organ and from his power to recognize foreign governments.⁵⁹ Justice Sutherland stated that Senate consultation was not required.⁶⁰

Justice Sutherland's sole organ doctrine fares no better in the Belmont setting. Moreover, his invocation of the President's "recognition power," which is derived from his duty under Article II, section 3, to "receive Ambassadors and other public ministers," is misinterpreted. Hamilton, Madison, and Jefferson shared the understanding that the recognition clause conferred upon the President merely a ceremonial function that does not include any "discretion" to reject foreign ministers.⁶¹ Writing what Madison considered the "original gloss" on the meaning of the clause, Hamilton explained:

[The authority] to receive ambassadors and other public ministers . . . is more a matter of dignity than authority. It is a circumstance which will be without consequence in the administration of government; and it was far more convenient that it should be arranged in this manner, than there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister, though it were merely to take the place of a departed predecessor.⁶²

By any measure, Hamilton was referring to a diplomatic function.

As Professor Louis Henkin has observed, "receiving ambassadors" seems "a function rather than a 'power,' a ceremony which in many

⁵⁷ For a fine discussion of the constitutionality of executive agreements, see BERGER, *supra* note 1, at 140-62.

⁵⁸ *See, e.g., United States v. Belmont*, 301 U.S. 324 (1937).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 330.

⁶² *Id.*

countries is performed by a figurehead.”⁶³ Indeed, the distinction between a power and a function cannot be stressed too strongly. Henkin has justly remarked that “while making treaties and appointing ambassadors are described as ‘powers’ of the President, receiving ambassadors is included in section 3, which does not speak in terms of power but lists things the President ‘shall’ or ‘may do.’”⁶⁴

Given the apparent refusal of the Convention members to convert the recognition clause into a well of discretionary power and to clothe the President with the treaty making power so that he alone might conduct foreign policy, *Belmont* certainly represents an “extreme extension” of presidential power in foreign affairs.⁶⁵ This extension contravenes not only the structure of the treaty power but also the policy reasons that predetermined that structure. Justice Sutherland did not address the Framers' intent in *Belmont*.

The Court again considered the validity of the Litvinov Assignment in 1942 in *United States v. Pink*.⁶⁶ Echoing the opinion in *Belmont*, Justice William O. Douglas invoked the sole organ doctrine as well as the recognition power as authorization for the executive agreement.⁶⁷ However, there was no need for Justice Douglas to attempt to sustain the assignment on purely presidential powers. He concluded that “the executive policy had been ‘tacitly’ recognized by congressional appointment of commissioners to determine American claims against the Soviet fund.”⁶⁸ However, Chief Justice Harlan Stone exposed the real issue in his dissent by stating, “We are referred to no authority which would sustain such an exercise of power as is said to have been exerted here by mere assignment unratified by the Senate.”⁶⁹

Belmont and *Pink*, in drawing upon *Curtiss-Wright*⁷⁰, can be seen as facilitating the trend toward presidential control of U.S. foreign policy, at least with respect to the use of executive agreements. And beginning in 1937, a virtual torrent of such agreements was unleashed, at the expense of the Senate and its constitutional role in making treaties.⁷¹ This trend, which continues to this day, as seen in *Dames & Moore v. Regan*,

⁶³ See David Gray Adler, *The President's Recognition Power*, PRESIDENTIAL STUDIES QUARTERLY, ch. 25 at 267-87 (1995).

⁶⁴ THE FEDERALIST No. 69 at 451 (Alexander Hamilton) (Edward M. Earle ed. 1937).

⁶⁵ HENKIN, *supra* note 51, at 41.

⁶⁶ *Id.*

⁶⁷ Hamilton stated that “the history of human conduct does not warrant the commitment of interests so delicate and momentous a kind . . . to the sole disposal of the President.” THE FEDERALIST No. 75 at 486 (Edward M. Earle ed. 1937).

⁶⁸ *United States v. Pink*, 315 U.S. 203 (1942).

⁶⁹ *Id.* at 223.

⁷⁰ BERGER, *supra* note 1, at 160.

⁷¹ *Pink*, 315 U.S. at 249 (Stone, J., dissenting).

constitutes a fundamental and extraordinary shift of power from Congress to the President.⁷²

In *Dames & Moore*, which represented “a political decision by a political court,” the High Tribunal was at pains to sustain the constitutionality of President Jimmy Carter's executive agreement with Iran that secured the release of American hostages.⁷³ In his opinion for the Court, then Justice (now Chief Justice) William Rehnquist found statutory authorization for much of the agreement but none for a critical leg: the suspension of all claims pending against Iran in U.S. courts.⁷⁴ Undaunted, Justice Rehnquist held that Congress had “tacitly” approved the President's pact. Apparently, Congress had evinced its support in two ways. First, Rehnquist located two statutes, the “general tenor” of which, he said, had delegated broad discretionary power to the President.⁷⁵ He conceded, however, that the statutes alone did not provide sufficient authority for the agreement.⁷⁶ Second, Justice Rehnquist asserted that, by virtue of its silence, Congress had acquiesced in the agreement. The Court concluded that the absence of explicit delegation did not imply congressional disapproval but merely showed that Congress had not anticipated such a situation.⁷⁷

To be sure, the doctrine of “tacit” delegation based on congressional acquiescence has its place in American jurisprudence. But “tacit” delegation is an acquiescence of a particular kind; it is based on a settled congressional understanding of an administrative construction of a statute. In other words, suppose an administrative agency adopts an erroneous interpretation of a statute. If Congress reenacts the statute with knowledge of the administrative interpretation, it is said to incorporate that interpretation and to give statutory standing to what was previously unlawful.⁷⁸ In effect, Congress ratifies and adopts that construction.

We find a single decision supporting this supposition. In the nineteenth century, Congress passed a number of statutes that made public lands available for private occupation. However, on hundreds of occasions, without statutory authority, the President withdrew some land from the right of entry. In 1915, in *United States v. Midwest Oil Co.*, the Court upheld President William Taft's withdrawal of certain lands from the

⁷² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁷³ *See, e.g., Ackerman & Golove, supra* note 52 at 885.

⁷⁴ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

⁷⁵ Arthur S. Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 UCLA L. REV. 1104, 1107 (1982).

⁷⁶ *Dames & Moore*, 453 U.S. at 673-77.

⁷⁷ *Id.* at 678.

⁷⁸ *Id.* at 677-78.

appropriation of oil rights offered to the public by an act passed in 1897.⁷⁹ The Court, consistent with the doctrine of tacit delegation, stated that the “long-continued practice, known to and acquiesced in by Congress,” had gained the “implied consent of Congress.”⁸⁰

There is, of course, no merit to the argument that an executive abuse of power acquires legal status if Congress does not correct it. In a parallel case, the Supreme Court held that a well-established, well-known and long-continued practice of granting suspended sentences did not justify the federal courts in following this practice when the statute did not authorize it.⁸¹ Nevertheless, the case is one of statutory interpretation. It treated congressional acquiescence as statutory authorization, not as a gloss on the Constitution.

Justice Rehnquist invoked *Midwest Oil* as precedential authority for his theory that Congress may acquiesce in presidential practices through silence. Of course, *Midwest Oil* is inapposite to *Dames & Moore*. In *Midwest Oil*, the Court recognized that Congress had passed a number of statutes with full knowledge of prior presidential action. Those statutes provided the requisite ratification of an administrative action. There was no such ratification in *Dames & Moore*. Indeed, even Rehnquist conceded that Congress had not passed a single statute to authorize the executive agreement in the Iranian hostage crisis. Finally, Congress did not even grant the “tacit” consent that it had in *Pink*, by virtue of its appointment of negotiators. There was no such congressional support in *Dames & Moore*.

What remained for Rehnquist at this point was to glean congressional support from congressional silence. This enterprise was problematic; indeed, the Court has stated that it is “treacherous to find in congressional silence alone the adoption of a controlling rule of law.”⁸² A failure to object does not necessarily mean that Congress approves of the action. There may be numerous reasons why Congress may not act even though a majority of the body may disagree with the President. Professor Gewirtz has written:

[W]hen Congress is faced with an executive policy that is in place and functioning, Congress often acquiesces in the executive's action for reasons which have nothing to do with the majority's preferences on the policy issues

⁷⁹ *Id.* at 678-89. See also *United States v. Woodley*, 726 F.2d 1328 (9th Cir. 1983), *reh'g granted*, 732 F.2d 111 (9th Cir. 1984) (holding that unchallenged historical practice is no longer sufficient evidence of constitutionality).

⁸⁰ See, e.g., *United States v. Arrendondo*, 31 U.S. (6 Pet.) 691, 713-14 (1832); *United States v. Alexander*, 12 Wall. 127, 180 (1871); *United States v. Safety Car Heating and Lighting Co.*, 297 U.S. 88, 95 (1936).

⁸¹ *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

⁸² *Id.* at 474, 478.

involved . . . In such a situation, Congress may not want to be viewed as disruptive; or Congresspersons may not want to embarrass the President; or Congress may want to score political points by attacking the executive's action rather than accepting political responsibility for some action itself; or Congresspersons may be busy running for reelection or tending to constituents' individual problems; or Congress may be lazy and prefer another recess.⁸³

The implications of Justice Rehnquist's reasoning are staggering. Ineluctably, the "doctrine of silence" would sanction "an almost total transfer of legislative power to the executive, so long as Congress does not object."⁸⁴ Justice Rehnquist's argument is not new, of course, for it is but a page torn from Theodore Roosevelt's "stewardship theory" of the presidency. As explained by Roosevelt:

I decline to adopt this view that what was imperatively necessary for the nation could not be done by the President, unless he could find some specific authorization to do it . . . I did not usurp power but I did greatly broaden the use of executive power. In other words, I acted for the common well being of all our people whenever and in whatever measure was necessary, unless prevented by direct constitutional or legislative prohibition.⁸⁵

Roosevelt's view, like Rehnquist's, "means that the President is free to undertake any folly, provided it is so gross that it has not occurred to Congress to forbid it."⁸⁶

At bottom, perhaps *Dames & Moore v. Regan* should not be understood as having sustained a purely executive agreement; after all, Justice Rehnquist ruled that the President enjoyed congressional authorization through tacit delegation. But Justice Rehnquist has misapplied the doctrine. As applied, it is a prescription for the exercise of unilateral presidential power in foreign affairs.

Travel Cases

⁸³ *Ex parte* United States, 242 U.S. 27 (1916).

⁸⁴ *Girouard v. United States*, 328 U.S. 61, 69 (1946); *see also* *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942).

⁸⁵ Paul Gerwitz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, LAW & CONTEMP. PROBS., Summer 1976, at 46, 79 (footnote omitted).

⁸⁶ Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 889 (1983).

For the past thirty years, the Supreme Court has steadily increased the power of the President to restrict the right of U.S. citizens to travel abroad. The peak of the Court's respect for the wishes of citizens to visit foreign lands was exhibited in its 1958 ruling in *Kent v. Dulles*, where the Court found that the right to travel is guaranteed by the Due Process Clause of the Fifth Amendment.⁸⁷ Since then, the Court has managed to "find" exceptions to that right by bowing to painfully plastic invocations of national security needs. The Court's vulnerability to the spirit of *Curtiss-Wright*—"deference to the judgment of the executive"—and its willingness to find congressional "approval" of State Department passport policies on the flimsiest of pretexts, have created an environment in which the administration is the sole judge of its policies.⁸⁸ In just a handful of cases, the Court has transmuted a congressional lawmaking function to determine what, if any, restrictions are to be imposed in foreign travel into a discretionary executive policymaking tool of great scope. In light of this fundamental shift of power, Justice Brennan has been moved to remark, "The reach of the Secretary [of State]'s discretion is potentially staggering."⁸⁹

The first national passport legislation passed in 1858 vested in the executive branch the exclusive authority to issue passports. Congress codified the language of this act in the Passport Act of 1926.⁹⁰ The 1926 Act did not grant specific authority to the Secretary of State to refuse or revoke passports because, at that time, Congress did not require passports for international travel by U.S. citizens except during periods of war or national emergency.⁹¹ However, the Court found in *Kent v. Dulles* that, in passing the 1926 Passport Act, Congress had adopted the State Department's prior administrative practice. Apparently, the Secretary of State had authority to resolve questions of the allegiance of a passport applicant, which meant verifying his or her citizenship as well as investigating the applicant's criminal activity. In the latter case the Secretary could deny passports to those violating U.S. law or seeking to escape the law. Thus, the adoption of this administrative practice by statute constituted a legalization of that practice.

The Court has ruled on only a few cases challenging the validity of State Department regulations developed under the Passport Act. In *Kent v. Dulles*, the first major case concerning this issue, the Secretary of State denied the passport application of two Communists under a department regulation that prohibited the issuance of passports to Communist party

⁸⁷ WILLIAM H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 143 (1925) (quoting Theodore Roosevelt).

⁸⁸ Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 678 (1972).

⁸⁹ *Kent v. Dulles*, 357 U.S. 116 (1958).

⁹⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁹¹ *Haig v. Agee*, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting).

members or to persons going abroad to engage in activities enhancing the Communist movement. The Court invalidated the regulation, per Justice Douglas, who ruled that the freedom to travel is a “liberty” protected by the Fifth Amendment and, moreover, that any regulation of the freedom to travel must be made pursuant to the congressional lawmaking function and must therefore be narrowly construed. Since the secretary lacks express authority to deny passports, only an administrative practice clearly adopted by Congress would imply a delegation of its lawmaking function. The Court found that neither the established administrative practice nor the specific delegation to the Secretary were sufficient to deny a passport merely because of one's beliefs and associations.⁹²

The bubble burst seven years later in *Zemel v. Rusk*, in which the Court, per Chief Justice Earl Warren, sustained the Administration's total ban on travel to Cuba.⁹³ The Court applied the standard developed in *Kent* and claimed to have discovered a substantial and consistent State Department practice of restricting travel to named geographic areas, both in wartime and peacetime, sufficient to warrant a conclusion that Congress was aware of the Secretary's policy and thus implicitly approved of such restrictions. The substance and “consistency” of such a practice is doubtful. Justice Arthur Goldberg, in a dissenting opinion, revealed that these “precedents” occurred during the proximity of war and were thus immaterial because they fell within the war power of the executive.⁹⁴

The *Zemel* Court also dismissed the Fifth Amendment challenge, reasoning that if the government could restrict travel within the United States for safety and welfare purposes, then surely the State Department could similarly restrict travel to Cuba for the same reasons. Chief Justice Warren, invoking *Curtiss-Wright*, said that “the weightiest considerations of national security” permit these travel restraints without violating due process.⁹⁵

Justice Hugo Black filed a strong dissenting opinion and took Warren to task for permitting the executive branch to make laws:

Since Article I, however, vests “All legislative Powers” in the Congress, and no language in the Constitution purports to vest any such power in the President, it necessarily follows, if the Constitution is to control, that the President is completely devoid of power to make laws regulating

⁹² 22 U.S.C. § 211(a) (Supp. III 1979).

⁹³ See *Zemel v. Rusk*, 381 U.S. 1, 31-32 (1965). The general passport requirement became law in 1952 with passage of the Immigration and Nationality Act. 8 U.S.C. § 1185 (1958).

⁹⁴ *Kent v. Dulles*, 357 U.S. 116-119, 124-25, 128, 130.

⁹⁵ *Zemel*, 381 U.S. at 15-16.

passports or anything else. And he has no more power to make laws by labeling them regulations than to do so by calling them laws . . . I cannot accept the Government's argument that the President has "inherent" power to make regulations governing the issuance and use of passports.⁹⁶

In *Kent* and *Zemel*, the Court recognized enforcement as one method of establishing congressional awareness and approval of the regulation. But it also stated, in terms foreshadowing *Dames & Moore v. Regan*, that courts could find approval from nothing more than congressional silence about a long-standing administrative practice. Chief Justice Warren Burger concluded that Congress had implicitly adopted the administrative construction because it had not made any changes in the executive's basic rulemaking power when it passed the Immigration and Nationality Act of 1952 or when it amended the Passport Act in 1978. Chief Justice Burger observed that Congress must have been aware of the "longstanding and officially promulgated view" of the State Department that the President could revoke passports for reasons of national security. There is, of course, no such official policy, and the cases advanced by Burger are not supportive.⁹⁷

The *Kent-Zemel* standard, which required a consistent pattern of actual enforcement in order to establish the requisite congressional approval, was for all intents and purposes overruled in *Haig v. Agee*.⁹⁸ *Haig* produced a new standard for establishing congressional approval: that Congress allows the State Department to construct its own regulations provides sufficient basis to assume implicit congressional approval of a passport regulation.⁹⁹ The Court in *Kent* had rejected a similar assertion by the government, holding that only an established departmental practice can convince the Court that Congress is sufficiently aware of the claimed authority. But the Court in the *Haig* decision did not require frequent instances of enforcement in order to build a track record. Even if no enforcement occurred, the validity of the executive's authority would not be destroyed, nor would lack of enforcement preclude congressional awareness of the State Department's construction.¹⁰⁰

⁹⁶ *Id.* at 17-18, 27-40.

⁹⁷ *Id.* at 15-16.

⁹⁸ *Id.* at 20 (Black, J., dissenting).

⁹⁹ *Haig v. Agee*, 453 U.S. 280, 301 (1981). For example, although the Court relied on *Zemel*, the *Zemel* Court had noted the historical consistency with which area travel restrictions were imposed both before and after the passage of the Passport Act of 1926. That practice, or at least the claim of a practice, and not the State Department's construction of its own regulation, permitted the Court to sustain the travel ban to Cuba.

Id.

¹⁰⁰ *Haig*, 452 U.S. 280.

That the Court could assume this position is all the more incredible in light of Congress' 1978 amendment of the Passport Act so as to deprive the President of all discretion with respect to the issuance of passports except to those countries with which the United States is at war or where there is imminent danger to Americans.¹⁰¹ Yet in the face of this statute, the Court asserted the superiority of national security claims, stating that "it is obvious and unarguable that no government interest is more compelling than the security of the nation."¹⁰² Therefore, said the Court, the government may regulate foreign travel within the limits of due process. But the guarantees of due process demand nothing more than the offer of a prompt revocation administrative hearing and a statement of reasons for the action.¹⁰³

Given the Court's view in *Haig* that the executive branch need merely assert a construction of its own regulation in order to satisfy the need for congressional awareness, it is little wonder that Justice Brennan would view the State Department's discretion as "potentially staggering."¹⁰⁴ Perhaps his use of the word "potentially" was optimistic. The discretion already is "staggering."

The Political Question Doctrine

The political question doctrine, the "principle under which the courts defer the determination of an issue to the political branches of government," stems primarily from the Court's concern for the separation of powers and its own role within that scheme.¹⁰⁵ There is a continuing debate about the scope of the doctrine, the essence of which involves two very different theories.

Chief Justice John Marshall espoused the "classical" view in *Cohens v. Virginia*, stating that the courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."¹⁰⁶ Similarly, Professor Herbert Wechsler has said that the existence of a political question in any particular issue is determined by "whether the Constitution has committed to another agency of government the autonomous determination of the issue."¹⁰⁷ Accordingly, a court must

¹⁰¹ *Id.* at 306.

¹⁰² *Id.* at 303.

¹⁰³ 22 U.S.C. § 211(a) (Supp. III 1979).

¹⁰⁴ *Haig*, 453 U.S. at 307 (citing *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 319 n.9 (Brennan, J., dissenting).

¹⁰⁷ Edwin B. Firmage, *The War Powers and the Political Question Doctrine*, 49 COL. L. REV. 65, 66 (1977); see also *Powell v. McCormack*, 395 U.S. 486, 518-22 (1969); *Baker v. Carr*, 369 U.S. 186, 210 (1962).

first decide the threshold separation of powers issue before it can invoke the political question doctrine.¹⁰⁸ A second theory, the "prudential" view, holds that courts should weigh the consequences that a particular case might have on the judiciary before addressing the merits of the claim.¹⁰⁹

The invocation of the political question doctrine has been a major means by which the judiciary has strengthened the President's role in foreign affairs. This section examines the judicial application of the doctrine in the areas of war making and treaty termination. First we turn to *Goldwater v. Carter*, in which Rehnquist, writing for a plurality, stretched the doctrine beyond its previous limits.¹¹⁰

Treaty Termination

In *Goldwater v. Carter*, Senator Barry Goldwater challenged President Carter's unilateral termination of the 1954 Mutual Defense Treaty with Taiwan.¹¹¹ In an opinion by Rehnquist (Burger, Stewart, and Stevens concurring), it was held that the issue of treaty termination represented a nonjusticiable political question precisely because it involved "the authority of the President in the conduct of foreign relations and the extent to which the senate or congress is authorized to negate the action of the President."¹¹²

The plurality's decision clearly is unfounded. In the words of Justice William Brennan's dissent, the quartet "profoundly misapprehend[ed] the political question doctrine as it applies to foreign relations."¹¹³ Indeed, in the opinion of Justice Lewis Powell, who concurred in the dismissal of the case but on grounds of ripeness, the foursome's "reliance upon the political question doctrine [was] inconsistent with our precedents."¹¹⁴

In his notable opinion in *Baker v. Carr*, Justice Brennan drew order from the confusion surrounding the political question doctrine.¹¹⁵ After a

¹⁰⁸ *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

¹⁰⁹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 7-8 (1959).

¹¹⁰ *See, e.g., Powell*, 395 U.S. at 521 (1968); *Baker*, 369 U.S. at 210 (1961).

¹¹¹ *See, e.g.,* ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); PHILIPPA STRUM, *THE SUPREME COURT AND POLITICAL QUESTIONS: A STUDY IN JUDICIAL EVASION* (1974).

¹¹² *Goldwater v. Carter*, 444 U.S. 996 (1979).

¹¹³ *Id.* Mutual Defense Treaty, December 2, 1954, U.S.-P.R.C., 6 U.S.T. 433. Article X of the Treaty provided that it "shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party." *Id.* at 437. For details of the case and the history and law regarding treaty termination, see ADLER, *TERMINATION*, *supra* note 1, at 149-307.

¹¹⁴ *Goldwater*, 444 U.S. at 1002.

¹¹⁵ *Id.* at 1006.

discussion of the previous cases, he set forth six alternative tests for identifying political questions:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of 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.¹¹⁶

The issue of treaty termination does not conform to any of these analytical components of the political question doctrine. Justice Brennan's first test--a textual commitment--has been justly characterized by Wechsler as the governing principle of the doctrine. He stated that "all the doctrine can defensibly imply is that the courts are called upon to judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised."¹¹⁷ There is, of course, no textual commitment of the authority to terminate treaties, for the Constitution is silent on the point. Thus, Goldwater certainly could not be labeled a political question case on this ground.

Under Brennan's second test, there is also no "lack of judicially discoverable and manageable standards" for resolving the issue.¹¹⁸ For example, the Court might have examined the logic of the treaty power's structure and drawn the inference that the authority to terminate treaties is coalescent with the treaty power. Support for this symmetrical construction was expressed by Justices Joseph Story and Benjamin Cardozo, two of the nation's most eminent jurists. Or the Court might have studied the historical practice of treaty termination, which would have revealed three alternatives: termination by the President and Senate jointly, by congressional directive, or by independent presidential action. Any one of these inquiries would have disclosed "manageable standards."¹¹⁹

¹¹⁶ *Id.* at 998.

¹¹⁷ *Baker v. Carr*, 369 U.S. 186 (1981).

¹¹⁸ *Id.* at 217.

¹¹⁹ Wechsler, *supra* note 107, at 7-8.

Neither Brennan's third test, which prohibits a nonjudicial policy determination, nor his fourth, which precludes resolution of the issue if it would require the judiciary to exhibit insufficient respect toward a coordinate branch of government, is applicable here either.¹²⁰ Surely the courts may not undertake an initial policy determination to make or terminate a treaty, for this type of action is nonjudicial. But deciding whether the appropriate political branch has made that determination is clearly justiciable.¹²¹ Moreover, the Court does not commit such a social solecism if it determines that the President has transgressed constitutional bounds. As Chief Justice John Marshall stated in *Marbury v. Madison*, "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"¹²² Whatever risk of insufficient respect toward the President exists, the overriding concern must attach to the integrity of the Constitution and its framework of limited government. "It is far more important," observed Justice Douglas, "to be respectful to the Constitution than to a coordinate branch of the government."¹²³

Brennan's fifth criterion is "an unusual need for unquestioned adherence to a political decision already made."¹²⁴ Although it is not clear which cases might satisfy this criterion, outside of, perhaps, a declaration of war, it is hard to imagine that this test could encompass the termination of a treaty.

Finally, the last reason cited by Brennan was "the potential embarrassment from multifarious pronouncements by various departments on one question."¹²⁵ Brennan probably had in mind *Luther v. Borden*, in which the Court was asked to decide which of two rival governments was the legitimate republican government in Rhode Island.¹²⁶ That case represented the possibility of six pronouncements, by six departments, on one question. In *Goldwater*, however, we do not find "multifarious pronouncements." Indeed, only the President acted, and that action was challenged as unconstitutional. If the Court had ruled that President Carter's termination of the Taiwan Treaty were invalid, that fact no doubt

¹²⁰ *Baker*, 369 U.S. at 217.

¹²¹ See ADLER, TERMINATION, *supra* note 1, at 84-237 for a discussion of these points.

¹²² *Baker*, 369 U.S. at 217.

¹²³ Justice Brennan wrote in his dissenting opinion that the issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts. *Goldwater v. Carter*, 444 U.S. 996, 1007. Moreover, Justice Powell, concurring only in the result, wrote that we are asked to decide whether the President may terminate a treaty under the constitution without congressional approval. Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue. *Id.* at 999.

¹²⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

¹²⁵ *Massachusetts v. Laird*, 400 U.S. 886, 894 (1970).

¹²⁶ *Baker*, 369 U.S. at 217.

would have been embarrassing to some and annoying to Peking, but it would not have produced the chaos Justice Brennan had in mind.

For Justice Rehnquist, the issue of treaty termination was a nonjusticiable political question merely because it raised the question of the allocation of foreign affairs power between the President and Congress. Rehnquist thus ignored Justice Brennan's sagacious observation in *Baker v. Carr* that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹²⁷ Justice Rehnquist's obeisance to the President in the conduct of foreign policy recalls the folly of *Curtiss-Wright*, the proposition that the President is the sole organ in foreign affairs.¹²⁸

Whatever authority the President has in the formulation of international policy, he is not the Pied Piper, and the other branches of government and the American public are not the children of Hamelin. Such a storybook view of presidential power cannot be reconciled with constitutional restrictions. To be sure, the allocation of power in the Constitution is not always clear, but when there is a question as to the repository of authority, determination of the matter is left to the courts. Justice Rehnquist's view that each of the branches "has resources available to protect its interests" would, as Raoul Berger has remarked, "return us to settlement of differences by Kentucky feud."¹²⁹ Rehnquist's adoration for

¹²⁷ *Id.*

¹²⁸ *Luther v. Borden*, 48 U.S. (1 How.) 1, 7 (1849).

¹²⁹ *Goldwater v. Carter*, 444 U.S. 996 (1979); *Baker*, 369 U.S. at 211. In *Webster v. Doe*, 486 U.S. 592 (1988), however, Chief Justice Rehnquist indicated he believed that judicial power extends to some cases affecting foreign affairs. In writing for an 8-1 majority, he held that the judiciary is not precluded from hearing a constitutional challenge to the dismissal of a CIA employee, in spite of the fact that the executive branch had claimed that sensitive material—security information—would be compromised. The ruling was important, for as one editor observed:

To allow the executive to usurp the judiciary's role as arbiter of conflicts between legitimate security interests and individual rights—the inevitable consequence of the government's . . . argument in *Webster*—would be to remove all external guarantees that the rule of law governs the national security apparatus of the United States.

See Note, The Supreme Court—Leading Cases, 102 HARV. L. REV. 330, 339 (1988) (quoting MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 313 (1990)). But this encouraging development was dwarfed by a cold reminder that the Court will reflexively invoke *Curtiss-Wright* to justify presidential actions in foreign affairs. In *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), Justice Stevens spoke for an 8-1 majority, with Justice Blackmun dissenting, which upheld an executive order issued by President Bush directing the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return them to Haiti without first determining whether they qualify as refugees. While the legal focus was on whether the executive order violated a congressional statute and the United Nations Convention relating to the status of refugees, the Court grounded its ruling in *Curtiss-Wright*. The Court deferred to

this sort of legal Darwinism would not save us from a covetous or usufructuary executive, but a Court committed to the Constitution might.

In an astute study of the political question doctrine, Professor Fritz Scharpf concluded that “the political question . . . had no place when the [C]ourt was presented with conflicting claims of competence among the departments of the federal government.”¹³⁰ That was the view of the Court in *Powell v. McCormack*, where it declared that its principal duty was to decide “whether the action of [another] branch exceeds whatever authority has been committed.”¹³¹ In *Goldwater*, however, the Court abdicated that duty. Despite Justice Powell's reminder that in the past the Court had been willing to determine “whether one branch of our government has impinged upon the power of another,” the Court declined to answer a very straightforward question in *Goldwater*: In which department of government does the Constitution vest the authority to terminate treaties?¹³²

As a practical matter, the Court's action, or rather its inaction, left the termination of the Mutual Defense Treaty intact. Although the plurality opinion in *Goldwater* did not establish a legal precedent, it will nevertheless establish a foundation, however shaky, for future unilateral presidential treaty terminations.¹³³ This result will have the unfortunate effect of placing the exclusive authority to terminate defense, commercial, economic, and arms control agreements, among others, in the hands of the President.

Political Questions and the War Power

Since 1950, the United States has been involved in a series of unilateral executive wars. Presidential usurpation of the war power has become commonplace, but this practice violates the policy objectives of the War Clause. Those present at the Constitutional Convention, fearful that one man might rush the nation into war, vested in Congress the exclusive power to initiate hostilities. Apparently oblivious to the common sense underlying this allocation of power, the judiciary remains a co-conspirator in this bifurcation of law and practice.

presidential decision in foreign affairs on the basis of the claim that such a presumption has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility. *Id.* at 188.

¹³⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹³¹ BERGER, *supra* note 46, at 625.

¹³² Frank Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 585 (1966).

¹³³ *Powell v. McCormack*, 395 U.S. 486, 521 (1968).

Indeed, its invocation of the political question doctrine has been a major means by which the judiciary has strengthened the role of the President in the conduct of foreign policy. Throughout the Vietnam War, for example, lower courts routinely invoked the doctrine in response to challenges to the constitutionality of that war, and many observers viewed this unwillingness to address the merits of the claims as a sign of judicial approval of administration policy.¹³⁴ This reticence certainly did not dissuade the President from continuing the war effort.

Aside from the problematical inferences drawn from the silence of the courts, the Vietnam War--like the Korean War before it and the later wars in Grenada and Panama--did not receive congressional authorization, which the Constitution requires.¹³⁵ The fact that various Presidents initiated war without congressional authorization created a constitutional crisis that might have been resolved by the judiciary, but it was not. As a consequence, the United States has suffered a string of presidential wars from Korea to Panama.

This series of presidential wars reflects a fundamental shift of power from Congress to the President. In a few cases challenging President Ronald Reagan's military adventures in Grenada, Nicaragua, and El Salvador, lower courts have refused to rule on the merits. As might be expected, they have held that these cases constitute nonjusticiable, political questions.¹³⁶ Judicial reluctance to enforce constitutional boundaries in the area of foreign policy has threatened, in Raoul Berger's phrase, to convert the Jefferson "'chains of the Constitution' into ropes of sand."¹³⁷ The effect has been to encourage the tendencies of the imperial presidency. It is no surprise, therefore, that recent presidents have come to view the military of the United States as a private army at their beck and call to fulfill the goals of a foreign policy agenda. However, this shift threatens the foundation of our republican form of government as well as our tradition of constitutionalism.¹³⁸

The nation's need for a judicial branch that will unflinchingly "say what the law is," therefore, is of greatest importance.¹³⁹ The law, as we

¹³⁴ *Goldwater v. Carter*, 444 U.S. 996, 1001 (1979).

¹³⁵ In *United States v. Pink*, 315 U.S. 203, 216 (1942), the Court observed that an equally divided vote on the controlling principle of law involved prevents it from being an authoritative determination for other cases. *Id.* In fact, the *Goldwater* case was vacated by the Court. Nevertheless, it already had been invoked as authority in *Beacon Prods. v. Reagan*, 633 F. Supp. 1191 (D. Mass. 1986).

¹³⁶ See generally Gerhard Casper, *Constitutional Constraints and Foreign Policy*, 43 U. CHI. L. REV. 471 n.30 (1976); Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715 (1984).

¹³⁷ See *supra* notes 15-25; Adler, *Warmaking*, *supra* note 1, at 1-29.

¹³⁸ See, e.g., *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

¹³⁹ Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 712 (1996) (quoting ELLIOT, *supra* note 14, at 543).

have seen, was articulated in a number of cases at the dawn of the Republic: only Congress may constitutionally initiate war.¹⁴⁰ The unwillingness of the judiciary to declare the Vietnam War unconstitutional illustrates the fact that the judicial branch of government abdicated its institutional duties. There is no need here to review the judiciary's treatment of the cases challenging the legality of that war, for such reviews can be found elsewhere.¹⁴¹ Suffice it to say that although no court affirmed the legality of the unilateral presidential war, only one court declared the war illegal.¹⁴² At the district and circuit court levels, judges routinely declared the issues nonjusticiable, and the Supreme Court routinely denied certiorari.¹⁴³

Recent lower court decisions have, in the tradition of the Vietnam War rulings, dismissed challenges to presidential warmaking on various grounds of nonjusticiability. In *Crockett v. Reagan*, the D.C. Court of Appeals dismissed as a political question a suit filed by members of Congress that claimed President Reagan had violated the War Powers Resolution when he failed to submit a report that American soldiers had been introduced into hostilities in El Salvador.¹⁴⁴ The Court refused to engage in the fact-finding necessary to determine whether hostilities existed or were imminent and reasoned that “[t]he question here belongs to the category characterized by a lack of judicially discoverable and manageable standards for resolution.”¹⁴⁵ The Court stated that it lacked “the resources and expertise [necessary] to resolve disputed questions of fact concerning the military situation in El Salvador.”¹⁴⁶ The difficulty involved in the fact-finding process, however, did not justify the invocation of the political question doctrine since the Supreme Court, in *Baker v. Carr*, had fenced off resolution of disputes characterized by uncertain legal standards but not those which entailed difficulties in settling questions of fact.¹⁴⁷

Members of Congress who claimed that President Reagan's use of military force in the Persian Gulf in 1987 violated the procedures of the

¹⁴⁰ The manner of the exercise of the war powers determines not only the nation's freedom from external danger, but also the respect which the national government has for law and for constitutional limitations on the exercise of power. WORMUTH & FIRMAGE, *supra* note 1, at 66.

¹⁴¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁴² *See, e.g., supra* notes 15-25.

¹⁴³ *See, e.g., Ratner & Cole, supra* note 134, at 715.

¹⁴⁴ *See, e.g., Holtzman v. Schlesinger*, 361 F. Supp. 553 (1973) (holding the bombing of Cambodia during the Vietnam War to be illegal).

¹⁴⁵ *See, e.g., Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967), *cert. denied* 387 U.S. 945 (1967).

¹⁴⁶ *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983); *see also* 50 U.S.C. §§ 1541-48 (1976).

¹⁴⁷ *Crockett*, 558 F. Supp. at 898.

War Powers Resolution met a similar fate in *Lowry v. Reagan*.¹⁴⁸ In *Lowry*, 110 plaintiffs saw their suit dismissed on two grounds: political question and remedial discretion. Here, as in *Crockett*, the Court misapplied the political question doctrine. The Court feared that a decision on the merits--whether a cease-fire in the Gulf meant that U.S. forces were in a situation in which hostilities were either present or imminent--would have required an evaluation of the stability of the cease-fire, a task "beyond judicial cognizance."¹⁴⁹ However, the existence of disputed questions of fact does not provide a basis to apply the political question doctrine; if that were so, judicial abstention would be the rule and not the exception. Disputed facts must be resolved through the traditional means of gathering evidence, not buried by resort to the doctrine of political questions.

The district court in *Lowry* also dismissed the lawsuit on the basis of the doctrine of remedial discretion, a judicial tool which mandates dismissal of congressional claims where members have an effective in-house remedy for their injuries, such as the enactment, repeal or amendment of a statute.¹⁵⁰ In 1985, in *Sanchez-Espinoza v. Reagan*, D.C. Circuit Judge (now Justice) Ruth Bader Ginsburg wrote a concurring opinion in which she dismissed as not ripe for review a suit brought by twelve members of Congress on issues arising from U.S. actions in Nicaragua.¹⁵¹ Judge Ginsburg said of the War Clause claim, "The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse."¹⁵² Moreover,

Congress has formidable weapons at its disposal--the power of the purse and investigative resources far beyond those available in the Third Branch. But no gauntlet has been thrown down here by a majority of the Members of Congress. On the contrary, Congress expressly allowed the President to spend federal funds to support paramilitary operations in Nicaragua. "If the Congress chooses not to confront the President, it is not our task to do so."¹⁵³

¹⁴⁸ *Id.*; see also *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984) (holding that suit filed by eleven members of Congress against President Reagan for his invasion of Grenada in 1983 was not within the jurisdiction of the court because relief was available to members through the regular legislative process), *appeal dismissed*, 765 F.2d 1124 (D.C. Cir. 1985). The message was a sobering one: if Congress wants to confront the President, it must assert its own powers; judicial relief is not available.

¹⁴⁹ *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁵⁰ *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987).

¹⁵¹ *Id.* at 340 (quoting *Baker*, 369 U.S. at 217).

¹⁵² *Lowry*, 676 F. Supp. at 337; see also *Riegle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 879 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981).

¹⁵³ *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

The message from the Court was clear and familiar: if Congress fails to assert its powers, it cannot expect to be protected by the judiciary.

The *Lowry* Court viewed the lawsuit as “a by-product of political disputes within Congress regarding the applicability of the War Powers Resolution to the Persian Gulf situation.”¹⁵⁴ The Court drew this conclusion from the numerous bills that had been introduced to “compel the President to invoke” the Resolution, to strengthen it, and to repeal it.¹⁵⁵ The tribunal embraced Justice Powell's concurring opinion in *Goldwater v. Carter* and stated that the “passage of legislation to enforce the Resolution, would pose a question ripe for review,” but that Congress had not passed a law and without it the Court would be interfering in the legislative debate.¹⁵⁶ The court's major error in this line of reasoning was its assumption that the plaintiffs' dispute was with “fellow legislators” and not with the President.¹⁵⁷ *Lowry* did not involve an intramural debate. Indeed, Congress had, in the passage of the War Powers Resolution, required the President to submit a report when troops had been introduced into hostilities or when hostilities were imminent.¹⁵⁸ President Reagan had not complied with the law and the plaintiffs simply sought enforcement of it.

In 1990, in the closely-watched case *Dellums v. Bush*, U.S. District Judge Harold H. Greene dismissed as not ripe for review a congressional challenge to President George Bush's claim of unilateral authority to wage war in Kuwait.¹⁵⁹ Nevertheless, in his decision Judge Greene forcefully rejected many of the sweeping claims made by the executive branch. He stated:

[If the President] had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an 'interpretation' would evade the plain language of the Constitution, and it cannot stand.¹⁶⁰

¹⁵⁴ *Id.* at 210-11 (quoting *Goldwater v. Carter*, 444 U.S. 996, 997 (1979)).

¹⁵⁵ *Id.* at 211 (citing *Goldwater*, 444 U.S. at 998).

¹⁵⁶ *Lowry*, 676 F. Supp. at 338.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 339; *cf. Goldwater*, 444 U.S. at 1000-01.

¹⁵⁹ *Lowry*, 676 F. Supp. at 339 (quoting *Reigle v. Federal Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981)).

¹⁶⁰ War Powers Resolution, Ch. 87 Stat. 555 (current version at 50 U.S.C. §§ 1541-48 (1982)). Section 4(a)(1) of the Resolution, in fact, does not give the President any discretion. If events occur that continue “hostilities or . . . situations where imminent

In response to the Department of Justice's contention that the issue was political and not judicial, Judge Greene ruled:

[T]he Department goes on to suggest that the issue in this case is still political rather than legal, because in order to resolve the dispute the court would have to inject itself into foreign affairs, a subject which the Constitution commits to the political branches. That argument, too, must fail. While the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation's foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs . . . In fact, courts are routinely deciding cases that touch upon or even have a substantial impact on foreign and defense policy.¹⁶¹

Although Judge Greene rejected the Bush Administration's sweeping assertions of independent presidential war powers, he nevertheless determined that the case was not ripe for judicial determination “unless the Congress as a whole, or by a majority, is heard from, the controversy here cannot be deemed ripe; it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it.”¹⁶²

While there is merit to the judicial concerns underlying the doctrines of ripeness and remedial discretion, the judiciary's obligation to police constitutional boundaries remains a greater concern. As these matters stand, if a minority in either the House or the Senate is unable to move its chamber to repel a presidential usurpation of power, the minority cannot find relief in court. This problem is particularly acute in the case of war-making, since members of Congress will have been deprived of their constitutional authority to vote on the wisdom of initiating war. The application of these judicial barriers was defended in *Lowry* and *Dellums* by the resuscitation of Justice Powell's emphasis on the silence of Congress with respect to the issue of treaty termination in his concurring opinion in *Goldwater*:

Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual confrontation between the Legislative and Executive branches . . . It cannot be said that either the Senate or the

involvement in hostilities is clearly indicated by the circumstances,” a report must be submitted.

¹⁶¹ *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

¹⁶² *Id.* at 1145.

House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so.¹⁶³

The invocation of the doctrines of ripeness and remedial discretion in warmaking cases, on grounds that Congress has taken no action with respect to presidential warmaking, ignores the fact that the institutional indifference of members of Congress toward their constitutional responsibilities has no bearing whatever on the Court's duties, which are independent of those vested in Congress. Neither the judicial duty "to say what the law is"¹⁶⁴ nor the scope of congressional power can be made to hinge on the interests, knowledge or integrity of Congress.¹⁶⁵ History teaches, and the Constitution contemplates, that public servants may not execute their duties faithfully, responsibly, or diligently.¹⁶⁶ How ironic it is that a majority of Congress, uninterested in exercising or defending its powers, as contemplated by the doctrines of separation of powers and checks and balances, would be rewarded for its irresponsibility, while a minority, committed to both constitutionalism and constitutionally-allocated institutional values, can find no relief, support, or protection from the courts.¹⁶⁷

It is true, as the courts have held, that Congress has resources to draw upon in battle with the executive, among them the power of the purse, the power to abolish programs and departments, investigatory authority, and the ultimate weapon, impeachment of the President for encroachment on its powers or for subversion of the Constitution.¹⁶⁸ But however

¹⁶³ *Id.* at 1146; see also 5 JOHN BASSETT MOORE, THE COLLECTED PAPERS OF JOHN BASSETT MOORE 196 (1944) ("There can hardly be room for doubt that the framers of the constitution, when they vested in the Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, so long as he refrained from calling his action war or persisted in calling it peace.").

¹⁶⁴ *Dellums*, 752 F. Supp. at 1151.

¹⁶⁵ *Goldwater v. Carter*, 444 U.S. 996, 998 (1979).

¹⁶⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁶⁷ Constitutional powers cannot be expanded or constricted by governmental departments, but only through the amendment process. See generally THE FEDERALIST No. 48, at 321 (James Madison) (Edward M. Earle ed. 1937) (explaining that since "power is of an encroaching nature . . . it ought to be effectively restrained from passing the limits assigned to assigned to it"); Corwin, *supra* note 29, at 9 (arguing that it is a necessary consequence of the separation of powers that "none of the departments may abdicate its powers to either of the others"); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935).

¹⁶⁸ The story of corruption in American politics is at least a thrice-told tale and requires no review here. The word "Watergate" says it all. The Constitution speaks to various government officials of the need for virtue in the exercise of their duties. Article II, section 3 states that the President "shall take Care that the Laws be faithfully executed."

formidable these weapons may appear to be, they are difficult to effectuate.¹⁶⁹ Moreover, they require majorities, and even a supermajority in the event of impeachment, and thus would be unavailing to the ineffectual minority that seeks judicial protection.¹⁷⁰ But should we really prefer an inter-branch conflict, with knives drawn and tempers frayed, to an impartial and dispassionate judicial resolution of competing constitutional claims?¹⁷¹ Is the nation well-served by a Court which sits idly by in the face of a manifest constitutional violation?¹⁷²

The Constitution was written not for Congress but for the American people.¹⁷³ Presidential usurpation of power does not become more or less legal as a result of congressional acquiescence or challenge. The constitutionality of a presidential act is determined solely on the basis of whether it enjoys constitutional warrant. Thus, judicial settlement of a constitutional controversy between the President and members of Congress, as in *Dellums*, does not constitute an intrusion into the business of the House and Senate; it serves as a check on the President. It is not an unwarranted interference in the affairs of Congress but an exercise of the courts' duty to police constitutional boundaries.¹⁷⁴ As Chief Justice

Article I, section 2, clauses 1 and 5 provide that, "The House of Representatives . . . shall have the sole Power of Impeachment." Article I, section 3, clause 5 vests the Senate with "the sole Power to try all Impeachments." Article II, section 4 sets forth impeachable offenses.

¹⁶⁹ Too many members of Congress, like too many other Americans, "tend to be concerned with ends rather than means." Philip B. Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619, 635. Kurland added, "Those who suggest a look at institutional values as a method of protection against tyranny are scorned as being concerned with a 'literary theory' rather than facts." *Id.*

¹⁷⁰ MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 319 (1990).

¹⁷¹ *Id.* Professor Michael Glennon finds "unpersuasive" the claim that "Congress has enough arrows in its legislative quiver to respond successfully to executive illegality." Glennon rightly notes the "practical problems that frequently render Congress' textbook tools too unwieldy." *Id.* Chief among them is the ability of an administration to delay a congressional investigation. *See id.* at 295-99. Dean Jesse Choper has said that of the various tactics that Congress may employ against the executive, they "may reasonably be viewed as both unseemly and undesirable." JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 286 (1980).

¹⁷² *See, e.g.*, U.S. CONST. art. I, § 3, cl. 6; U.S. CONST. art. II, § 4.

¹⁷³ When Congress collided with President Andrew Johnson during the impeachment process, Chief Justice Salmon Chase took the view that conflicting claims would have been better resolved by the judiciary. RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 300 (1973).

¹⁷⁴ Professor Martin Redish justly stated, "The moral cost of such a result, both to society in general and to the Supreme Court in particular, far outweighs whatever benefits are thought to derive from the judicial abdication of the review function." Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U.L. REV. 1031, 1060 (1984). Professor Glennon has rightly asked, "Why is judicial inaction in the face of controversy necessarily more prudent than judicial *action*?" GLENNON, *supra* note 164, at 318. Raoul Berger powerfully stated the case for judicial resolution in stating, "The centrality of the separation of powers to our democratic system and to the protection of individual rights dictates that such injuries to a coordinate branch must be halted by the judiciary."

Edward White stated in 1912, in words that echo *Marbury v. Madison*, it is the “ever present duty [of the courts] to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.”¹⁷⁵

The duty of the Court to enforce the exclusive grant of authority to Congress to initiate war is surely more vital and compelling than its solemn responsibility to safeguard the sole power of Congress to appropriate funds from the United States Treasury.¹⁷⁶ Who would excuse a judicial invocation of the doctrines of ripeness and remedial discretion in the face of a presidential usurpation of the appropriations power? The constitutional measure of the exercise of each power is whether Congress has acted affirmatively by voting. Congressional silence is not the mechanism provided by the Constitution for the authorization of war or appropriations. Whether Congress has taken that affirmative action is a legal issue subject to resolution by the courts.

If a quiescent Congress bows to a usurpatious President, and if the Court shirks its duty to say what the law is, what is left in the way of governmental institutions to bring an errant executive to heel? Who, indeed, will act to maintain the integrity of the Constitution?

II. Judicial Deference to the Executive

As we have seen, the Court has been willing, even eager, to manipulate the Constitution and statutory law in order to justify executive action in the realm of foreign affairs. The Court's reflexive use of law to legitimate the international politics of the President, and its concomitant

BERGER, *supra* note 1, at 334 (1974). The eminent judge and legal scholar George Wythe, who also served as Thomas Jefferson's mentor, wrote that the protection of one branch of the legislative “against the usurpation of the other[s],” protects “the whole community.” *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 8 (1782), quoted in BERGER, *supra* note 1, at 334 n.144.

¹⁷⁵ In *Powell v. McCormack*, 395 U.S. 486, 547-48 (1969), the Court emphasized the “basic principles of our democratic system,” and the right of the people to “choose whom they please to govern them.” For an excellent discussion of the founders' conception of a constitution as a governing document that flows from the sovereignty of the people, see generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (2d ed. 1992); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

¹⁷⁶ A manifest correlative of the separation of powers was that no department of government was granted authority to act in excess of its constitutional power. The courts were authorized to check transgressions. See RAOUL BERGER, *CONGRESS V. THE SUPREME COURT* 8-16, 188-97 (1969). As Chief Justice John Marshall stated in *Marbury v. Madison*, “To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?” 5 U.S. (1 Cranch) 137, 176 (1803).

paralytic refusal to invoke its paramount prerogative of invalidation, have served to exalt the President's authority in these matters above constitutional norms.¹⁷⁷

The judiciary's deference to the executive and its determination to clothe the President with powers that are not tethered to the Constitution evokes questions about its motives. Why has the judicial branch been so loath to find usurpation of power? Why has it evinced no disposition to frustrate the tremendous growth of power in the executive, especially in the field of foreign relations? A complete explanation is beyond the reach of this article. The explanatory factors adequate to such a task are like pieces of a puzzle that cannot at this juncture be fitted properly. No more is hoped for here than to succeed in placing most of the pieces on the table.

It is likely that the Court views its function as supporting governmental policy once it has been established.¹⁷⁸ Invariably, this perspective translates into support for presidential conduct of U.S. foreign relations. Certainly, any attempt to adduce an explanation would have to include the Court's belief that the President has plenary powers in the area of foreign policy that give him broad, discretionary authority to identify and define national interests and national security. Second, the Court claims that it lacks competence, expertise, equipment, and guidelines for resolution of foreign affairs cases. Finally, the Court fears the embarrassment, chaos, and confusion that may attend the exercise of judicial power reversing a presidential act. These factors have coalesced to make the judiciary an arm of the executive in the conduct of foreign policy.

There can be little doubt that *Curtiss-Wright* has overwhelmed the foreign relations law of the United States.¹⁷⁹ The Court's penchant for precedent, however flimsy, drives it almost inexorably back to *Curtiss-Wright*, the source of the view that the President exercises plenary authority over foreign affairs. The effect of court-positivism has given this case an oracular status that will not likely be diminished.¹⁸⁰

¹⁷⁷ *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150 (1912).

¹⁷⁸ U.S. CONST. art. I, § 9, cl. 7 states: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

¹⁷⁹ See the development of this theme in Arthur S. Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585 (1980). Harold Koh has concluded that "the Court's decisions on the merits of foreign affairs claims have encouraged a steady flow of policy-making power from Congress to the executive." HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 146 (1990). In this regard, the courts became the "President's accomplices." *Id.*

¹⁸⁰ See, e.g., *Haig v. Agee*, 453 U.S. 280, 291 (1981).

Indeed, from *Belmont* and *Pink* to *Zemel* and *Haig*, the Court has regularly evinced its support of the President's dominant role.¹⁸¹ As an attribute of his authority, the President has virtually unlimited discretion to identify and define U.S. national security interests. As manifested in *Zemel* and *Haig*, when the Court withdrew all checks on the executive's power to regulate travel where national security interests are concerned, the Court has shown an exaggerated deference to the President's perception in this area. Of course, it is of no moment to the judiciary that this sole organ doctrine has been savaged by constitutional scholars as utterly without foundation and support in Anglo-American legal history.¹⁸²

The Court's obeisance to the President cannot be explained solely in terms of its subscription to the sole organ doctrine, however. Sixty years ago, Professor Louis Jaffe was at pains to understand the Court's almost "unreasoning sense of incompetency" in foreign relations cases.¹⁸³ This sense of incompetency--which becomes, in the judges' minds, "no competency"--should be considered in the broader context of the Court's view that the President is superior in every aspect of policymaking because of his alleged superior information, expertise, foreign relations machinery, diplomatic skills, and better understanding of the national interest. In short, the judges place more faith in the executive process of weighing values and measuring the gains and losses of policies than they do in the judicial process. This mindset of a lack of competency is evident in a number of the cases that we have reviewed, ranging from *Curtiss-Wright* (in which Justice Sutherland supported the President's lofty status with the claim of superior information) to its unwillingness to rule on the issue of unilateral presidential warmaking.¹⁸⁴ The Court's sense of incompetency in foreign affairs is also reflected in the political question doctrine, as exemplified by the test involving a lack of "judicially discoverable and manageable standards."¹⁸⁵

Given this backdrop of the judiciary's insecurity in its competency and the fact that the Court ordinarily can only check acts after they have occurred, repeated judicial deference is somewhat more comprehensible. As a result, there is something of an urge to "go along" with the established policy. In reality, judicial deference provides a support

¹⁸¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹⁸² *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2567 (1993) (citing *Curtiss-Wright* for the proposition that the President has "unique responsibilities" with respect to foreign and military affairs).

¹⁸³ *Haig*, 453 U.S. 280 (1981); *Zemel v. Rusk*, 381 U.S. 1 (1965); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

¹⁸⁴ Thomas Reed Powell used to tell his students at Harvard Law School, "Just because Mr. Justice Sutherland writes clearly, you must not suppose that he thinks clearly." SCHLESINGER, *supra* note 1, at 103.

¹⁸⁵ LOUIS JAFFE, *JUDICIAL ASPECTS OF FOREIGN RELATIONS* 223 (1933).

function for the executive since Congress rarely acts first, and this act of filial piety can work tragedy, as it did in the internment of Japanese-Americans in World War II.

Finally, the Court recognizes the political realities of the international realm. The contortions of Justice Rehnquist in *Dames & Moore*, stretching and twisting to find congressional authorization for President Carter's agreement with Iran, reflects his understanding of realpolitik and the complexities of international negotiation.¹⁸⁶ If the Court had ruled against the Iranian pact, chaos and confusion may have resulted and a carefully crafted diplomatic package could have been unraveled. A similar fate awaited President Roosevelt in both *Belmont* and *Pink* if the Court had not contrived authority for the executive branch. Embarrassment is a weighty concern for the Court, as are its desires to promote order and tranquillity and avoid confusion and stress.

For all of these reasons, and perhaps others, the Court is inclined to take a very narrow view of its role in foreign affairs cases. The reasoning underlying this conception leads the Court to grant considerable respect, latitude, and discretion to other departments, especially in foreign affairs cases. In short, the Court believes it should not interfere with a President's policymaking but instead should give him virtually untrammelled authority. With this line of thought we have come full circle, for we have returned to the argument of *Curtiss-Wright*.

III. Conclusion: Policing Constitutional Boundaries

The growth of executive foreign affairs powers in the past sixty years has been tremendous. Although given only modest authority by the Constitution, the President's powers have become so great as to provide him with a virtual "monopoly" over foreign affairs.¹⁸⁷

The judicial contribution to presidential hegemony is reprehensible. Beginning with *Curtiss-Wright*, the courts have steadily fed the springs of presidential power.¹⁸⁸ They have done so by showing great deference to the executive, sometimes by virtue of the political question doctrine and other times by blanket disregard of congressional intentions. Whatever the method, the judiciary has played a pivotal role in the trend toward executive domination of foreign affairs.

Its obeisance to the President betrays the wisdom of the deep-seated suspicion with which the framers and ratifiers viewed executive discretion, an animus so powerful that it led them, virtually without

¹⁸⁶ See, e.g., *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

¹⁸⁷ *Baker v. Carr*, 369 U.S. 186 (1961).

¹⁸⁸ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

dissent, to place the conduct of foreign policy beyond the presidency and in the more trusted hands of Congress. That decision, of course, also reflected their commitment to the republican principle of collective decisionmaking, a process they believed would produce foreign policy consistent with the national interests.

Acting as an arm of the executive branch, the Court has done much to undermine collective decisionmaking and shared powers in foreign affairs at the expense of its duty to police constitutional boundaries. As Justice Robert Jackson said, “some arbiter is almost indispensable when power is . . . balanced between different branches, as the legislative and executive . . . Each unit cannot be left to judge the limits of its own powers.”¹⁸⁹ By policing constitutional boundaries, the Court not only maintains the integrity of the Constitution but also protects the entire political community against usurpation. A political community like the United States expects that the allocation of governmental power by the Constitution will be maintained--barring, that is, fundamental changes through the amendment process. Change through that method assures the sovereign people a voice in the system by which they are governed. When the written Constitution is violated by usurpation of power, the people may wonder about the utility of limited powers “if these limits may, at anytime, be passed by those intended to be restrained.”¹⁹⁰

John Marshall, speaking as a member of the Virginia Ratifying Convention, had an answer. “To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.”¹⁹¹ In recent years, the judiciary has failed to provide protection against executive usurpation of legislative power in foreign affairs; indeed, it has sanctioned it. As a result, the doctrine of shared powers has been virtually emasculated. If Marshall is right, then the Constitution and the Republic are imperiled.

¹⁸⁹ BERGER, *supra* note 1, at 117.

¹⁹⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹⁹¹ ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 9 (1949). Madison wrote that neither of the two departments “can pretend to an exclusive or superior right of settling the boundaries between their respective powers.” *THE FEDERALIST* No. 49, at 345 (James Madison) (Edward Gaylord Bourne ed., 1937).