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The War Powers Resolution: Conflicting Constitutional Powers, the War Powers and U.S. Foreign Policy*

BRADLEY LARSCHAN**

I. INTRODUCTION

Fourteen years, some practical experience and several Supreme Court decisions have passed since the War Powers Resolution¹(WPR) was enacted over a Presidential veto on November 7, 1973.² Since then, the United States' foreign policy has grappled, with varying degrees of success, with this unique legislation, which seeks to control the Executive's use of armed force in situations short of war. The effectiveness of this legislation has been problematic at best³ and its future is clouded by lingering questions as to its constitutionality and, on a policy level, by concerns about the potential use of U.S. armed forces with respect to, among other things, international terrorism.⁴

This paper will examine briefly the political and legislative history⁵ of the War Powers Resolution. It will then set the War Powers Resolution in historical perspective by analyzing the original intention of the Fram-

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1. Pub. L. 93-148, § 2, 87 Stat. 555, (codified at 50 U.S.C. § 1541 (1973)).

2. H.R.J. Res. 542, 93d Cong., 1st Sess., 119 CONG. REC. 24,707-708 (1973). President Nixon vetoed the bill Oct. 24. *Veto of War Powers Resolution*, 9 WEEKLY COMP. PRES. DOC. 1285 (Oct. 29, 1973). The House overrode the veto (284-135), 119 CONG. REC. 36,202, 36,221 (1973), as did the Senate (75-18), 119 CONG. REC. 36,174, 36,198 (1973).

3. Turner, *The War Powers Resolutions: Unconstitutional, Unnecessary and Unhelpful*, 17 LOY. L.A. L. REV. 683 (1984).

4. See, e.g., *The testimony of the State Department's Legal Adviser of April 29, 1986, before the Subcommittee on Arms Control, International Security and Science of the House Committee on Foreign Affairs, reprinted in BUREAU OF PUBLIC AFFAIRS, DEP'T STATE, CURRENT POLICY No. 832, THE WAR POWERS RESOLUTION AND ANTITERRORIST OPERATIONS 1* (1986).

5. For a comprehensive account of the legislative history of the War Powers Resolution, see H.R. Doc. No. 287, 93d Cong., 1st Sess., *reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2346*.

ers of the Constitution from a domestic and international legal perspective. This paper analyzes the fundamental constitutionality of sections 5(b)&(c) of the War Powers Resolution, as well as the Resolution's constitutionality in light of the legislative veto cases. Finally, it will examine the policy aspects of sections 5(b)&(c) of the War Powers Resolution, especially as they relate to the U.S. response to international terrorism.

A. *Historical Development of the War Powers Resolution*

The War Powers Resolution was born of Congressional frustration over the United States' prolonged military involvement in Vietnam,⁶ the second most divisive conflict in our history. The WPR was the culmination of Congressional efforts to curtail Presidential authority to commit American troops into combat, beginning with the 1967 Senate Foreign Relations Committee Hearings⁷ and Report.⁸ Under the stewardship of Senator J. William Fulbright, a sense of the Senate Resolution was adopted in June 1969 proclaiming that "a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States government by means of a treaty, statute, or concurrent resolution of both Houses of Congress, specifically providing for such commitment."⁹

This country's involvement in Vietnam continued, however, as did Congressional attempts to control (short of requiring complete withdrawal), the President's discretion to commit U.S. forces in Southeast Asia.¹⁰ Following the announcement of the 1973 ceasefire agreement, the Congress passed the Cooper-Church amendment¹¹ and the Mansfield

6. J. JAVITS, WHO MAKES WAR: THE PRESIDENT VERSUS THE CONGRESS 268-71 (1973).

7. *U.S. Commitments to Foreign Powers: Hearings Before the Senate Comm. on Foreign Relations on S. Res. 151*, 90th Cong., 1st Sess. (1967).

8. See SENATE COMM. ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, S. REP. NO. 797, 90th Cong., 1st Sess. (1967). Many of the questions raised in the report questioning the President's constitutional authority have been answered by the Executive branch. See, e.g., Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12 (1976).

9. On the effects of a concurrent resolution, see Sofaer, *id.*

10. See A. THOMAS & A. THOMAS JR., THE WAR-MAKING POWERS OF THE PRESIDENT 119-28 (1982).

11. The Cooper-Church amendment to the Department of Defense Appropriations Act of 1970, § 643, 83 Stat. 469, provides that "none of the funds appropriated by this Act shall be used to finance the introduction of American combat troops into Laos or Thailand." The Cooper-Church amendment to the Special Foreign Assistance Act of 1971, § 7, 84 Stat. 1942, provides:

(a) In line with the expressed intention of the President of the United States, none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia.

(b) Military and economic assistance provided by the United States to Cambodia and authorized or appropriated pursuant to this or any other Act shall not be construed as a commitment by the United States to Cambodia for its

amendment.¹² These amendments forbade use of government funds for American military activities in Indochina “unless specifically authorized” by Congress. The Congress then approved a measure to cut off all funds for U.S. combat activities in Cambodia and Laos. This measure, however, was vetoed by President Nixon and an attempt to override the veto failed.¹³ President Nixon was compelled, for political reasons, to agree to a “compromise” on July 1, 1973 in which funds for military activities in Laos and Cambodia were cut off on August 15, 1973.¹⁴ The President agreed thereafter to seek congressional authorization for further military activities in Indochina.¹⁵

During this period, a more subtle and yet infinitely more important struggle was taking place. There was a clash of constitutional titans for

defense.

12. The Mansfield amendment to the Military Procurement Act of 1972, § 601(a), 85 Stat. 430, provides:

It is hereby declared to be the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina, and to provide for the prompt and orderly withdrawal of all United States military forces at a date certain, subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or such forces. The Congress hereby urges and requests the President to implement the above-expressed policy by initiating immediately the following actions:

(1) Establishing a final date for the withdrawal from Indochina of all military forces of the United States contingent upon the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for all Americans missing in action who have been held by or known to such Government or such forces.

(2) Negotiate with the Government of North Vietnam for an immediate cease-fire by all parties to the hostilities in Indochina.

(3) Negotiate with the Government of North Vietnam for an agreement which would provide for a series of phased and rapid withdrawals of United States military forces from Indochina in exchange for a corresponding series of phased releases of American prisoners of war, and for the release of any remaining American prisoners of war concurrently with the withdrawal of all remaining military forces of the United States by not later than the date established by the President pursuant to paragraph (1) hereof or by such earlier date as may be agreed upon by the negotiating parties.

13. The Constitution provides for an override of a Presidential veto by a two-thirds vote of the Congressmen present in each house, U.S. CONST. art. I, § 7, cl. 2, providing there is a quorum. *Missouri Pacific Railway Co. v. Kansas*, 248 U.S. 276 (1919). A quorum is a majority of the members of each house. *Id.* See also Senate Rule 6, para. 1.

14. Act of July 1, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99, 129 (1973). The Act provided:

None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam or off the shores of Cambodia, Laos, North Vietnam and South Vietnam by the United States forces, and after August 15, 1973, no other such funds heretofore appropriated under any other Act may be expended for such purposes.

15. See 87 Stat. 99.

the control of U.S. foreign policy. The "Imperial Presidency" was under siege by an assertive and powerful Congress. Since Franklin Roosevelt's Presidency, the American Chief Executive's powers swelled on all things touching foreign policy. The United States had emerged as the first Superpower. Moreover, it was the only Western democracy in a position to halt Soviet expansionism in what remained of war-torn Europe and other areas of the globe. Of the two political branches of government, it was the Presidency which was best equipped to meet the challenge of and to respond quickly to political and military crises. Congress watched from the sidelines as the Presidency grew increasingly independent of the legislative branch on matters of foreign policy.

Prior to Watergate, it was not the Congress but the Supreme Court that had checked the growth of presidential power over foreign affairs.¹⁶ The Congress became frustrated as Presidents committed this country to a series of controversial policies, including the Berlin airlift, Korea, NATO, the Bay of Pigs, the Congo rescue operation, intervention in the Dominican Republic and the Cuban Missile Crisis. It was not until the Nixon Presidency was confronted with the dual political crises of Watergate and Vietnam that the Congress was able to reassert itself. When it did, it was with a vengeance. With an active and increasingly powerful Congress confronting a President whose personal and political powers were waning, the stage was set for the introduction of the War Powers Resolution.¹⁷

B. Promulgation of the War Powers Resolution

Two provisions contain the heart of the War Powers Resolution, which Professor Gerald Gunther characterized as "an unusual, quasi-constitutional variety of congressional action, delineating not substantive policy but processes and relationships."¹⁸ Section 5(b) requires the President to withdraw U.S. forces from hostilities or situations of imminent hostilities within 60 or 90 days, unless Congress either declares war or specifically authorizes continued military activities. Section 5(c) requires the President to withdraw U.S. forces if directed by a concurrent resolu-

16. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) [hereinafter cited as *Steel Seizure Case*]. It is interesting that this case has become the dumping ground of constitutional reasoning, and is often invoked to support the thesis that war powers belong, by negative implication, to the Congress. See, e.g., Buchanan, *In Defense Of The War Powers Resolution: Chadha Does Not Apply*, 22 Hous. L. REV. 1155, 1162, n. 26 (1985). For a discussion of the circumstances leading up to and including the *Steel Seizure Case*, see M. MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1977); A. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE: YOUNGSTOWN SHEET AND TUBE CO. v. SAWYER, THE STEEL SEIZURE DECISION* (1958).

17. The War Powers Resolution was conceived and zealously promoted by Senator Jacob K. Javits, who has written extensively on the subject. See, e.g., J. JAVITS, *WHO MAKES WAR; THE PRESIDENT VERSUS CONGRESS*, *supra* note 6.

18. G. GUNTHER, *CONSTITUTIONAL LAW* 371, n. 4 (11th ed. 1985).

tion.¹⁹ It should be emphasized that the concurrent resolution was chosen quite deliberately by the WPR's drafters as a device to avoid the constitutionally-required two-thirds vote of each House to override a Presidential veto, so that a simple majority vote would replace the presentment process.²⁰

President Nixon rejected the War Powers Resolution. In his October 1973 veto message, he stated that it was "dangerous to the best interests of our nation," and "that both these provisions [Sections 5(b)&(c)] are unconstitutional. The only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution . . . and any attempt to make such alterations by legislation alone is clearly without force."²¹

In the view of this writer, President Nixon was correct on both grounds. The War Powers Resolution is bad public policy and it is unconstitutional. It impairs the President's flexibility to project military power as an instrument of American foreign policy. Moreover, it is unconstitu-

19. A concurrent resolution is to be distinguished from a joint resolution in that the former is intended to become operative after it is approved by each house of Congress while the latter is subject to Presidential disapproval and Congressional override. *See generally* JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES §§ 396-97, H.R. Doc. No. 403, 96th Cong., 2d Sess. (1979).

20. *See* Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?* 16 WM. & MARY L. REV. 823, 844-49 (1975). During the congressional debate on the War Powers Resolution, Rep. Zablocki observed that, were it otherwise, "[o]ne-third of either body will thwart the will of the majority." 119 CONG. REC. 24,689 (1973). *See also* War Powers Resolution of 1973, H.R. REP. No. 287, 93d Cong., 1st Sess. 11 (1973).

21. "Veto of War Powers Resolution," *supra* note 2.

Every Chief Executive since President Nixon has complied with the War Powers Resolution but has explicitly stated that Sections 5(b) & (c) are without constitutional force. For instance, in his signing statement enacting into law the Multinational Force in Lebanon Resolution, Pub. L. 98-119, 97 Stat. 805, *reprinted in* 19 WEEKLY COMP. PRES. DOC. 1422 (Oct. 17, 1983). President Reagan said:

I believe it is, therefore, important for me to state in signing this resolution that I do not and cannot cede any of the authority vested in me under the Constitution as President and as Commander-in-Chief of the United States armed forces. Nor should my signing be viewed as any acknowledgement that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in Section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired or that Section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy the United States armed forces.

Former President Gerald R. Ford noted in a 1977 lecture that "[t]he United States was involved in six military crises during my presidency In none of those instances did I believe the War Powers Resolution applied Furthermore, I did not concede that the resolution itself was legally binding on the President on constitutional grounds." "The War Powers Resolution: Striking a Balance between the Executive and Legislative Branches," speech by former President Gerald R. Ford, University of Kentucky, Louisville (Apr. 11, 1977), *reprinted in* *A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. 325, 327 (1977) (statement of Pres. Gerald R. Ford).

tional on two grounds: at least part of it is a legislative veto of the type found unconstitutional in *Immigration and Naturalization Service v. Chadha*²² and *Consumers Union, Inc. v. FTC.*²³ The WPR also violates the constitutional doctrine of separation of powers, depriving the President by means of mere statute (and against his will) of certain powers vested in the Executive by the Constitution and reassigning those powers to the Congress.²⁴

II. MECHANICS OF THE WAR POWERS RESOLUTION

Congress' stated purpose in enacting the WPR was to:

fulfill the intent of the framers of the Constitution . . . and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States armed forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances and to the continued use of such forces in hostilities or in such situations.²⁵

The WPR seeks to apply this "collective judgment" to three classes of activities involving American armed forces²⁶ (unless war has been declared by the Congress). It is triggered where U.S. troops are introduced:

1. "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;"
2. "into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces;" or
3. "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."²⁷

Under the War Powers Resolution, three discrete duties are imposed upon the President:

1. He must consult the Congress prior to committing United States armed forces "in every possible instance".²⁸
2. Once U.S. armed forces are deployed, he *must* submit a written

22. 462 U.S. 919 (1983).

23. 691 F.2d 575 (D.D.C. 1982), *aff'd mem. sub nom.*, *Process Gas Consumer Group v. Consumer Energy Council of America, Inc.*, 463 U.S. 1216 (1983), *reh'g denied*, 463 U.S. 1250 (1983).

24. Sec. 8(d) of the WPR expressly states that the War Powers Resolution does not alter the constitutional authority of the President. This is not only a self-serving statement, but also is an erroneous legal conclusion, for the reasons set forth below.

25. 50 U.S.C. § 1541(a) (1982).

26. Actually, the three types of activities are explicitly set forth in § 4(d), the "reporting requirement." Sec. 5(b) attempts to include these activities by reference, covering "any use . . . with respect to which such report was submitted (or required to be submitted)." Sec. 3 applies only to forces introduced into hostilities or imminent hostilities.

27. 50 U.S.C. § 1543(a)(1)-(3) (1982).

28. 50 U.S.C. § 1542 (1982).

report to the Speaker of the House of Representatives and the President *pro tempore* of the Senate explaining (a) why the troops were committed; (b) the President's legal authority to deploy the forces; and (c) the "estimated scope and duration of the hostilities or involvement."²⁹ If the U.S. involvement continues, the President must report to the Congress periodically, but no less than every six months.

3. He must end the projection of American military power unless the Congress takes positive action to authorize its continued use.

Section 5(b)³⁰ requires affirmative congressional action to continue the deployment or engagement of U.S. forces in an area of hostilities.³¹ Under Section 5(b), the President must withdraw U.S. armed forces within 60 days unless both Houses of Congress agree, by concurrent resolution, to continue American involvement. If either or both Houses of Congress fail to authorize continued U.S. military involvement, through action or inaction, the 60 day period may be extended automatically for not more than an additional 30 days "if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about" their prompt removal.³²

Section 5(c) provides that Congress may, by concurrent resolution, require the President to remove U.S. armed forces at any time, notwithstanding the 60 day provision in Section 5(b). The concurrent resolution may be adopted by a simple majority of both Houses. Since it is not to be presented to the President, a concurrent resolution is not subject to a presidential veto.

Finally, the WPR contains a separability clause which provides that if any provision is found to violate the Constitution, the remainder of the WPR is to continue in effect.³³

III. THE WAR POWERS RESOLUTION'S UNCONSTITUTIONALITY

A. Section 5(c): Violates the Presentment Clause

Section 5(c), which has never been invoked by Congress, is clearly unconstitutional.³⁴ Article I, § 7, cl. 2 of the Constitution requires that

29. 50 U.S.C. § 1543(a)(A)-(C) (1982).

30. 50 U.S.C. § 1544(b) (1982).

31. "Hostilities" are not defined in the WPR. However, one definition is found in the Report of the House Foreign Affairs Committee on H.J. Res. 542, 93d Cong., 1st Sess., quoted in Comment, *A Tug of War: The War Powers Resolution and the Meaning of "Hostilities,"* 15 PAC. L.J. 265, 282 (1982).

32. *Id.*

33. The constitutionality or effect, if any, of the severability clause is beyond the scope of this paper. For a thought-provoking discussion, see Tribe, *The Legislative Veto Decision: A Law By Any Other Name*, 21 HARV. J. ON LEGIS. 1, 21-27 (1984).

34. See *infra* text accompanying notes 35-51. See also Lungren & Krotoski, *The War Powers Resolution After The Chadha Decision*, 17 LOY. L.A.L. REV. 767, 777 (1984), Tur-

every bill passed by the Congress "shall, before it become a Law, be presented to the President of the United States."³⁵ Since a concurrent resolution is a unilateral congressional action, and not presented to the President, it violates the presentment clause.³⁶ Of course, the enactment of the War Powers Resolution in itself met the requirements of the presentment clause. But the effect of Section 5(c) is to amend the presentment clause as it applies to future congressional acts. Put another way, Section 5(c) is nothing less than a unilateral attempt to effect an ongoing

ner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, supra note 3, at 684; Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571, 577 (1984).

35. A concurrent resolution, for purposes of constitutional analysis, would be considered a bill. But even if it weren't so considered, clause 3 provides:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Clause 3 was inserted precisely to prevent a measure from being enacted by Congress without Presentment to the President. See *infra* text accompanying notes 40-42. The process of law-creation was intended to be cumbersome, with certain built-in time constraints, to prevent Congress from encroaching upon the President's powers. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 301 (M. Farrand ed. 1911). Presentment is also more than a procedural nuisance, since the Framers wanted the Congress to be apprised of the President's reasons for a veto and then to reconsider their actions in this light. See *infra* text accompanying notes 40-42.

36. The Supreme Court noted in *Chadha* that

[n]ot every action taken by either house is subject to the bicameralism and presentment requirements of Art. I. Whether actions taken by either House are, in law and fact, an exercise of legislative powers depends not on their form but upon whether they contain matter which is properly to be regarded as legislative in character and effect.

Chadha, 462 U.S. at 952. Any action legislative in character must be performed by passage in both houses and presentment to the President. *E.E.O.C. v. Ingersoll Johnson Steel Co.*, 583 F. Supp 883 (S.D. Ind. 1984).

In *Chadha*, the Court relied on an 1897 Senate committee report to determine what action constitutes an exercise of legislative power and thereby necessitating that a bill be presented to the President. 462 U.S. at 952. In the report, the Senate Committee on the Judiciary had been directed by the Senate to, among other things, report whether *concurrent resolutions* must be submitted to the President. "The Constitution," the report notes, "looks beyond the mere form of a resolution . . . and looks rather to the subject matter." S. Rep. No. 1335, 54th Cong., 2d Sess. 1 (1897). Thus, it is the legislative substance of the resolution, not necessarily the legal form, which is controlling. The report continued, "every exercise of 'legislative powers' involves the concurrence of the two Houses; and every resolution not . . . involving the exercise of legislative powers, need not be presented to the President." *Id.* at 8.

The Senate Committee found that, for an action to be an exercise of legislative power, the measure must "contain matter" which would properly be "regarded as legislative in its character and effect." *Id.* *Chadha* found that the immigration statute had a legislative effect because it altered the "legal rights, duties, and relations of persons, including [executive branch officials and others], all outside the legislative branch." 462 U.S. at 952.

restructuring of the Constitution by legislation.³⁷ It attempts to alter article I, § 7, cl. 2 by granting to Congress the power for all time to decide, by *simple majority*, without presentation to the Executive, that it may require a President to withdraw U.S. armed forces upon demand.³⁸ Thus, it is unconstitutional on its face.

Equally important, Section 5(c) subverts the delicate balance of the separation of powers.³⁹ In this sense, the presentment clause is part of the "checks and balances" and, as such, is a cornerstone of our constitutional framework. The Supreme Court has noted "[t]he records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers."⁴⁰ The Court went on to observe that:

Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." As a consequence, Art. I, § 7, cl. 3 . . . was added.⁴¹

Writing in *The Federalist* No. 73, Alexander Hamilton observed that the President's veto power

establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body. . . . The primary inducement to con-

37. Although only recently addressed by the Supreme Court, the debate surrounding the Presentment Clause has been with us for some time.

The issue was raised in connection with a proposed reservation to the Treaty of Versailles authorizing American withdrawal from the League of Nations by "concurrent resolution." Although the proposal was accepted by a majority of the Senate, several Senators expressed the view that it was unconstitutional, and President Wilson wrote in a letter to Senator Hitchcock, "I doubt whether the President can be deprived of his veto power under the Constitution even with his own consent." Clearly, neither a treaty nor an Act of Congress can amend the Constitution, and an alteration of the procedure provided in the Constitution for making any "order, resolution or vote" effective, would be such an amendment.

Wright, *The Power To Declare Neutrality Under American Law*, 34 AM. J. INT'L L. 302, 307-08 (1940).

38. It might be argued that Congress has the power without § 5(c), based on its constitutional mandate, to require the withdrawal of U.S. forces. But if this were true, why did Congress believe it necessary to promulgate § 5(c) to begin with? Why not simply pass a resolution mandating withdrawal? And why was it viewed as necessary to circumvent the Presentment Clause? See *supra* note 7.

39. See *infra* notes and text accompanying notes 109-120.

40. *Chadha*, 462 U.S. at 946, citing 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 611 (3d ed. 1858); 1 The Records of the Federal Convention of 1787, *supra* note 35, at 21, 73-74, 97-104, 138-140, 181, 301-305.

41. *Chadha*, 462 U.S. at 946 (citations omitted).

ferring the power in question upon the executive, is to enable him to defend himself; the secondary one is to encrease the chances in favor of the community, against the passing of bad laws, through haste, inadvertence, or design.⁴³

During the constitutional debates, James Wilson stated that "[w]ithout such a self-defence, the legislature can at any moment sink [the Executive] into non-existence."⁴³ It was in this sense that the presentment clause question was central to the Supreme Court's landmark decision finding the legislative veto unconstitutional. In *Chadha*, the Court said that "[t]he decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed."⁴⁴

Of course, *Chadha* dealt specifically with the one House veto,⁴⁵ while Section 5(c) may be seen as a two House veto.⁴⁶ But this ignores the fun-

42. *The Federalist* No. 73 (A. Hamilton), in *THE FEDERALIST PAPERS* 372-73 (Bantam Classic ed. 1982), quoted in *Chadha*, 462 U.S. at 947. Of the 85 Federalist Papers, which first appeared on October 27, 1787, 26 discussed defense or foreign policy. Alexander Hamilton wrote 51 papers, James Madison 29 and John Jay 5. For a fascinating and well-written account of the events leading to the publication of *The Federalist Papers*, see R. MORRIS, *WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION* (1985).

The Federalist Papers were written to persuade the people of New York State to ratify the Constitution. One observer has noted that

[t]heir practical wisdom stands pre-eminent amid the stream of controversial writing at the time. Their authors were concerned, not with abstract arguments about political theory, but with the real dangers threatening America, the evident weakness of the existing Confederation, and the debatable advantages of the various provisions of the new Constitution.

3 W. CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE AGE OF REVOLUTION* 258 (1957).

43. 5 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 151 (J. Elliot ed. 1845) [hereinafter cited as *DEBATES*]. *Accord id.* at 347 (Mason); *id.* at 344 (Ellsworth); *id.* at 345 (Madison).

44. *Chadha*, 462 U.S. at 947 (citations omitted). The Court went on to observe that "[i]t is beyond doubt that lawmaking was a power to be shared by both Houses and the President." *Id.* (citations omitted).

The Founding Fathers assumed that the Congress would become the "first among equals" in the federal government. For instance, based upon his experience, Madison believed there was "a tendency in our governments to throw all power into the Legislative vortex." He observed that legislative encroachment "was the real source of danger to the American constitutions," and suggested that this justified "the necessity of giving every defensive authority to the other departments that was consistent with republican principles." 5 *DEBATES*, *supra* note 39, at 345. See also L. FISHER, *PRESIDENT AND CONGRESS: POWER AND POLICY* 21-2 (1972).

45. Therefore, the issue of bicameralism was also presented in *Chadha*. However, the issue in *Chadha* revolved around the legislative veto of a certain express delegation of congressional authority to an administrative agency. See generally Ratner & Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 *LOY. L.A.L. REV.* 715, 738, n. 99 (1984).

46. Sec. 5(c) requires the President to withdraw troops if so directed by a concurrent resolution of the Congress. This clearly is a two house veto. It is not clear, however, whether

damental ground upon which *Chadha* was based: that there must be a clear division in functions between branches, even though powers may be shared. It was upon this basis that a two House veto was held unconstitutional in *Consumers Union, Inc. v. FTC*.⁴⁷ In a *per curiam* order affirmed without opinion by the Supreme Court,⁴⁸ the District of Columbia appeals court, *en banc*, held unconstitutional Section 21(a) of the Federal Trade Commission Improvements Act of 1980, which provided that an FTC regulation would become effective unless disapproved by concurrent resolution of both Houses of Congress. The court found that Section 21(a) violated both the separation of powers and "the procedures established by Article I for the exercise of legislative powers."⁴⁹ If anything, the War Powers Resolution suffers from a greater constitutional infirmity because it addresses not an independent administrative agency but the Presidency. Section 5(c) is a legislative veto since it may act only in a unilateral manner. It is a legislative action that overrides executive decision.

There can be no more clear a violation of the presentment clause and the prohibition against the legislative veto than Section 5(c) of the War Powers Resolution.⁵⁰ From all outward appearances, it seems likely that

§ 5(b) is a one or two house veto. Sec. 5(b) requires the President to withdraw troops after 60 days, subject to a 30 day extension, unless Congress (1) has declared war, (2) passed a concurrent resolution authorizing continued activities or (3) is physically unable to meet as a result of armed attack upon the country. Thus, joint action is required by the Congress.

It should be noted, however, that § 5(b) also may be a one house veto. For instance if the Senate approved Presidential action and the House rejected it, the President would be required (under § 5(b)) to withdraw U.S. forces by virtue of the action (or inaction) of one house of Congress. Lungren & Krotoski found that:

Section 5(b) has a significant effect because the action or inaction of one House can terminate the use of armed forces abroad. While it is true that section 5(b) does not contain express language providing for a one House legislative veto, this is irrelevant since the operational force of the section is the functional equivalent [sic] of a one House legislative veto.

Lungren & Krotoski, *supra* note 34, at 785-86.

47. *Consumers Union*, 691 F.2d 575.

48. *United States House of Representatives v. Federal Trade Commission*, 463 U.S. 1216 (1982).

49. *Consumers Union*, 691 F.2d at 578.

50. Sec. 5(c) may be unconstitutional on another ground, depending upon the factual context, because it may conflict with the President's powers as Commander in Chief. See *A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations, supra* note 21, at 72, 74-5 (statement of former State Dep't Legal Adviser Monroe Leigh). This is especially true in the area of self-defense, which is a constitutional function of the President. *But see* § 2(c) of the WPR, which narrowly defines the President's powers as Commander in Chief. This led one observer to note that

[t]he legislative veto provisions of section 5(c) would allow Congress unilaterally to determine whether or not to permit the use of the armed forces in cases of self-defense, for example. A power which lies in the domain of the Executive under the Constitution would thus be transferred to the control of Congress. No resolution of Congress is constitutionally capable of accomplishing this feat.

Statement of Monroe Leigh, *id.*, at 76.

the current Supreme Court⁵¹ would strike down Section 5(c) as long as *Chadha* stands⁵² (if the challenge surmounts the issue of justiciability).

B. Section 5(b): Fundamental Constitutional Issues

1. Violates The Separation Of Powers

A more detailed analysis is required to demonstrate that Section 5(b) violates the doctrine of the separation of powers and institutions.⁵³

Section 5(b) requires the President to withdraw U.S. armed forces engaged in hostilities or imminent hostilities within 60 days, subject to a 30 day extension, *unless* war has been declared or both Houses of Congress specifically authorize an extension. Thus, both Houses of Congress must take affirmative action, by a simple majority vote on a concurrent resolution, to authorize the continued deployment of U.S. armed forces. Or, to put it the other way, the President is required to withdraw American forces if Congress fails to act.⁵⁴ Moreover, either House may block the use of American troops by a simple majority vote or by failing to address the issue.⁵⁵

In *Chadha*, the Court found the legislative veto unconstitutional because it has "the purpose and effect of altering the legal rights, duties, and relations of persons, including [Executive branch officials], all outside

The delegation of the Commander in Chief power is quite narrow. *See infra* text accompanying notes 139-49.

51. There is an aversion by the courts to reach the merits of war powers disputes. *See Henkin, Constitutional Issues in Foreign Policy*, 23 J. INT'L AFF. 222 (1969).

52. Apparently, Justice White reached the same conclusion. *Chadha*, 462 U.S. at 970-71 (White, J., dissenting).

53. *But see* Lungren & Krotoski, *supra* note 34, at 782-83 (arguing that *Chadha* has rendered § 5(b) unconstitutional *per se*). For a well-reasoned and precisely contrary view, *see* Buchanan, *supra* note 16 (arguing that the War Powers Resolution is unaffected by *Chadha*).

54. Unless Congress is physically unable to meet, in which case the President may continue to act. *See* § —, WPR, *supra* note 1.

55. Arthur Schlesinger asks: "If one house of Congress could prevent the declaration or authorization of war, why should not a single house be able to prevent the continuation of undeclared or unauthorized war?" A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* 306 (1973). This presupposes, of course, that the President did not have the original authority to commit U.S. armed forces to combat — a thesis with which I disagree as a matter of constitutional delegation of powers, and to which two centuries of practice stands in opposition. Moreover, the termination of hostilities is distinctly different, from a constitutional law perspective, from a declaration of war. *Cf.* 2 J. STORV, *supra* note 40, at § 1171 ("It should therefore be difficult in a republic to declare war, but not to make peace."). *See also* note 72, *infra*.

It is widely accepted that the President, as Commander in Chief, has the power to negotiate and enter into armistice agreements without Congress' consent. *See* L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 52 (1975). Similarly, the President has the constitutional authority to make executive agreements, while treaties require consent of the Senate. *See, e.g.,* *United States v. Belmont*, 301 U.S. 324 (1937). Finally, the constitution is quite precise as to the law-making process, a fact Prof. Schlesinger's reasoning overlooks.

the legislative branch.”⁵⁶ The legislative effect of Section 5(b) is to terminate the Executive’s use of armed force in the absence of express approval by both Houses within a short time frame. This can be done through Congressional inaction or by the “veto” of one House.

The only way to interpret Section 5(b) consistently with the prohibition against the legislative veto, is to assume that the decision to use American troops is assigned solely to the Congress by the Constitution.⁵⁷ As Fredrick S. Tipson, former chief counsel of the Senate Foreign Relations Committee, put it, under Section 5(b) “the president’s authority to act in emergencies simply runs out in 60 days if Congress does nothing.”⁵⁸ Under this view, the Constitution vests the Congress with the requisite war powers; the Congress has delegated to the President discretionary powers for only 60 days without further Congressional approval. This assessment of the war powers is premised upon the assumption that constitutional separation of powers and institutions accords the Congress, rather than the Executive, most of the War Powers. This paper will argue that the constitutional separation of powers and institutions is that once Congress has raised an army, appropriated funds for its support, approved pay scales and appointments, and promulgated rules for military conduct, it then falls to the President to use the armed forces in his capacity to conduct foreign policy in situations short of war. Because the War Powers Resolution is based upon a constitutional interpretation under which the Congress exercises certain Executive War Powers, it is a usurpation by the Congress of the President’s power and, thus, a violation of the constitutional separation of powers.

2. *The Powers Shared*

In domestic affairs, the Constitution’s sharing of power and responsibility are fairly clear. “In foreign affairs, it was often cryptic, ambiguous and incomplete.”⁵⁹ Like other principal functions of national government, the War Power⁶⁰ is a “pattern of shared constitutional authority . . . not

56. 462 U.S. at 952. The Court went on to state that “[t]he one-House veto operated in these cases to overrule the Attorney General and mandate Chadha’s deportation; absent the House action, Chadha would remain in the United States. Congress has *acted* and its action has altered Chadha’s status.” *Id.* The same may be said of the effect of one house voting against continued use of force, or inaction by either or both houses, under § 5(b).

57. *See, e.g.*, the comment of Rep. Clement Zablocki that “under the Constitution, Congress is given the exclusive power to commit troops into hostilities. Congress does not delegate this power to the President in the War Powers Resolution.” Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 *LOV. L.A.L. REV.* 579, 590 (1984).

58. Tipson, *The War Powers Resolution Is Constitutional and Enforceable*, A.B.A. J., March 1984, at 10, 14.

59. A. SCHLESINGER, *supra* note 55, at 2.

60. War has been defined as an international legal “state of armed hostility between sovereign nations or governments.” 7 J.B. MOORE, *DIGEST OF INTERNATIONAL LAW* 154 (1906). The War Power of the federal government is more difficult to define. “This power is tremendous,” said John Quincy Adams; “it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.” *Quoted in*

an hermetic separation of powers, but a scheme of divided power — what Hamilton called an intermixture of powers, the only effective way to prevent a monopoly of power in any one branch of government.”⁶¹

It is axiomatic that the Constitution divides the War Powers between the Executive and the Congress.⁶² The Constitution does not address explicitly the issue of which branch of government has the power to decide to deploy U.S. armed forces in situations of hostilities or imminent hostilities. The Congress' War Powers are specifically enumerated in the Constitution. With respect to the use of force, Congress has the power to declare war,⁶³ to raise and support Armies,⁶⁴ to provide and maintain a Navy,⁶⁵ to make laws regulating the armed forces,⁶⁶ and to support the militia of the several states.⁶⁷

The President's powers, by comparison, are described vaguely but are hardly less important. The “executive power” is vested in the President.⁶⁸ He is the Commander in Chief of U.S. armed forces,⁶⁹ as well as of the militia when called into federal service.⁷⁰ He also has the power to call forth the militia in certain circumstances.⁷¹ The President has “declared

United States v. Macintosh, 283 U.S. 605, 622 (1931).

The war power of the national government is “the power to wage war successfully.” It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of the war.

Hirabayashi v. United States, 320 U.S. 81, 93 (1943).

[T]he war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.

Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 426 (1934).

When used in this article, the War Power will refer to so much of that sweeping constitutional grant of power as is implicated by the War Powers Resolution, *i.e.*, the power to send U.S. armed forces into combat abroad.

61. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 847 (1972). See also Buckley v. Valeo, 424 U.S. 1, 121 (1976).

62. Hirabayashi v. United States, 320 U.S. at 93 (“The Constitution commits to the Executive and the Congress the exercise of the war power”).

63. U.S. CONST. art. I, § 8, cl. 11.

64. *Id.* at cl. 12.

65. *Id.* at cl. 13.

66. *Id.* at cl. 14.

67. *Id.* at cls. 15 & 16.

68. *Id.* at art. II, § 1, cl. 1. See *infra* note 134.

69. *Id.* at § II, cl. 1. See *infra* notes and text accompanying notes 135, 139-49.

70. *Id.*

71. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28-33 (1827); Luther v. Borden, 48 U.S. (7 How.) 1, 44-48 (1849); The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862); Sterling v. Constantin, 287 U.S. 378, 399 (1932). Compare U.S. CONST. art. I, § 8, cl. 15.

peace”⁷² and proclaimed neutrality.⁷³ And, very early in our history, John Marshall observed that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”⁷⁴ Indeed, the President may obligate the United States to other States

72. This is a non-exclusive power which has been exercised unilaterally by the executive. The Supreme Court observed that “[t]he state of war’ may be terminated by treaty or legislation or Presidential proclamation.” *Ludecke v. Watkins*, 335 U.S. 160, 168 (1948). See also *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 161 (1919); *McElrath v. United States*, 102 U.S. 426, 438 (1880); *The Protector*, 79 U.S. (12 Wall.) 700 (1871); *United States v. Anderson*, 76 U.S. (9 Wall.) 56, 70 (1869).

73. In 1793, when revolutionary France declared war on England, President Washington proclaimed U.S. “impartiality.” (The international law term “neutrality” was avoided, Letter of Jefferson to Monroe, July 14, 1793, in 7 J.B. MOORE, *supra* note 60, at 1004, just as the international law term “blockade” was avoided in President Kennedy’s “quarantine” of Cuba during the missile crisis. Address of Oct. 22, 1962 of Pres. Kennedy, 47 Dep’t State Bull. 715 (Nov. 12, 1962); *Public Papers of the Presidents of the United States: John F. Kennedy, 1962* 806 (1963).) Several pro-French members of Congress vehemently denounced the action as infringing Congressional power. However, President Washington — outraged by the conduct of the French minister, the notorious Citizen Genet, who sought to entangle the fledgling nation in the European war and, among other things, issued letters of marque and reprisal from his American legation to U.S. merchantmen and established Prize courts in French consulates, B. ZIEGLER, *THE INTERNATIONAL LAW OF JOHN MARSHALL* 183 (1939) — believed the power was at least in part vested in the President. See H. LODGE, *ALEXANDER HAMILTON* 172-74 (1882). This dispute sparked the well-known *Pacificus-Helvidius* letters initiated by Alexander Hamilton and acrimoniously replied to by James Madison. See generally *Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793* (1845, reprinted in 1976). Similarly, following the outbreak of the First World War in August 1914, Pres. Wilson issued a proclamation of neutrality.

It should be noted, however, that in 1794, Congress passed the first Neutrality Act, 1 Stat. 381 (1794), and in 1917 passed another Neutrality Act, 40(1) Stat. 217 (1917).

74. The statement was made in the House of Representatives when Marshall was a Congressman debating the Jonathan Robbins affair. 10 *Annals of Cong.* 613 (1800), reprinted in 18 U.S. (5 Wheat.), App. 1, at 26 (1820). This phrase has been invoked repeatedly by the Supreme Court. See, e.g., *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766-68 (1972); *Chicago & Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103, 109 (1948) (paraphrased); *Hirota v. MacArthur*, 338 U.S. 197, 208 (1948) (per curiam) (Douglas, J., concurring); *United States v. Pink*, 315 U.S. 203, 229 (1942); *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (paraphrased) (Black, J. dissenting); *United States v. Belmont*, 301 U.S. at 330; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936); *Goldwater v. Carter*, 617 F.2d 697, 707 (D.C. Cir. 1979), *rev’d on other grounds*, 444 U.S. 996 (1979). See also REP. OF THE SENATE COMM. ON FOREIGN RELATIONS, Feb. 15, 1816, *Compilation of Reports, 1901, 56th Cong., 2d Sess., Sen. Doc. 231, Vol. 8, p. 24* (“The President is the constitutional representative of the United States with regard to foreign nations.”), quoted in *Curtiss-Wright, supra*, at 319. See generally Henkin, *The President and International Law*, 80 AM. J. INT’L L. 930, 932-33 (1986).

Hamilton characterized this power as “the constitutional agency of the president[] in the conduct of foreign negotiations.” *The Federalist* No. 75 (A. Hamilton), *supra* note 42, at 381. *But see* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 164-65 (1978); L. HENKIN, *supra* note 55, at 45-50, criticizing this characterization of the President’s powers as too sweeping and without constitutional foundation. *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 661, *et seq.* (1981); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L.J. 467 (1946); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Assessment*, 83 YALE L.J. 1 (1977); Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-33 (1972).

through executive agreement, including certain military agreements, without the advice and consent of the Senate.⁷⁵

75. Under the Constitution, of course, the Senate must advise and consent to a treaty before the President may ratify it. U.S. CONST. art. II, § 2. The Supreme Court has held that a treaty must involve an issue "properly the subject of negotiations with a foreign country." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). See also *Weinberger v. Rossi*, 456 U.S. 25. However, all international compacts are not treaties which require the "participation" of the Senate. *U.S. v. Belmont*, 301 U.S. at 330-31. See also *U.S. v. Pink*, 315 U.S. at 230. The parameters of the Executive's power to make international agreements is unresolved. *L. TRIBE*, *supra* note 74, at 170. See also State Dep't Circular No. 175, Dec. 13, 1955, reprinted in 50 AM. J. INTL. L. 784 (1956); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 119, Comment (1965). Dr. Guive Mirfendereski commented that the President's constitutional power to enter into sole executive agreements is narrow.

The language in *Belmont* may lead some to conclude that there is a class of agreements that the President can ratify independent of the "advice and consent" of the Senate. Such a conclusion is untenable. The *Belmont* decision speaks of agreements whose ratification does not always require the *participation* of the Senate. In other words, not every agreement requires the *active* or *affirmative* exercise of the Senate's power of "advice and consent." The Senate's "advice and consent" — *i.e.*, approval — may take other forms: silence, implied approval, acquiescence. In fact, the presumption of congressional approval is upset only where the Congress does in some way resist the exercise of Presidential authority. See *Dames & Moore v. Regan*, 453 U.S. 654, 686-88 (1981). Therefore, in *Dames & Moore*, the Supreme Court found Congress' implicit approval to be "crucial" to its decision to uphold the President's power to bind the U.S. to a series of agreements with Iran for the release of U.S. citizens. 453 U.S. at 680. Furthermore, the Court went as far as to suggest that the ratification of agreements without the explicit advice and consent of the Congress is only so because of the Congress' decision not to require it. The Court took judicial notice of the fact that the Congress is quite capable of objecting to executive agreements, as it did with respect to a 1977 Executive Agreement with Czechoslovakia, forcing the Executive to renegotiate the claims settlement agreement. *Id.* at 688, n. 13.

Letter from Dr. Guive Mirfendereski to the author (Jan. 31, 1987) (discussing the issue of Presidential powers under the Constitution to engage in sole executive agreements). See further Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345 (1955); Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341 (1944). See the interesting discussion of the tension in the use of executive agreements as a method of the President's conduct of foreign policy, in Rehm, *Making Foreign Policy Through International Agreement*, in THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 126-38 (F. Wilcox & R. Frank eds. 1976). See generally *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 660 (4th Cir. 1953), *aff'd on other grounds* 348 U.S. 296 (1955) ("The executive may not by-pass congressional limitations regulating . . . [imports] by entering into an agreement with [a] foreign country that the regulation be exercised by the country through its control over exports"); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 64, 109-10 (1801).

One of the most important executive agreements was the "Destroyers for Bases" arrangement of Sept. 9, 1940, between the United States and Great Britain, prior to the U.S. entry into the Second World War. E.A.S. No. 181 (1940). See 39 Op. Atty. Gen. 484 (Aug. 27, 1940). The U.S. traded 50 destroyers for 99-year leases on military bases in eight British possessions from Newfoundland to the Carriibbean. In his memoirs on the war, Winston Churchill characterized the arrangement as "a decidedly unneutral act by the United States. It would, according to all the standards of history, have justified the German Government in declaring war upon them." 2 W. CHURCHILL, THE SECOND WORLD WAR: THEIR FINEST HOUR

It is clear that the Congress may prohibit the use of U.S. armed forces in certain areas by statute. It is also clear that it is the President who orders deployment of troops. Nowhere, however, does the Constitution specifically set forth which branch of government has the power to decide to deploy American forces in situations of hostilities or imminent hostilities. We must, therefore, indulge in constitutional interpretation. There are two principal methods of inquiry: first, to analyze the intent of the Founding Fathers; second, to examine the theoretical structure of the government—the separation of powers and institutions—to determine where the power reposes.

3. *Original Intent*

Any attempt to discern the original intent⁷⁶ of the Founding Fathers as a method of constitutional interpretation is, at best, a dubious affair. As John P. Roche observed:

The prodigious outpouring of “authoritative” interpretations of the “original intent” of the Framers of the Constitution . . . is rather baffling to one who has spent almost 40 years laboring in the primary sources of 18th-century American constitutionalism. . . .

What finally emerged was not a separation of powers but a separation of institutions: the President’s veto is a legislative power of immense impact, as is the authority of the Federal judiciary to hold acts of Congress unconstitutional The Senate clearly moves in on executive power when it approves appointments, and if Hamilton’s observations in Federalist 77 that “the consent of that body would be necessary to displace as well as to appoint” had ever been ranked as an “original intent,” the President would really be locked in.

[A]fter four decades I can sadly testify that not only do I not know the “original intent” of the Framers — a fantastic reification on its face — but I increasingly suspect that much of the time on many of the provisions they didn’t either. I know what Madison thought of some things, what Hamilton thought about others, but have no reason to believe their views were the accepted wisdom.⁷⁷

404 (1949).

The effect of the destroyers-for-bases arrangement may have been to move the U.S. from “neutrality” to the uncertain international legal status of “non-belligerency.” In appealing to President Roosevelt for weapons in May 1940, Prime Minister Churchill urged the United States to “proclaim non-belligerency, which would mean that you would help us with everything short of actually engaging armed forces.” *Id.* at 24-25. On the question of non-belligerency, see, e.g., Wilson, *Some Current Questions Relating to Neutrality*, 37 AM. J. INT’L L. 651 (1943); Kunz, *Neutrality and the European War 1939-1940*, 39 MICH. L. REV. 719 (1940-1941). Cf. note 80, *infra*.

76. Reference to original intent is instructive on the broad structure of the government. On issues of detail, however, original intent is as often misleading as it is informative.

77. Roche, “A Constitution Short on Intent,” *N.Y. Times*, May 18, 1986, at 24, col. 4.

Compare, for example, Hamilton’s view of the constitutional authority to direct the use of force, 4 THE WORKS OF ALEXANDER HAMILTON 437-44 (H. Lodge ed. 1904), with Madison’s view. 6 THE WRITINGS OF JAMES MADISON 138-88 (G. Hunt ed. 1906).

The futility of discerning original intent is exemplified by the debate over the substitution of the phrase "declare War" for "make War" during the drafting of Article I.⁷⁸ The debate usually starts like this: under the Articles of Confederation, Congress had the power to declare and make war.⁷⁹ The original draft of the Constitution gave Congress the power to "make war," which was changed during the Constitutional Convention to "declare war." This is significant because "one of the chief purposes of the Convention was to separate the legislative from the executive functions."⁸⁰ The inference is that the power to declare war — that is, to mobilize the country and to alter the United States' international legal status (with its many ramifications), in itself a constitutional law issue — was of a clearly legislative character and, thus, belonged to the Congress. The power to "make war," however, was considered an executive function and, thus, belonged to the President.⁸¹

Another view is that the Founding Fathers themselves intended a more narrow meaning. Of late, the most often quoted⁸² treatment of the debate on the War Power during the Constitutional Convention is by Judge Abraham Sofaer, now Legal Adviser to the Department of State, who observed:

78. Changes in language between the Articles of Confederation and the Constitution may be significant. In *McCulloch v. Maryland*, for example, Chief Justice Marshall noted that the word "expressly" does not appear in the Tenth Amendment, although it was contained in the Articles of Confederation. "The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it, to avoid those embarrassments." 17 U.S. (4 Wheat.) 316, 406-07 (1819). See also *Knowlton v. Moore*, 178 U.S. 41, 85 (1900) (recognizing the "distinction between the Articles of Confederation and the present constitution" for purposes of discerning the meaning of words within the Constitution).

79. ARTICLES OF CONFEDERATION art. 9.

80. *Myers v. United States*, 272 U.S. 52, 115-16 (1926) (Taft, C.J.). The Court did not alter its reasoning on the separation of powers as it relates to this argument in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Weiner v. United States*, 357 U.S. 349 (1958).

81. The traditional view is that the change from "make" to "declare" war was intended to give the President significantly greater powers. See, e.g., Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAW. 187, 209 (1975). See also Lungren & Krotoski, *supra* note 34, at 769-772. But see Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972). Professor Lofgren considers the change from "make" to "declare" as an ambiguous one, and sets forth five explanations of its significance. First, America would therefore restrict itself to fully declared wars. Second, America would limit its intercourse with other nations to trade and commerce. Third, if Congress' power to declare war is strictly interpreted then the power to make undeclared wars must be viewed as not belonging to Congress but to the President. Fourth, as used in the Constitution, "declare" was taken to mean "commence" and not the narrower international law term of art. Finally, any war-commencing power not covered by Congress' power to declare war must be considered as vested in Congress because of Congress' control of reprisals, e.g., the power to grant letters of marque and reprisal. *Id.* at 694-95.

82. See, e.g., A. Lakeland, *The War Powers Resolution: Necessary and Legal Remedy to Prevent Future Vietnams*, in CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 153, 153-54 (S. Soper ed. 1984).

The draft Constitution assigned Congress the power to "make" war. Charles Pinckney sought on August 17 to vest the power in the Senate alone; the Senate would be familiar with foreign affairs, it already had the power to make treaties of peace, and action by both houses would take too long. Pierce Butler responded that, if informed judgment and efficiency were the relevant criteria, he was "for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." Madison then "moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." Sherman apparently assumed the President already had power to repel attacks. He thought the clause "stood very well. The Executive shd. be able to repel and not to commence war. 'Make' better than 'declare' the latter narrowing the power too much."

Elbridge Gerry from Massachusetts, who seconded Madison's motion to substitute "declare" for "make," attacked Butler's suggestion: he "never expected to hear in a republic a motion to empower the Executive alone to declare war." Ellsworth then spoke against Pinckney's motion to give the power of war to the Senate. "[T]here is a material difference," he said, "between the cases of making war, and making peace. It shd. be more easy to get out of war, then into it. War also is a simple and overt declaration. Peace attended with intricate & secret negotiations." George Mason of Virginia also was for clogging war and facilitating peace, and therefore "was agst giving the power of war to the Executive, because not (safely) to be trusted with it; or to the Senate, because not so constructed as to be entitled to it." He added that "he preferred 'declare' to 'make,'" and Rufus King concurred because "'make' war might be understood to 'conduct' it which was an Executive function."

Pinckney's suggestion that the Senate be given the power to make war was rejected overwhelmingly, but Madison's motion to change "make" for "declare" was approved. The change was intended by Madison and Gerry to enable the President to respond to "sudden attacks" without a declaration of war, and by King and others to leave the conduct of war in executive hands. They therefore appear to have intended the clause to authorize the President to defend the United States from attack without consulting the legislature, at least where the attack is so "sudden" that consultation might jeopardize the nation. But nothing in the change signifies an intent to allow the President a general authority to "make" war in the absence of a declaration; indeed, granting the exceptional power suggests that the general power over war was left in the legislative branch.⁸³

Judge Sofaer suggests that the Founding Fathers intended by "make war" only to give the President power enough to repel sudden attacks, but that Congress retained the power to decide when and where force was to be used.

83. A. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 31-32 (1976) (citations omitted).

Now that is a powerful argument to draw an opposite inference. But this conclusion is historically incorrect and raises more questions than it answers. For one thing, it does not consider what the Founding Fathers meant by "war." There is a strong argument that the Founding Fathers had in mind something more akin to the international law⁸⁴ distinction⁸⁵ between "war" and "peace"⁸⁶ than to the practice of using force without declaring war,⁸⁷ such as the French intervention in the American war of

84. "International law had unobtrusively been woven into the fabric of our national existence." Raymond & Frischholz, *Lawyers Who Established International Law in the United States, 1776-1914*, 76 AM. J. INT'L L. 802, 803 (1982).

85. "War is an aspect of a nation's international relations and must therefore be seen from the perspective of the international as well as the domestic order." Wallace, *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L. REV. 719, 720 (1972). This has been a recognized and well-settled proposition at least since *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 83-84 (1795). See also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 315, et seq.

86. As Grotius observed, "inter bellum et pacem nihil est medium" (between war and peace there is no other category). H. Grotius, *De Jure Belli ac Pacis* III, xxi, 1 (1625). Modern international law also recognizes this distinction. See, e.g., L. OPPENHEIM, INTERNATIONAL LAW, Vol. 1, PEACE (H. Lauterpacht 8th ed. 1955), Vol. 2, WAR (H. Lauterpacht 7th ed. 1952) [hereinafter cited as Lauterpacht].

87. Among other things, the declaration of war alters the declarant's international legal status, empowering the declarant to take action, i.e., against certain shipping, and forcing other States to declare war or neutrality — a fact the Federalists, mostly from northern trading states, were keenly aware of. Indeed, it was in Massachusetts that the first American Prize court was established. 1 J.B. SCOTT, PRIZE CASES DECIDED IN THE UNITED STATES SUPREME COURT 1789-1918 2 (1923). In the 1807 British Prize case *The Neptune*, Sir William Scott (Lord Stowell) observed that "[i]t is well known that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce." 165 Eng. Rep. 978, 979, 6 Rob. 403, 405-06 (1807). See also *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 535-36 (1867) (it is universally accepted that "the immediate and necessary consequence of a declaration of war is to interdict all intercourse or dealings between the subjects of the belligerent states."); *The William Bagaley*, 72 U.S. (5 Wall.) 377, 405 (1866) ("War necessarily interferes with the pursuits of commerce and navigation, as the belligerent parties have a right, under the law of nations, to make prize of the ships, goods, and effects of each other upon the high seas."); *Jecker v. Montgomery*, 59 U.S. (18 How.) 110, 112 (1855) ("The consequence of this state of hostility is, that all intercourse and communication between [belligerents] is unlawful."); *The Commercen*, 14 U.S. (1 Wheat.) 382, 395-407 (1816) (Marshall, C.J. concurring) (declared war between the U.S. and Britain gave the U.S. the "declared right" under international law to capture a Prize Swedish vessel where Sweden was a co-belligerent with Britain against France, a war in which the U.S. was neutral); *The Nereide*, 13 U.S. (9 Cranch) 388, 418 (1815) ("[W]ar gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend."); *The Rapid*, 12 U.S. (8 Cranch) 155 (1814) (A state of war provides states with the right to authorize capture of enemy vessels); *The Julia*, 12 U.S. (8 Cranch) 181, 193 (1814) ("[I]n war, all intercourse between the subjects and citizens of the belligerent countries is illegal"); *The Sally*, 12 U.S. (8 Cranch) 382 (1814) (Property of enemy nationals as well as citizens of U.S. trading with the enemy, captured on the high seas, is prize of war under international law); *Hannay v. Eve*, 7 U.S. (3 Cranch) 242, 247 (1806) (during a declared war, international law authorizes the U.S. government to allow the crew of an enemy vessel to submit their ship and collect the Prize). See generally *The Paquette Habana*, 175 U.S. 677 (1900); 10 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 791-913 (1968); 7 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 1-341; A.

independence, or limiting the Executive from using armed force short of war in pursuit of the then-recognized international law rights of self-help or reprisal.⁸⁸ It was perhaps in this sense that Oliver Ellsworth observed during the constitutional debate that “[w]ar . . . is a simple and overt declaration.”⁸⁹ Similarly, when Elbridge Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war,” he contemplated a *declaration*, not the tactical use of force.⁹⁰ It

VERZIJL, *LE DROIT DES PRISES DE LA GRANDE GUERRE* (1924); 7 J.B. MOORE, *supra* note 60, at 342-858.

A preliminary exercise to the taking of Prize is the right of visit and search. *The Neride*, 13 U.S. (9 Cranch) at 427-28; G. HACKWORTH, *supra*, at 175-76. The Supreme Court noted that “[t]he right of visitation and search [is] strictly a belligerent right.” *The Antelope*, 23 U.S. (10 Wheat.) 66, 119 (1825) (Marshall, C.J.). “[T]he right of visitation and search . . . is strictly a belligerent right, allowed by the general consent of nations, in time of war, and limited to those occasions.” *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 42 (1826) (Story, J.). In *The Louis*, 2 Dods. 210, 165 E.R. 1464 (1817), the High Court of Admiralty observed that

[t]his right, incommodious as its exercise may occasionally be to those who are subjected to it, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defense, in preventing the enemy from being supplied with the instruments of war, and from having its means of annoyance augmented by the advantages of maritime commerce.

2 Dods. at 238, *Id.* at 1475. *Accord* *The Young Jacob and Johanna*, 1 Rob. 20, 165 E.R. 81 (1798); *The Maria*, 1 Rob. 340, 165 E.R. 199 (1799).

Because of this, the War Power was linked to the Commerce Power, which is specifically assigned to the Congress. U.S. CONST. art. I, § 8, cl. 3. One highly respected scholar has observed that “[n]eutral merchants had very profitable possibilities connected with the carrying trade of belligerents, while merchants operating as privateers, or others exercising belligerent rights had quite different opportunities which called for a careful readjustment of mercantile rights.” A.P. RUBIN, *Foreign Policy by Congress: Book Review*, 4 FLETCHER FOR. 283, 284 (1980). See also L. ATHERLEY-JONES, *COMMERCE IN WAR* (1907); F. UPTON, *THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR* 16-36, *et seq.* (3d ed. 1863). It was, perhaps, in this vein that President Washington urged in his Farewell Address that “[t]he great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little political connection as possible.” G. Washington, *Farewell Address*, reprinted in *BASIC DOCUMENTS IN AMERICAN HISTORY* 70, 77 (R. Morris ed. 1965). The linkage of “war, peace and commerce” is also made in *The Federalist* No. 64 (J. Jay), *supra* note 42, at 325.

88. See, e.g., A. HINDMARSH, *FORCE IN PEACE: FORCE SHORT OF WAR IN INTERNATIONAL RELATIONS* 85, *passim* (1933, reprinted in 1973). The eminent international law scholar Judge Sir Hersch Lauterpacht observed that self-help and reprisal “are not necessarily acts initiating war.” 2 Lauterpacht, *supra* note 86, at 203.

89. Quoted in A. SOFAER, *supra* note 83.

90. John Bassett Moore noted that:

Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though not force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another . . . and yet no state of war may arise. . . . The distinction is of the first importance, since, from the moment when a state of war supervenes third parties become subject to the performance of the duties of neutrality as well as to all the inconveniences that result from the

should be recalled that it was Gerry who, in June 1775, proposed the establishment of the first American Prize court,⁹¹ while Ellsworth had served as an appeals judge in the Prize case of *The Active*,⁹² illustrating their understanding of and concern for the international law of war.⁹³ Finally, Rufus King appears to say that he agreed that Congress' power should be restricted to a declaration of war because making war "was an Executive function." This distinction (between making war and declaring war) was recognized in *Bas v. Tingy*⁹⁴ and *Montoya v. United States*.⁹⁵ In both cases the Supreme Court found that a *declaration* of war was a profound legal act by the Congress,⁹⁶ as opposed to the use of force in armed conflict.⁹⁷

The Founding Fathers surely were concerned with the effects of a *declaration* of war on commerce.⁹⁸ Professor Alfred P. Rubin noted that

exercise of belligerent rights.

7 J.B. Moore, *supra* note 60, at 153-54.

91. 1 J.B. SCOTT, *supra* note 87, at 2. In November 1775, General Washington urgently requested the Continental Congress to set up a system of national Prize courts. "Washington to the President of Congress, Nov. 8 and 11, 1775," in 4 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799 73, 81-82 (J. Fitzpatrick ed. 1931-1944). On Nov. 25, 1775, Congress responded by establishing for a trial period Prize courts. 3 JOURNALS OF THE CONTINENTAL CONGRESS 371-75 (W. Ford ed. 1904-1937).

92. Bourguignon, *Incorporation of the Law of Nations During the American Revolution — The Case of the San Antonio*, 71 AM. J. INT'L L. 270, 295 (1977).

93. *Id.* On some legal effects of war, see, e.g., W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 952-54 (3d ed. 1971).

94. 4 U.S. (4 Dall.) 37 (1800).

95. 180 U.S. 261 (1901).

96. "We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 140 (1866) (concurring opinion of Chase, C.J., and Wayne, Swayne and Miller, J.J.).

97. Hague Convention III of 1907, 36 Stat. 2259, 2271 (1967) provides in article I that: "The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war." This statement may have been more a reflection of prior rather than contemporary practice. See, e.g., Moore, who noted: "It is universally admitted that a formal declaration is not necessary to constitute a state of war." 7 J.B. MOORE, *supra* note 60, at 171. Nevertheless, the practice continued. See the British ultimatum to Germany initiating hostilities in the Second World War.

98. In *The Rapid*, the Supreme Court noted that, upon a declaration of war a new state of things has occurred — a new character has been assumed by this nation, which involves it in new relations, and confers on it new rights . . .

The nature and consequences of a state of war must direct us to the conclusions which we are to form in this case . . . The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom, and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy — because the enemy of his country . . . The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it.

12 U.S. (8 Cranch) at 160-62.

the fact that the Constitution entrusted to Congress the power to declare war in the same clause as the power to grant letters of marque and reprisal makes it overwhelmingly clear to those familiar with classical legal distinctions that the war-declaring power was connected with the status of merchants.⁹⁹

Perhaps the best evidence of this distinction is the Supreme Court's opinion in *Bas v. Tingy*.¹⁰⁰ The case grew out of a dispute involving the prize owed in the recapture of the *Eliza* during the "undeclared war" with France between 1798-1800. A unanimous Court observed that the United States could wage hostilities without a declaration of war, because the declaration of war was a distinct constitutional act affecting commerce and relations with other States.¹⁰¹ The Court thus recognized that the country could wage armed conflict¹⁰² absent a declared war.¹⁰³

In *The Aurora*, Pinkney argued that "[t]he rule, that trade with the enemy is illegal, results necessarily from the declaration of war, and is included in it: there was no necessity for any subsequent law to enforce the rule." 12 U.S. (8 Cranch) 203, 213 (1814). He went on to argue that "this principle was decided to be correct as early as 1704 and 1707; and it is presumed, that those decisions were founded upon former cases." *Id.* at 213-14. Lauterpacht found the origins of this rule in the 15th century. 2 Lauterpacht, *supra* note 86, at 261. Moreover, it was "settled doctrine" that the declaration of war extinguished commercial relations between citizens of belligerent States. "The doctrine is not at this day to be questioned, that during a state of hostility, the citizens of the hostile states are incapable of contracting with each other." *Scholefield v. Eichelberger*, 32 U.S. (7 Pet.) 586, 593 (1833). *Accord* *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1833) (Declaration of war authorizes Congress under international law, to enact legislation to seize enemy property within the territorial U.S.); *Jecker v. Montgomery*, 59 U.S. (18 How.) at 112. (During a state of war, "all intercourse and communication" between the belligerents' citizens is prohibited by "the law of nations"); *The William Bagaley*, 72 U.S. (5 Wall.) at 405. ("Public war, duly declared or recognized as such by the war-making power, imports a prohibition by the sovereign to the subjects or citizens of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy country."); *Hanger v. Abbott*, 73 U.S. (6 Wall.) at 535 (1867). (It is a universal principle of international law that when war is "duly declared or recognized" all commercial transactions are extinguished); *Coppell v. Hall*, 74 U.S. (7 Wall.) 542, 557 (1868). (Under international law, contracts made during war are "utterly void").

99. A.P. Rubin, *supra* note 87, at 283-84. This point is completely missed by Judge Sofaer, who interpreted the clause on letters of marque and reprisal, U.S. CONST. art. I, § 8, cl. 11, as granting to Congress the constitutional basis for directing the use of armed force short of war, a proposition which finds no support in the classic legal literature. A. SOFAER, *supra* note 83, at 32. While letters of marque and reprisal could be issued in peacetime, as was done in the "undeclared war" with France in 1793, it would nevertheless be a *causus belli* under international law and, therefore, a means to trigger a declaration of war.

100. 4 U.S. 37.

101. 4 U.S. at 40. *See* *Talbot v. Seemans*, 5 U.S. (1 Cranch) 1, 18-20 (1801) (The U.S. and France were in "partial war"). This case is discussed *infra* at note 197.

102. Professor Franck has noted that "[s]ince the decision of the Supreme Court in *Bas v. Tingy* in 1800 and in the Prize cases in 1862, and up to and including the Vietnam cases of 1971 to 1973, the courts have refused to sustain the proposition that the use of force by the President is unconstitutional except after a formal declaration of war by the Congress." T. FRANCK, *CONSTITUTIONAL PRACTICE UNTIL VIETNAM: CONGRESS, THE PRESIDENT AND FOREIGN POLICY* 16 (1984).

103. But even this persuasive distinction is blurred by the ambiguous use of "war" at

This distinction was also drawn by Daniel Webster, who noted that:

This act [of May 28, 1798], it is true, authorized the use of force, under certain circumstances, and for certain objects, against French vessels. But there may be acts of authorized force; there may be assaults; there may be battles; there may be captures of ships and imprisonment of persons, and yet no general war. Cases of this kind may occur under . . . the laws and usages of nations, and which all the writers distinguish from general war.¹⁰⁴

Professor Rubin concluded that

the Constitution contains two distinct legal [war] powers. The power to order troops into action, bringing the law of war into play with regard to that action but not with regard to uninvolved merchants, belongs to the President. The power to change general relations between the United States and any other country from the regime of the international law of peace to the regime of the international law of war belongs to the Congress. There is no reason legally or historically to view either of those powers as a limit on the other, and the refusal of the President to order forces into battle regardless of a Constitutional declaration of war, like the refusal of the Congress to declare war regardless of a Presidential order of military action, illustrates the political tensions built into the Constitution for sound legal and political reasons.¹⁰⁵

The Framers appear to have regarded the *declaration* of war as distinct from the use of armed force, such as the numerous Indian "wars" and the two Barbary "wars," and even the French intervention in the U.S. war of independence.

It is impossible to state with certainty, however, the intent of the Founding Fathers. As Justice Jackson noted in the *Steel Seizure Case*,

the time of the Constitutional Convention. "War," at that time, usually was perceived in its international legal sense, which could not have escaped notice by the Founding Fathers. On the other hand, "war" was sometimes used colloquially to mean "combat." This ambiguity was reflected in the Articles of Confederation, which provided that "[t]he United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . .," and that "[t]he United States . . . shall never engage in a war . . . in time of peace . . ." Art. 9, paras. 1 & 6. This ambiguity led at least one author to equate, erroneously, the power to "declare war" with the power "to authorize the international use of force." Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1417 (1984).

104. Speech on French Spoilations, 4 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 164 (1903). Webster went on to note that

On the same day in which this act passed, . . . Congress passed another act, entitled 'An act authorizing the President of the United States to raise a provisional army; and the first section declared, that the President should be authorized, 'in the event of a declaration of war against the United States, or of actual invasion of their territory, by a foreign power, or of imminent danger of such invasion,' to cause to be enlisted ten thousand men.

Id. at 164-65.

105. A.P. Rubin, "The President and the Congress at War — Part I" (unpublished paper 1984).

the "partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question."¹⁰⁶ In fact, it is quite likely the Founding Fathers disagreed among themselves on the nature of the War Power, preferring for the sake of political expediency to leave the issue unresolved and to let future generations grapple with the question.¹⁰⁷ It should come as no surprise that John Quincy Adams observed that "[t]he respective powers of the President and Congress of the United States, in the case of war with foreign powers are yet undetermined. Perhaps they can never be determined."¹⁰⁸

One of the few things that is clear is that advocates can muster authority for just about any interpretation of original intent on the War Power. Therefore, perhaps the more reliable path to an understanding of the War Power is to analyze the structure of the Constitution itself to

106. *Youngstown Sheet & Tube Co.*, 343 U.S. at 634-35 (Jackson, J., concurring).

107. Another view is that much of the "foreign affairs power" is not mentioned in the Constitution because the Founding Fathers assumed the new government had the powers any State may possess under international law. Justice Story observed that powers in the Constitution flow not only from the aggregate of enumerated powers but also "from the aggregate powers of the national government." For instance, Story argued, since the Constitution omits reference to extending jurisdiction over conquered territory, one must look to the nature of government (and *not* Amendment X) for this power. "This would perhaps rather be a result from the whole mass of the powers of the national government, and from the nature of political society, than a consequence or incident of the powers specially enumerated." 2 J. STORY, *supra* note 40, at 148. See also *Jones v. United States*, 137 U.S. 202, 212 (1890). Cf. *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936). In *The Chinese Exclusion Cases*, the Court noted that Congress possessed jurisdiction over and could, therefore, exclude aliens (even though there is no specific constitutional authority) since

[j]urisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. . . . [T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory.

130 U.S. 581, 603-04 (1889). See also *Burnett v. Brooks*, 288 U.S. 378, 396 (1933); *MacKenzie v. Hare*, 239 U.S. 299, 311 (1915).

Perhaps the most radical exposition of this thesis was by Mr. Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*, where it was stated that

the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and . . . found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

299 U.S. at 364 (citations omitted).

108. J.Q. ADAMS, *EULOGY ON MADISON* 47 (1836).

determine, from an architectural perspective, where the power should reside.

4. *The Separation of Institutions and Powers*

John Roche observed that ours is a government of separated institutions sharing powers.¹⁰⁹ The Supreme Court has noted that “[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers; it was woven into the document that they drafted in Philadelphia in the summer of 1787.”¹¹⁰ “This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands.”¹¹¹ In this regard, the Framers of our Constitution were profoundly influenced by Montesquieu,¹¹² whose injunction against the concentration of political power in any single branch of government was reflected in the Constitution’s balance of powers.¹¹³ Montesquieu observed:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary con-

109. See also *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880); *Kendall v. United States*, 37 U.S. (12 Peters) 524, 610 (1838). The doctrine of the separation of powers is nowhere stated in our Constitution; rather, it is “a conclusion logically following from the separation of the several departments.” *Springer v. Government Philippine Islands*, 277 U.S. 189, 201 (1928). *Accord Myers v. United States*, 272 U.S. at 89.

110. *Buckley v. Valeo*, 424 U.S. at 124. The separation of powers “is at the heart of our Constitution . . .” *Id.* at 119. *Accord Chadha*, 462 U.S. at 951-52, 962; *Springer v. Government Philippine Islands*, 277 U.S. at 201. *Cf. Miller & Knapp, The Congressional Veto: Preserving the Constitutional Framework*, 52 *IND. L.J.* 367, 390 (1977) (“It is doubtful that the concept of separation of powers can really have any objective meaning.”).

111. *O’Donoghue v. United States*, 289 U.S. 516, 530 (1933).

112. Madison observed that “[t]he oracle who is always consulted and cited on this subject is the celebrated Montesquieu.” *The Federalist* No. 47 (J. Madison), *supra* note 42, at 244. Although Montesquieu profoundly influenced the Framers, his injunctions were more in the nature of philosophical views than a blueprint of English government. Professor Fisher quotes Justice Holmes as saying that Montesquieu’s “England — the England of the threefold division of power into legislative, executive and judicial — was a fiction invented by him . . .” L. FISHER, *supra* note 44, at 248. Indeed, Fisher argued that

[o]ur structure of government owes its existence to the experiences of the framers, not the theory of Montesquieu or precedents borrowed from England. The framers used Montesquieu selectively, adopting what they knew from their own experience to be useful and rejecting what they knew to be inapplicable. The product was more theirs than his.

L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 10 (1985).

113. Montesquieu’s view that the maintenance of independence as between the legislative, the executive and the judicial branches was a “security for the people” and had the “full approval” of the Framers. *Myers v. United States*, 272 U.S. at 116.

troul; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.¹¹⁴

In *The Federalist* No. 47, Madison found that when Montesquieu said that governmental powers should be separated, he (Montesquieu) did not mean isolated or fully independent.

[H]e did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other. His meaning . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted.¹¹⁵

The Framers were rather pragmatic and motivated by a belief that political powers should not be divided completely among institutions, only that institutions should be independent of one another.¹¹⁶ Thus, said Madison, the three branches of Government "ought to be kept as separate from, and independent of each other as the nature of free government will admit; or as is consistent with the chain of connection, that binds the whole fabric of the constitution in one indissoluble bond of unity and amity."¹¹⁷

The powers of government, however, were to be shared, so that each branch would have a check upon the other. "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty."¹¹⁸ Madison argued in *The Federalist* No. 48 that the political powers of each department should not "be wholly unconnected with each other"

unless these departments be so far connected and blended, as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice, be duly maintained.

114. Quoted in CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 649 (4th ed. P. Freund, A. Sutherland, M. Howe, E. Brown, eds. 1977).

115. *The Federalist* No. 47 (J. Madison), *supra* note 42, at 245 (emphasis deleted).

116. This concept is often misunderstood. See, e.g., Vance, *Striking The Balance: Congress And The President Under The War Powers Resolution*, 133 U. PA. L. REV. 79, 84 (1984) (arguing that the war power does "not fit neatly into the classic concept of the separation of . . . powers. Instead, the area is one of shared and overlapping responsibilities . . .").

117. *The Federalist* No. 47 (J. Madison), *supra* note 42, at 246, quoting with approval the New Hampshire Constitution (emphasis deleted).

The Supreme Court observed in *Buckley v. Valeo*, 424 U.S. at 120, that there is "common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another."

118. *Bowsher v. Synar*, — U.S. —, 106 S.Ct. 3181, 92 L. Ed. 2d 583 (1986) (*Striking down the Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985*).

It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. It is equally evident, that neither of them ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next and most difficult task, is to provide some practical security for each against the invasion of the others. What this security ought to be, is the great problem to be solved.¹¹⁹

Perhaps the quintessential example of this sharing of powers is the War Power, which is divided between the political branches.¹²⁰ One can discern the constitutional repository for the power to decide to deploy U.S. armed forces into hostilities or imminent hostilities from an examination of the theory and practice of the separation of powers or, put another way, "by their nature, and by the principles of our institutions."¹²¹

There are two paths to find the constitutional resting place of this power. The first is the "more like" line of inquiry: Is the power to decide to deploy U.S. armed forces into hostilities or imminent hostilities more like the power to raise and support the army, or is it more like the power to command the forces once deployed? This is a theoretical inquiry involving an analysis of specifically enumerated war-related powers. The

119. *The Federalist* No. 48 (J. Madison), *supra* note 42, at 250.

120. Rostow, *supra* note 61, at 847. See also E. KEYNES, UNDECLARED WAR (1982); A. SOFAER, *supra* note 83, at 1-60. In *Atlee v. Laird*, 347 F. Supp. 689, 705 (E.D. Pa. 1972), *aff'd mem.* 411 U.S. 911 (1973), the district court noted that "the courts that have considered the war-making power of the United States have all agreed that such power is shared by the executive and legislature to the exclusion of the courts." See also *Mitchell v. Laird*, 488 F.2d 611, 613-14 (D.C. Cir. 1973); *Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971); *Berk v. Laird*, 429 F.2d 302, 305 (2nd Cir. 1970), *aff'd sub nom.*, *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971), *Drinan v. Nixon*, 364 F. Supp. 854, 859 (D. Mass. 1973).

The conduct of foreign relations generally is reserved to the political branches. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 3-2 (1918). See also *Chicago & Southern Airlines v. Waterman Steamship Co.*, 333 U.S. 103, 111 (1948). *U.S. v. First National Bank*, 396 F.2d 897, 901 (2nd Cir. 1968). This does not mean that "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). It is clear that

[t]he courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts . . . We cannot shirk this responsibility merely because our decision may have significant political overtones.

Japan Whaling Association v. American Cetacean Society —U.S. —, 54 U.S.L.W. 4929, 4931 (June 30, 1986).

121. *Ex parte Milligan* 71 U.S. (4. Wall.) at 139 (concurring opinion of Chase, C.J., and Wayne, Swayne and Miller, JJ.)

other line of inquiry is to look for constitutional analogies to determine where this power most properly resides. This will be done by an examination of cases involving the separation of powers.

a. *Constitutional division of war-related powers.*

As noted previously, the Constitution specifically assigns certain powers to Congress and others to the President.¹²²

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of the Congress, nor Congress upon the proper authority of the President. Both are servants of the people whose will is expressed in the fundamental law.¹²³

i. *The Congress*

Congress' powers include the raising of armed forces,¹²⁴ appropriating funds to support them,¹²⁵ prescribing rules to regulate their conduct¹²⁶ and, most importantly, the power to declare war.¹²⁷ Moreover, the Senate must approve Presidential nominees for promotion in the armed services.¹²⁸

The War Powers Resolution appears to be founded upon only one of Congress' powers: the power to declare war. It is clear, or at least well settled by custom and usage, that the Congress' power is not wider, since the President may send U.S. armed forces anywhere in the world, at any time he pleases,¹²⁹ subject only to restrictions in the law,¹³⁰ including (arguably) the War Powers Resolution. The theory underlying the War Powers Resolution is that the use of force *may* catapult the United States into a war, depriving the Congress of its power to decide whether or not

122. Moreover, a fundamental constitutional distinction exists between powers exercised in domestic and foreign affairs. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304.

123. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139 (concurring opinion of Chase, C.J., and Wayne, Swayne and Miller, JJ.). In his veto message of the War Powers Resolution, President Nixon stated: "The authorization and appropriations process represent one of the ways in which such influence can be exercised." "Veto of War Powers Resolution," *supra* note 2. *See also* Glennon, *Strengthening the War Powers Resolution: The Case for Purse-String Restrictions*, 60 MINN. L. REV. 1, 28-38 (1975). *But see* the possible constitutional conflict raised in note and text accompanying note 200 and as a possible limitation upon this power.

124. U.S. CONST. art. I, § 8, cls. 12 & 13.

125. U.S. CONST. art. I, § 8, cls. 12 & 13.

126. U.S. CONST. art. I, § 8, cl. 14.

127. U.S. CONST. art. I, § 8, cl. 11.

128. U.S. CONST. art. II, § 2, para. 2.

129. *See supra* note 114.

130. Such as prohibitions to spend funds for combat forces in a certain place. *See, e.g., Act of July 1, 1973, supra* note 14.

to declare war.¹³¹ Thus, the President's use of force may on this ground be restrained. This reasoning is historically and constitutionally flawed.¹³²

At least since the outset of the 20th century, this country has run little or no risk of becoming embroiled in a declared war because of the use of American troops without congressional approval. In the two largest military actions short of war, Korea and Vietnam,¹³³ the Congress willingly and continuously exercised its power in support of the use of troops in combat by raising armed forces through conscription and supporting them with ongoing appropriations. In the numerous minor incidents in which the President has ordered troops into hostilities, such as the Dominican Republic in 1965-1966 and Grenada in 1983, there was little risk of declared war.

ii. *The President*

The President's powers flow from his broad mandate; he is: vested with the "executive power,"¹³⁴ Commander in Chief¹³⁵ and the sole organ

131. Professor Henkin offers an alternative and interesting theory. He sees the policy aspect of the use of force as a source for Congressional war powers. See Henkin, 'A More Effective System' For Foreign Relations: *The Constitutional Framework*, 61 VA. L. REV. 751, 764 (1975).

132. This reasoning also ignores the fact that in the conduct of contemporary diplomacy, a wide variety of factors not involving the use of U.S. military forces might lead to war, such as food embargoes, economic sanctions, economic assistance to a State involved in an armed conflict and so forth. For instance, it is widely believed that the Japanese attack on Pearl Harbor which triggered the U.S.' entry into the Second World War, was caused in part by U.S. economic policies towards Imperial Japan. See generally B.H. LIDDELL HART, *HISTORY OF THE SECOND WORLD WAR* 199 (1970); G. PRANGE, *AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR* (1981). Surely, the Congress may not control or interfere with the President in these areas pursuant to its power to declare war; therefore, Congress' War Power has limits. Based upon the writings of the Founding Fathers, international law at the time and Revolutionary War-era Prize cases, there is little reason to doubt that the phrase "declare war" meant anything other than what it says.

133. Professor Henkin observed that

[o]f the numerous recent 'uses' of force, only Korea and Vietnam would have been clearly covered [by the War Powers Resolution]. Had such legislation been in effect, President Truman would perhaps have acted anyhow, but might have been impelled to seek Congressional approval within thirty days. Vietnam was expressly authorized, and, presumably, any Tonkin Resolution would have clearly authorized hostilities beyond thirty days as well.

L. HENKIN, *supra* note 55, at 103.

134. U.S. CONST. art. II, § 1. "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed . . ." *Myers v. United States*, 272 U.S. at 118.

135. See *infra* text accompanying notes 139-149.

Alexander Hamilton distinguished between the broad language of article II, § 1 and the specific grants in article I, § 1. "All legislative Powers *herein granted* shall be vested in a Congress of the United States." 7 WORKS OF ALEXANDER HAMILTON 76 (H.C. Lodge ed. 1851). Hamilton concluded that "[t]he [article II] enumeration [in §§ 2 & 3] ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, inter-

for the conduct of foreign relations.¹³⁶ These are amorphous but extremely potent powers, which led the Supreme Court to observe that “[t]he difference between the grant of legislative power under article I to Congress, which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article II is significant.”¹³⁷

A President may act upon the sum of his powers, while congressional action requires a specific constitutional provision, sweeping though it may be (consider the commerce power, for instance). Thus, a theoretical analysis may be reduced to a single question: Does the power to decide to deploy U.S. armed forces into areas of hostilities or imminent hostilities flow to Congress from one of its specific powers, or to the President under his broad mandate of executive powers?

(A) *Commander in Chief Power*

It has been stated repeatedly, and wrongly, in my view, that the font of the President’s War Power is his constitutional appointment as Commander in Chief.¹³⁸ One former Chief Executive and Chief Justice of the Supreme Court observed that “[t]he President is the Commander-in-Chief of the army and navy, and the militia when called into the service of the United States. Under this, he can order the army and navy anywhere he will, if the appropriations furnish the means of transportation.”¹³⁹ This is probably not the power upon which the President properly may ground a decision to decide to deploy U.S. armed forces into a new armed conflict, although it is the power to wage war effectively.¹⁴⁰ It is, therefore, a very potent power. For example, it was in the exercise of this power that Franklin Roosevelt agreed with Winston Churchill during

preted in conformity with other parts of the constitution.” *Id.* at 80-81.

136. *See supra* note 74.

137. *Myers v. United States*, 272 U.S. at 128.

138. In his concurring opinion in the *Steel Seizure Case*, Justice Jackson observed that the Commander in Chief power implies “something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by non assertion yet cannot say where it begins or ends.” 343 U.S. at 641.

139. W. TAFT, *THE PRESIDENT AND HIS POWERS* 94-95 (1916). During the debate surrounding the Congressional approval of the Act of March 3, 1909, 35 Stat. 773-74, requiring the President to maintain a complement of marines on Navy capital ships and cruisers of not less than 8 percent of the enlisted strength, Senator Borah stated:

Congress has not the power to say that an army shall be at a particular place at a particular time or shall manouver in a particular instance. That belongs exclusively to the Commander in Chief of the Army. The dividing line is between the question of raising, supporting and regulating an army, and commanding it. It is difficult to define, for the reason that it is difficult to tell where the dividing line is. But when it is ascertained, there is no question about the constitutional provision covering it.

43 CONG. REC. 2452 (1909).

140. T. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER* 113 (1974); Wallace, *supra* note 85, at 744-52 *et seq.*

the Casablanca Conference in January 1943 that their countries would demand the "unconditional surrender" of the three Axis powers;¹⁴¹ a decision of profound significance for the war effort. Similarly, President Lincoln based the emancipation proclamation upon the Commander in Chief power, claiming it was justified by military necessity.¹⁴² Further, President Truman based his decision to drop the atomic bomb on Japan but not to use it in the Korean conflict upon the Commander in Chief power.

The Commander in Chief delegation was intended to insure civilian control of the military¹⁴³ and, once hostilities existed, to vest the power to wage the struggle in the President.¹⁴⁴ In one of the most often quoted

141. For an interesting and well researched account of this momentous decision, see 7 M. GILBERT, WINSTON S. CHURCHILL: THE ROAD TO VICTORY, 1941-1945 309 (1986); H. FEIS, CHURCHILL, ROOSEVELT, STALIN: THE WAR THEY WAGED AND THE PEACE THEY SOUGHT 108-11 (2d ed. 1967). Roosevelt stated:

Peace can come to the world only by the total elimination of German and Japanese war power. . . . The elimination of German, Japanese, and Italian war power means the unconditional surrender by Germany, Italy, and Japan. That means a reasonable assurance of future world peace. It does not mean the destruction of the population of Germany, Italy, or Japan, but it does mean the destruction of the philosophies in those countries which are based on conquest and the subjugation of other people.

Quoted in *id.* at 109.

142. See *supra* note 143.

143. 10 Op. Att'y Gen. 74, 79 (1861). See also L. HENKIN, *supra* note 55, at 50; A. SCHLESINGER, *supra* note 55, at 6. "By making the Commander in Chief a civilian who would be subject to recall after four years, the Founders doubtless hoped to spare America tribulations of the sort that the unfettered command and consequent political power of a Duke of Marlborough had brought to England." *Id.*

The Commander in Chief power may and, in fact, has crossed the threshold and become a substantive power. Perhaps the best example of this is when President Abraham Lincoln used this power as his constitutional authority for the Emancipation Proclamation. Lincoln claimed this was a necessary military measure to shorten the Civil War. W. WHITING, WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES 66 (10th ed. 1864, reprinted in 1971). See also G. MILTON, THE USE OF PRESIDENTIAL POWER 1789-1943 118 (1965). Whether or not the Emancipation Proclamation was needed for military reasons, it certainly aided Lincoln politically in the northern states. Of all the Presidents, Lincoln made the widest and most frequent use of this power. *Id.* at 316.

144. The Founding Fathers wanted to assure that control of military activities was not vested in the Congress because of the experience of war by committee during the war of independence. It was in this vein that Hamilton wrote that "[]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *The Federalist* No. 74 (A. Hamilton), *supra* note 42, at 376.

It has been observed that:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interfere with the command of the forces and the conduct of campaigns. That power and duty belongs to the President as commander-in-chief.*

Ex parte Milligan, 71 U.S. (4 Wall.) at 139 (Chase, C.J., and Wayne, Swayne, and Miller, JJ., concurring) (emphasis added). In *Swain v. United States*, 28 Ct. Cl. 173, 221 (1893),

passages of *The Federalist*, Alexander Hamilton opined that the power of the Commander in Chief "amount[ed] to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral. . ."¹⁴⁵ Although the Commander in Chief power is broad and involves policy-making when war (and, perhaps, even high intensity armed conflict) exists,¹⁴⁶ this power was neither intended to nor does it authorize the President to make the policy decision to involve U.S. armed forces in combat, with the exception of areas such as self-defense and preemptive strikes.¹⁴⁷ Justice Jackson, in his concurring opinion in the *Steel Seizure Case*, rejected the notion that it vests the President with the "power to do anything, anywhere, that can be done with an army or navy."¹⁴⁸ Chief Justice Stone observed in the *Nazi Saboteurs Case* that the Constitution "invests the President as Commander in Chief with power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces."¹⁴⁹ In *United States v. Sweeny*,¹⁵⁰ the Supreme Court observed that the Commander in Chief power "is evidently to vest in the President the supreme command over all the military forces, — such supreme and undivided command as would be necessary to the prosecution of a successful war."¹⁵¹ Surely we would not claim that the joint chiefs of staff have the constitutional authority to decide, as a matter of national political policy, that armed force as opposed to negotiation should be employed in a given situation. How, then, can it be that the "first General and Admiral" is to be treated differently? The Commander in Chief power gives the President the authority to deploy armed forces, but not to *decide* to deploy them.

(B) Foreign Policy Power

The decision to use American troops, in situations short of war, is clearly related to the conduct of U.S. foreign policy—an executive, rather than a legislative, function.¹⁵² The President¹⁵³ is responsible for sending

aff'd, 165 U.S. 553 (1897), the Court of Claims noted that "Congress may increase the Army, or reduce the Army, or abolish it altogether . . . but so long as we have a military force Congress can not take away from the President the supreme command."

145. *The Federalist* No. 69 (A. Hamilton), *supra* note 42, at 350. See also Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850). (The Commander in Chief power did not "extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.")

146. This includes certain powers affecting citizens within the United States. See E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984* 231, 242 *et seq.* (5th rev. ed. 1984). Cf. *Youngstown Sheet & Tube Co.*, *supra*.

147. See L. HENKIN, *supra* note 55, at 53. But see Rehnquist, *The Constitutional Issues — Administration Position*, 45 N.Y.U.L. REV. 628, 631-32 (1970).

148. 343 U.S. at 641-42 (Jackson, J., concurring).

149. *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

150. 157 U.S. 281 (1895).

151. 157 U.S. at 284.

152. The State Department took the position at one point that the President's use of

and recalling ambassadors, opening and closing embassies, formulating and coordinating geopolitical strategy, negotiating trade agreements, entering into executive agreements, presenting and prosecuting international claims, and a host of other international activities inherent in the foreign policy power. There is no question that the projection of military power is a means of conducting foreign policy.¹⁵⁴ Diplomacy and the use of force "are complementary aspects to the . . . art of conducting relations with other states."¹⁵⁵ Thus, "foreign policy and war are on a continuum."¹⁵⁶ Consider, for example, the "Carter Doctrine." In his State of the Union address on January 23, 1980, President Carter proclaimed: "An attempt by an outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States. It will be repelled by use of any means necessary, including military force."¹⁵⁷ Similarly, in his State of the Union address on December 2, 1823, fearing the reconquest of Spanish America by the Holy Alliance in favor of the Bourbons, President James Monroe declared that the United States "should consider any attempt . . . to extend [foreign intervention] to any portion of this hemisphere as dangerous to our peace and safety."¹⁵⁸ This became known as the Monroe Doctrine.¹⁵⁹ President

force in foreign policy is outside the Congress' direct power to control.

Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that his authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.

Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Comm. on Foreign Relations and Armed Services, 82d Cong., 1st Sess. 92-93 (1951) (statement of Secretary of State Dean Acheson), reprinted in *THE POWERS OF THE PRESIDENT AS COMMANDER IN CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES* 66, 71 (D. Schaffer & D. Mathews eds. 1974). The implication of this testimony is that the constitutional restraints on the use of force in the conduct of foreign policy are the same as those which apply to the normal conduct of diplomacy.

153. In foreign policy making, Americans tend to adopt an anthropomorphic view. Of course, the President does not single-handedly make foreign policy decisions; rather, there are any number of departments of the U.S. Government which daily contribute to the foreign policy process. For instance, there are 26 federal government agencies, departments and offices which regularly participate in international trade policy making.

154. Clausewitz observed that the use of force is yet another means of conducting politics. K. CLAUSEWITZ, *ON WAR* 101 (1968).

155. R. ARON, *PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS* 24 (1966).

156. Wallace, *supra* note 85, at 733.

157. "Transcript of President's State of the Union Address to Joint Session of Congress," *N.Y. Times*, Jan. 24, 1980, at A 12, col. 3.

158. The Monroe Doctrine, reprinted in R. MORRIS, *supra* note 87, at 99.

159. In his State of the Union address on December 2, 1845, President James Polk reasserted the Monroe Doctrine, expanding it to prohibit diplomatic intervention by outside powers in the New World. He concluded that "[t]he people of the United States can not, therefore, view with indifference attempts of European powers to interfere with the independent action of any nation on this continent." Admittedly, the Monroe Doctrine was transformed from a defensive measure to a justification for intervention by President Theodore Roosevelt in his State of the Union address on December 6, 1904, in what later became known as the Roosevelt Corollary to the Monroe Doctrine, during the heyday of American

Woodrow Wilson issued the Fourteen Points in a declaration that had profound consequences for American foreign policy.¹⁶⁰ Historian Arthur Schlesinger noted that “[t]he Fourteen Points were of critical significance to the war and peace, but this was entirely a presidential initiative, without congressional consultation or clearance.”¹⁶¹ Other notable instances where Presidents have set American foreign policy which implicated the use of force include: the stationing of combat troops in Iceland in July 1941, the Atlantic Charter of August 14, 1941, and the Truman Doctrine of March 2, 1947, from which sprang the policy of containment. On October 23, 1962, President John F. Kennedy issued the Proclamation of a Quarantine of Offensive Weapons to Cuba during the Cuban Missile Crisis.¹⁶² President Kennedy ordered the U.S. Navy to blockade the shipment of offensive weapons to Cuba, using force if necessary, and unquestionably bringing this country to the brink of war.

Moreover, is there any doubt that the decision whether or not to recognize another country, to establish an embassy and to exchange ambassadors, is an executive function? Could the Congress order the President to recognize a country? Could the Congress block the President’s recognition of a country? The Supreme Court answered these questions with a resounding “no” in *United States v. Pink*¹⁶³ and *United States v. Belmont*,¹⁶⁴ holding that as the “sole organ of the federal government in the field of international relations,”¹⁶⁵ these powers, either explicitly or implicitly, belong to the President. In fact, one proponent of the War Powers Resolution conceded that “the President undoubtedly possesses an exclusive power to initiate a military commitment, power that Congress may not negate or otherwise control.”¹⁶⁶

Perhaps the zenith of Congress’ foray into the field of foreign relations was in the inter-war period, 1919-1939, when isolationists blocked the U.S.’ adherence to the Versailles Treaty, entry into the League of Nations, rejection of American participation in the Permanent Court of International Justice and a host of other activities. History has revealed the failure of these policies and the Congress’ role in their formulation.

(C) *Executive Power*

Even within the foreign affairs context, the President is vested with perhaps the broadest of all delegations of authority—the Executive power. It is axiomatic that the Constitution was created to supersede the

gunboat diplomacy.

160. The Fourteen Points, in R. MORRIS, *supra* note 87, at 153.

161. A. SCHLESINGER, *supra* note 55, at 93.

162. “Interdiction of the Delivery of Offensive Weapons to Cuba,” Proclamation No. 3504, 27 Fed. Reg. 10,401, *reprinted in* 47 Dep’t State Bull. 717 (1962).

163. *United States v. Pink*, 315 U.S. 203.

164. *United States v. Belmont*, 301 U.S. 324.

165. *United States v. Curtiss-Wright Corp.*, 299 U.S. at 320. *See supra* note 74.

166. Buchanan, *supra* note 16, at 1170.

Articles of Confederation, that a stronger and effective central government was preferred to a weak one.¹⁶⁷ The *raison d'être* of the constitutional blueprint was to replace administration by legislative committee (and not much of an administration, at that) with government by a single magistrate. Whether or not the Founding Fathers harbored an original intention that the President would have the power to decide to deploy armed forces into areas of hostilities or imminent hostilities, it is beyond question today that, of the three branches of government, this is most appropriately an Executive function, both by constitutional design and by the reality of conducting foreign policy.

This analysis is also supported by the constitutional concept of checks and balances. It is beyond doubt that Congress may control the President's use of the armed forces, among other ways, simply by placing limitations upon appropriations. Moreover, the Executive branch is required to continue to report to the Congress because of its oversight responsibilities and to continue to obtain funds. On a political level, the President must maintain good relations with Congress, lest he find political pressure applied along a spectrum of activities. Admittedly, Congress' checks against Presidential action cannot be implemented quickly.¹⁶⁸ Then again, the constitutional checks and balances were not intended to act speedily.

That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.¹⁶⁹

However, "Congressional unwillingness to use its constitutional powers cannot be deemed a sufficient reason for inventing new ways to act."¹⁷⁰

The Congress can no more appropriate the power to decide to deploy U.S. armed forces into areas of hostilities or imminent hostilities, without specific legislation, *e.g.*, to conduct U.S. naval exercises off the Libyan coast or to escort ships in the Persian Gulf, than it could to recognize or to sever relations with another country.

a. *Case law*

The seminal case on the separation of branches of our government is *Myers v. United States*.¹⁷¹ *Myers* arose when the President dismissed the Postmaster of Seattle, despite a law requiring the advice and consent of the Senate. In a thorough and scholarly analysis of the separation of gov-

167. See generally *The Federalist* No. 70 (A. Hamilton), *supra* note 42.

168. See *infra* note 201.

169. *Bowsher v. Synar*, — U.S. at —, 54 U.S.L.W. 5064, 5066 (U.S. July 2, 1986).

170. *Consumer Energy Council of America, Inc. v. Federal Energy Regulatory Commission*, 673 F.2d 425, 477 (1982).

171. *Myers v. United States*, 272 U.S. 52.

ernmental branches and powers, the Court reasoned that the constitutional blueprint required a constant tension between the political branches of government.¹⁷³ This tension was designed to prevent any single branch from usurping the power of another. Since the Constitution itself was silent with respect to the power of removal,¹⁷³ the Court looked to how the tension between the political branches was to be maintained. In examining the structure of government, the Court quoted Madison, who observed:

The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. . . . We ought always to consider the Constitution with an eye to the principles upon which it was founded. . . . [I]f the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also. The nature of things restrains and confines the Legislative and Executive authorities in this respect; and hence it is said that the Constitution stipulates for the independence of each branch of the Government.¹⁷⁴

Here was an explanation of the theory upon which the checks and balances were grounded. The Legislature and the Executive should have the ability to impose their wills on the other, to some extent, each within its constitutional mandate.¹⁷⁵ This led the Court to conclude that to allow Congress to have a "veto" over the dismissal of an officer of the Executive branch amounted to an overreaching of power, vesting too much control in Congress.¹⁷⁶ Besides, the power to dismiss an official is more properly

172. For in this tension, or rivalry for supremacy, the Founding Fathers placed their hopes for co-equal branches which would prevent the collection of political powers in one branch or individual. *See generally* *The Federalist* No. 48 (J. Madison), *supra* note 42. Justice Brandeis noted in his dissenting opinion in *Myers* that

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

Myers v. United States, 272 U.S. at 293 (Brandeis, J., dissenting). *See further* M. FARRAND, *supra* note 35, at 400 (statement of Mr. Dayton in the Senate, Nov. 4, 1803).

173. U.S. CONST. art. II, § 2, cl. 2 gives the President the power to make appointments, subject to the advice and consent of the Senate.

174. *Myers v. United States*, 272 U.S. at 128-129.

175. *See, e.g., Chadha*, 462 U.S. at 955 & n. 21.

176. In *Buckley v. Valeo*, 424 U.S. at 131-32, the Court held that Congress could not appoint a majority of the voting members of an independent commission (Federal Election Commission) because it violated the Appointments Clause. U.S. CONST. art. II, § 2, cl. 2. This amounted to an unconstitutional infringement upon executive power since the President is to nominate and, with the Senate's advice and consent, shall appoint all "Officers of the United States," even though "Congress has express authority to regulate congressional elections, by virtue of the power conferred in U.S. CONST. art. I, § 4. The Court's holding,

an Executive function than a legislative function. To hold otherwise, said the Court, would violate the principle of the separation of institutions.¹⁷⁷

In the War Powers context, the same fundamental dilemma is posed. Professor Corwin characterized this as "an invitation to struggle for the privilege of directing American foreign policy."¹⁷⁸ How far can the Congress go without infringing upon the President's power and tipping the delicate constitutional balance in the struggle for control of foreign policy? The Congress has the power to raise the armed forces, to provide for their support, to define the qualifications for its members, to approve appointments and promotions of officers, and to prescribe rules for its conduct. It ultimately can control the use of the armed forces through the appropriations process. Can it also be said of the War Powers that the Congress may direct the Executive when and how to use the armed forces directly or through a legislative veto? How does this differ from ordering the President to give a prescribed set of policy instructions to the Postmaster General? In this sense, *Chadha* is implicated. In *Chadha*, the Attorney General was delegated certain powers, subject to a congressional veto. The Court found this violated the doctrine of the separation of institutions. The same reasoning applies to the War Powers Resolution, which allows Congress to veto the President's policy decision to use armed force. It is clear that the War Powers Resolution violates the separation of powers and institutions upon which our Constitution is based.

IV. IMPLICATIONS OF THE WAR POWERS RESOLUTION FOR CONDUCTING U.S. FOREIGN POLICY

One writer has noted that "the problem addressed by the War Powers Resolution is at least as much political as it is constitutional . . ."¹⁷⁹

What effect, if any, does the War Powers Resolution have on the conduct of American foreign policy? First, it serves as a symbol to foreign nations that the Executive branch is not free to project military power, regardless of the political effectiveness such action could have.¹⁸⁰ Thus, the War Powers Resolution tends to make the United States look like a "Paper Tiger" in the eyes of many allies and other countries. Second, the

however, rested upon the explicit nature of the Appointments Clause. In *Consumer Energy v. F.E.R.C.*, 673 F.2d 425, the District of Columbia Court of Appeals struck down a statute providing for a rejection of an agency plan to deregulate natural gas prices should either house of Congress exercise a legislative veto. Following the holding of *Buckley v. Valeo*, the court observed that "[i]t would be anomalous in the extreme to hold that Congress may not appoint the officials who make rules, but may enact a mechanism permitting effective congressional control over those officials' decisions." *Id.* at 474. See also *Springer v. Philippine Islands*, 277 U.S. 189.

177. *Myers*, 272 U.S. at 167.

178. E. CORWIN, *supra* note 146, at 171.

179. P. HOLT, *THE WAR POWERS RESOLUTION: THE ROLE OF CONGRESS IN U.S. ARMED INTERVENTION 1* (1978). See also Wallace, *supra* note 85, at 721 *et seq.*

180. *Cf.* notes and text accompanying notes 154-159, *supra*.

War Powers Resolution may actually encourage a group or a State to prolong a conflict beyond the 60 and 90 day deadlines. In this sense, the War Powers Resolution may actually encourage a higher intensity of fighting, and for a longer period of time, possibly foreclosing to the United States the opportunity to apply precise and swift force. Alternatively, it may force the U.S. to make otherwise unnecessary concessions in negotiations to terminate the American presence. Third, and perhaps a corollary of the second point, it may encourage a President to use overwhelming force where a smaller action was called for in order to avoid the 60 day provision. Fourth, the War Powers Resolution might force the Congress, for political reasons, to support a presidential action which, upon deliberative reflection, it might otherwise have opposed. Finally, the War Powers Resolution is an invitation to foreign States to wage a political struggle within the U.S. By virtue of our open society, we find that State sponsors of terrorism, such as Iran,¹⁸¹ Libya¹⁸² and Syria,¹⁸³ and even international terrorists like Yassir Arafat and Abu Abbas, have ready access to the American news media.¹⁸⁴ In some cases, this access has been employed skillfully in an attempt to divide the country politically through disinformation.

These drawbacks are most evident in the United States' effort to combat international terrorism. Following the U.S. raid on Libya in response to that country's continued State-sponsored terrorism,¹⁸⁵ there was wide disagreement on Capitol Hill whether the War Powers Resolution did or should apply.¹⁸⁶ The time may come when the President of the United States is compelled to strike a blow at the international terrorist network.¹⁸⁷ What he will need is the full support of the country, including the Congress, lest the action cause more harm (domestically) than good (internationally). But the War Powers Resolution may be triggered by events short of the actual use of force,¹⁸⁸ such as naval exercises off the Libyan coast — arguably an area of "imminent hostilities," or by escorting U.S.-flag vessels into the Persian Gulf during the Iran-Iraq war.¹⁸⁹

181. See Larschan, *Legal Aspects to the Control of Transnational Terrorism: An Overview*, 13 OHIO N.U.L.REV. 117, 125 (1987).

182. *Id.*

183. *Id.* at 126.

184. See generally TERRORISM, THE MEDIA AND THE LAW (A. Miller ed. 1982).

185. Dale, *US defends Libya raid*, Financial Times (London), Apr. 16, 1986, at 1, col. 3; Weintraub, *American Bombers Strike Bases in Libya; President Asserts Raid Is In Retaliation For "Reign of Terror" Linked to Qaddafi*, N.Y. Times, April 15, 1986, at A1, col. 6; Wilson & Hoffman, *U.S. Warplanes Bomb Targets in Libya As 'Self-Defense' Against Terrorism*, Wash. Post, Apr. 15, 1986, at A1, col. 1.

186. Dewar & Walsh, *War Powers Act Scrutinized*, Wash. Post, Apr. 16, 1986, at A30, col. 1.

187. See, e.g., Ottaway, *Schultz Emphasizes Use of Covert Antiterrorism, Vows to Consult Congress*, Wash. Post, May 16, 1986, at A1, col. 1.

188. See, e.g., the examples cited *infra* at note 212.

189. Roberts, *Congress and White House at Odds Over Growing Presence in Gulf*, N.Y. Times, May 21, 1987, at A19, col. 1.

This also triggered debate on the applicability of the WPR.¹⁹⁰ One wonders whether it is unrealistic to require, as a matter of law, that the President consult the whole Congress¹⁹¹ *before* American troops are engaged in hostilities or areas of potential hostilities? A sound U.S. foreign policy should not permit requiring the President to withdraw troops in 60 or 90 days because the Congress failed to take affirmative steps to approve the action. Among other things, this is an encouragement to terrorists to hold out until the War Powers Resolution requires the withdrawal of American forces. Turner has analogized this to

the experience of French socialist Premier Mendes-France, who announced in June 1954 that he would resign if he did not succeed in arranging a cease-fire in Indochina by July 20 of that year. The communist delegations at the Geneva Conference realized that the longer they stalled the more concessions he would be willing to make to preserve his job. The serious negotiations took place during the final hours of July 20, and shortly before midnight the wall clock was unplugged to permit the French delegation to make a few more concessions within the artificial time deadline.¹⁹²

At the very least, the WPR hands the terrorists yet another propaganda victory by forcing a political debate over the use of force *before* the action is concluded.

The natural and understandable response to this is that Congress should have a voice in the use of American armed forces. However, this cannot be effected by methods and processes which themselves undermine the Constitution. The proper Congressional role is three-part: legislative, budgetary and oversight. The Congress should be an active partner in Executive decisions relating to the use of U.S. armed forces. As a prac-

On May 17, 1987, an Iraqi warplane fired two missiles, apparently in error, at the U.S.S. *Stark*, on patrol in the Persian Gulf. Thirty-seven American seamen were killed and the *Stark* was heavily damaged. Wilson & Cannon, *Iraqi Missile Sets U.S. Frigate Ablaze, Causing Casualties*, Wash. Post, May 18, 1987, at A1, col. 5. President Reagan felt compelled, for political reasons, to publicly state that the U.S. actions would not lead to war. Sciolino, *Reagan Says U.S. Presence In Gulf Won't Lead to War*, N.Y. Times, May 27, 1987, at A14, col. 5.

190. See, e.g., *Guns in August*, N.Y. Times, Aug. 12, 1987, at A22, col. 1 (editorial); Adams, *Invoke the War Powers Act*, Wash. Post, June 29, 1987, at A13, col. 3; Cannon, *President Minimizes War Risk, But Senators Warn Of U.S. Involvement In Iran-Iraq Conflict*, Wash. Post, May 28, 1987, at A1, col. 6. Compare 133 Cong. Rec. S7,262-63 (daily ed. May 28, 1987) (statement of Sen. Helms)(arguing against applicability of WPR) with letter from Sen. Claiborne Pell to Sec'y of State Shultz (May 21, 1987) (arguing in favor of applicability of WPR).

191. If, as the war Powers Resolution claims, the Congress has the exclusive war power, what is the constitutional validity of consulting with only a handful of Congressional leaders? Is not the Congress, as an institution, to be consulted if there is a constitutional requirement? On a practical level, the most that can and, perhaps, should be expected is that Presidents will consult with Congressional leaders to obtain a sense of the Congress and to make a symbolic attempt to work in tandem with the legislature prior to and during the use of armed force abroad.

192. TURNER, *supra* note 34, at 687.

tical matter, no use of armed force will succeed without at least some support from Congress.¹⁹³ One must avoid overstating the virtues of the Congress at the expense of the Executive by overlooking the effect of the inevitable swings of public opinion on Congress' position on the use of force. After the First World War, the isolationists in Congress effectively eviscerated the Executive's foreign policy powers. It is generally agreed that our international relations in the inter-war period were, perhaps, the worst in our history. Partly as a consequence, the Presidency emerged as not the preeminent, but the exclusive organ of foreign relations upon the U.S.' entry into the Second World War. Indeed, the popular perception, inside and outside of Congress at that time, was that the legislative branch was not to be trusted with foreign policy. It was not until the twin political crises of Vietnam and Watergate that the pendulum swung the other way, leading to a resurgence of Congressional power — and the War Powers Resolution.¹⁹⁴ In noting this phenomenon of American politics, Walter Lippmann observed that

[t]he unhappy truth is that the prevailing public opinion has been destructively wrong at the critical junctures. The people have imposed a veto upon the judgments of informed and responsible officials. They have compelled the governments, which usually knew what would have been wiser, or was necessary, or was more expedient, to be too late with too little, or too long with too much, too pacifist in peace and too bellicose in war, too neutralist or appeasing in negotiation or too intransigent. Mass opinion has acquired mounting power in this century. It has shown itself to be a dangerous master of decision when the stakes are life and death.¹⁹⁵

In this, Lippmann echoed the astute observations of Alexis de Tocqueville, who noted “[t]he propensity which democracies have to obey the impulse of passion rather than the suggestions of prudence . . .”¹⁹⁶ Referring to England's political leadership during the second half of the 1930s, Winston Churchill summarized the prevailing credo: “I am their leader, therefore I must follow them.”

One must not generalize from this to say that Congress, because it is most susceptible to the whims of public opinion, should hold or should exercise all or none of the War Powers.¹⁹⁷ In fact, American Presidents

193. Revely observed that “the constitution does impose an iron demand on the President and Congress: that they cooperate if any sustained venture for war or peace is to succeed.” W. REVELY, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROW AND OLIVE BRANCH?* 49 (1981).

194. Rostow, *Once More Unto the Breach: The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1 (1986).

195. W. LIPPMANN, *THE PUBLIC PHILOSOPHER* 23 (1955).

196. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* Ch. 13, p. 273 (H. Reeve trans. 1974).

197. *But see* Talbot v. Seemans, 5 U.S. (1 Cranch) at 28, in which Chief Justice Marshall said that “[t]he whole powers of war being, by the constitution of the United States, vested in congress . . . At least one scholar has stated that Marshall had in mind a federal-

should and frequently do consult with congressional leaders prior to engaging American forces in hostilities. Often, however, secrecy and speed are the essential ingredients to a successful foreign policy, including the use of force.¹⁹⁸ Professor Aron observed that “[t]he weapons of mass destruction, the techniques of subversion, the ubiquity of military force because of aviation and electronics, introduce new human and material factors which render the lessons of the past equivocal at best.”¹⁹⁹ Consider, for example, President Kennedy’s employment of armed forces during the Cuban Missile Crisis, President Johnson’s invasion of the Dominican Republic, President Carter’s ill-fated Iranian rescue mission and President Reagan’s actions in Grenada. Should the whole Congress have been consulted? What of speed and secrecy?

To recognize contemporary political realities is not to deny that the Congress possesses legitimate — and vital — powers. Presidents are politically dependent upon the Congress for continued support,²⁰⁰ both for the use of the troops as well as for the entire range of domestic and foreign policies. A President can ill afford to alienate the Congress, especially on an issue as sensitive as the use of American troops. In this sense, the War Powers Resolution is superfluous.

Moreover, the War Powers Resolution is a disservice to the Congress and the country. It forces the Congress to confront the use of force in an artificially narrow period, depriving it of the time to gain a perspective on the armed conflict, to weigh the effectiveness of the action in terms of U.S. foreign policy objectives and to determine, as far as possible, whether the use of force will achieve those objectives. In most cases, the

ism issue when he wrote this, *i.e.*, that the federal government, and not the *states*, had the “whole powers of war.” B. ZIEGLER, *supra* note 73. This was the first case decided by the Supreme Court after Marshall’s appointment. 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 16 (1919).

198. Certainly this was recognized with respect to the negotiation of treaties. See *The Federalist* No. 64 (J. Jay), *supra* note 42, at 327; *The Federalist* No. 75 (A. Hamilton), *supra* note 42, at 379.

199. R. ARON, *supra* note 155, at 2.

200. One respected scholar observed that there are constitutional limitations on Congress’ power to control executive conduct of armed conflict through the appropriations process. See Wallace, *supra* note 85, at 748-52. This also seems to be the position taken by Monroe Leigh when he was State Department Adviser, when he testified that:

I do believe personally that such matters [as the Cambodia and Vietnam evacuations] involve the inherent constitutional power of the President and I don’t think that every limitation that Congress might enact on an appropriation or otherwise is necessarily a constitutional one. I think there are some that would be plainly unconstitutional.

Hearings on Compliance with the War Powers Resolution Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 1st Sess. 35 (testimony of Monroe Leigh) (1975).

It has been stated, however, that the Supreme Court has never held unconstitutional any use of the appropriations power as a counter-weight to Presidential action. See *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION*, S. DOC. No. 82, 92d Cong., 2d Sess. 1597-1619 (1973).

use of force is popular in at least the first two or three months; because of this, Congress may give its blessing to an armed conflict by riding the crest of nationalistic fervor. The strength of the Congress lies in its thorough — and time-consuming — “step-by-step, deliberate and deliberative process,”²⁰¹ evaluating all the facts, discussing all the issues, before committing itself.

The War Powers Resolution was designed to deal with one President and one armed conflict.²⁰² The Congressional override of the presidential veto came less than three weeks after the “Saturday night massacre,” when Attorney General Elliot Richardson and Deputy Attorney General William French Smith resigned rather than dismiss Watergate special prosecutor Archibald Cox.²⁰³ But would the War Powers Resolution have prevented the Vietnam episode? The answer is probably not.²⁰⁴ The Gulf of Tonkin Resolution²⁰⁵ almost certainly gave the President the legal sup-

201. *Chadha*, 462 U.S. at 959. “What emerges from our analysis of the purpose of the law making restrictions in Article I is that the Framers were determined that the legislative power should be difficult to employ.” *Consumer Energy Council of America v. F.E.R.C.*, 673 F. 2d at 464. Cf. the statement by former Senator Javits that

[i]n most situations, even when a clear consensus is presented, it takes a long time for Congress to make its legislative will, owing, in large measure, to the various forms a single, affirmative, legislative remedy may take. A simple and unamenable resolution of approval or disapproval adopted pursuant to a legislative veto provision incorporated into an earlier statute, however, avoids the institutional delays and permits expedited postenactment review.

Javits & Klein, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U.L. REV. 455, 462 (1977).

202. Eugene Rostow observed just prior to the enactment of the War Powers Resolution that [w]e wisely refrained from curbing the powers of the Supreme Court even after the catastrophic error of *Dred Scott*. The same calm prudence should guide our course now, with respect to the Presidency. Rostow, *Great Cases Make Bad Law: The War Powers Act*, *supra* note 61, at 836.

203. It is at best problematic that the veto of the War Powers Resolution would have been overridden absent the unique domestic political conditions in the country at the time, and especially the “Saturday night massacre.” See R. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 109 (1983); TURNER, *supra* note 34, at 685.

204. See *supra* the cases cited in note 120.

205. H.R.J. Res. 1145, 88th Cong., 2d Sess. (1964); Pub. L. No. 88-408, 78 Stat. 384, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 441-42. The Gulf of Tonkin Resolution provides that

The Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

port required by Section 5(b) of the War Powers Resolution to bypass the entire issue of the 60 or 90 day deadlines.²⁰⁶ In fact, as previously noted, the Congress enabled the President to continue American involvement in Vietnam through the draft and massive appropriations.²⁰⁷

The War Powers Resolution would have had a devastating impact, however, on the United States' entry into the Second World War. The American Congress was unalterably opposed to entering the war against Germany between 1939 and 1941, even as Hitler tightened his grip on Europe and the Battle of Britain raged.²⁰⁸ It is often overlooked that in August 1941, the House of Representatives renewed mandatory conscription by a single vote.²⁰⁹ This led President Franklin Roosevelt, who favored an early U.S. entry into the war, to confide at the close of the Argentia summit conference that he intended to wage war, not to declare it.²¹⁰ The same can be said of the United States' entry into the First World War and repelling the invasion of South Korea. Would Presidents Wilson or Truman have risked precipitating a constitutional crisis by challenging the War Powers Resolution?²¹¹ Perhaps they would have felt compelled to do so; but would a constitutional crisis have been in the

Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by the actions of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

On the Tonkin Gulf Resolution, see generally J. GALLOWAY, *THE GULF OF TONKIN RESOLUTION* (1970). See also *The Gulf of Tonkin, The 1964 Incident: Hearing Before the Senate Comm. on Foreign Relations*, 90th Cong., 2d Sess. (1968). The Gulf Of Tonkin Resolution was repealed in January 1971, Pub. L. No. 91-672; 84 Stat. 2053, 2055, 91st Cong., 2d Sess. (1971).

206. Compare, for example, the remarks of Sen. Fulbright, 110 CONG. REC. 18,409 (1964), with Sen. Morse, 110 CONG. REC. 18,430 (1964).

207. See, e.g., Supplemental Appropriation, Pub. L. No. 89-18, 79 Stat. 109; Defense Appropriations Act, Pub. L. No. 91-171 § 638, 83 Stat. 469, reprinted in 1969 U.S. CODE CONG. & AD. NEWS 507.

208. When President Roosevelt warned the Congress in 1939 that the world was teetering on the brink of war, Senator William E. Borah stated that there would be no war with Germany. "I have my own sources of information," he said, insisting on continuing the policy of isolationism. W. LANGER & S. GLEASON, *THE CHALLENGE TO ISOLATION, 1937-1940* 144 (1952).

209. G. PRANGE, *supra* note 132, at 178. "No wonder that Nomura [Japan's Ambassador to the United States] could never quite convince the Foreign Ministry that the Americans 'meant business'; talk and bluster were cheap, but when it came to a hard vote to lay before their constituents, Congress felt safe in nearly scuttling the draft." *Id.*

210. See, e.g., J. COLVILLE, *THE FRINGES OF POWER: 10 DOWNING STREET DIARIES 1939-1955* 428 (1985); P. ABBAZIA, *MR. ROOSEVELT'S NAVY: THE PRIVATE WAR OF THE U.S. ATLANTIC FLEET, 1939-1942* 220 (1975); 6 M. GILBERT, *WINSTON S. CHURCHILL: FINEST HOUR, 1939-1941* 1168 (1983). In fact, this is precisely what Roosevelt did *prior* to formal hostilities, with the Destroyers for Bases deal, see *supra* note 67, and with the so-called War in the Atlantic, in which Roosevelt declared that any German or Italian warship in the western half of the Atlantic would be attacked by the U.S. Navy. See, e.g., note 139.

211. Senator Robert C. Byrd stated that "the *Chadha* decision has driven us to attempt to correct what would probably be a constitutional crisis at exactly a time the Nation could not afford it." 129 CONG. REC. S14,164 (daily ed. Oct. 19, 1983).

country's best interest at so delicate a period? President Nixon argued that the War Powers Resolution "would have vastly complicated or even made impossible" the U.S. actions in the 1961 Berlin Crisis, the Cuban Missile Crisis, the Congo rescue operation in 1964 and the 1970 Jordanian Crisis.²¹² He went on to observe that the War Powers Resolution would

undercut the ability of the United States to act as an effective influence for peace. For example, the provisions automatically cutting off certain authorities after 60 days unless they are extended by the Congress could work to prolong or intensify a crisis. Until the Congress suspended the deadline, there would be at least a chance of United States withdrawal and an adversary would be tempted therefore to postpone serious negotiations until the 60 days were up. Only after the Congress acted would there be a strong incentive for an adversary to negotiate. In addition, the very existence of a deadline could lead to an escalation of hostilities in order to achieve certain objectives before the 60 days expire.²¹³

As tragic as the American experience was in Vietnam, this cannot erase the lessons learned throughout our history, that the President is far better equipped than the Congress to determine when armed force should be used. The effect of the War Powers Resolution is to undermine the ability of the President to project military power. This is especially important when the United States is confronted with acts of international terrorism, where speedy and decisive action may be required.

V. CONCLUSION

Sections 5(b) and (c) of the War Powers Resolution are unconstitutional because they act as a legislative veto, contrary to the Supreme Court's holding in *Chadha*, and because they impinge upon the Executive's war and foreign affairs powers. Section 5(c) is unconstitutional because it purports to grant to Congress the power to require the President to withdraw U.S. armed forces pursuant to a concurrent resolution. Thus, an action undertaken by the President can be vetoed by a simple majority congressional vote. Section 5(b) is unconstitutional on two grounds; first, it seeks to limit Presidential authority to use armed forces to a 60 or 90 day time period, unless specifically extended by the Congress, giving rise to a legislative veto of Executive action. Moreover, Section 5(b) impinges upon the President's constitutional authority to use armed force pursuant to his Executive and foreign policy powers, violating the doctrine of the

212. "Veto of the War Powers Resolution," *supra* note 2. Professor Rostow found that the War Powers Resolution would have made "illegal": "the expedition of Commodore Perry to Japan"; "mobilization of troops to the Mexican border after the Civil War to persuade France to abandon support of Maximilian"; "President Nixon's policies towards China . . . because the heart of those policies is a diplomatic warning to the Soviet Union not to make war on China"; and, U.S. actions in the 1973 Middle East war. Rostow, *Comment*, 61 VA. L. REV. 797, 803-04 (1975).

213. "Veto of War Powers Resolution," *supra* note 2.

separation of powers and institutions.

As a matter of policy, the War Powers Resolution has undermined the United States' ability to project military power as a means of conducting foreign policy by creating uncertainty as to the U.S. commitment and by ensuring an untimely insertion of Congress in the decision-making process. The Congress has a major and ultimately decisive role to play with respect to the use of U.S. armed forces. However, congressional powers are limited by the Constitution. The use of the armed forces is an Executive function; providing for their support is a Legislative function. The President should, and often does, consult with congressional leaders prior to sending U.S. armed forces into combat. This is a matter of comity and politics but not a constitutional requirement.

Finally, the War Powers Resolution is ineffective. It would not have prevented the Vietnam war. However, it may hamper the effective use of force against international terrorism by creating an artificial controversy and by precipitating a constitutional crisis at a time when a united political front is needed.