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War-Making Powers a Constitutional Flaw

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THE WAR-MAKING POWERS: A CONSTITUTIONAL FLAW?

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As the Vietnam War became more controversial, and as American emotions about it mounted, its legality was increasingly questioned.[1] The entry of United States troops into Cambodia in May 1970 elicited great emotion and much dispute.[2] Notwithstanding such controversy, the essential issue raised by Vietnam and Cambodia is not the

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1 *Compare* U.S. Dep't of State, *The Legality of U.S. Participation in the Defense of Viet-Nam*, 112 CONG. REC. 11,202 (1966), *with* Lawyer's Comm. on American Policy Towards Vietnam, *American Policy Vis-à-Vis Vietnam in Light of Our Constitution, the United Nations Charter, the 1954 Geneva Accords, and the Southeast Asia Collective Defense Treaty*, 112 CONG. REC. 2666 (1966).

2 *See* Memorandum, The Congressional and Executive Roles in Warmaking: An Analytical Framework, *reprinted in* 116 CONG. REC. 16,478 (1970); Memorandum, Indochina: The Constitutional Crisis (pts. 1 & 2), *reprinted in* 116 CONG. REC. 15,410, 16,352 (1970). These two memoranda, prepared by a number of scholars and attorneys with the assistance of Yale Law School students, provide an excellent discussion of the war power and of legislative actions taken to justify our posture in Southeast Asia. A similar memorandum prepared at the Harvard Law School discusses in particular the efforts of Senators John Cooper and Frank Church (*see* note 149 *infra*). Legal Memorandum on the Amendment To End the War, *reprinted in* 116 CONG. REC. 16,120 (1970).

Former Secretary of State Dean Rusk presided over a meeting of the American Society of International Law in Washington on June 16, 1970, at which opposing ideas on the nature of the Cambodian action were expressed. On one hand, William D. Rogers, a Washington attorney, stated:

> This was war. It is the Congress's responsibility to declare it so.
>
> Ultimately, to explain the dispatch of impressive United States ground forces into Cambodia as just another tactical field decision is to expand the scope of the President's unilateral authority by a quantum jump. . . .
>
> Such an escalation of the Presidency's powers is not only inconsistent with the intent of the Founders; it is also bad policy and bad politics.

Rogers, *The Constitutionality of the Cambodian Incursion*, 65 AM. J. INT'L L. 26, 36 (1971) (footnote omitted). In response, William H. Rehnquist, then Assistant Attorney General for the Office of Legal Counsel of the Department of Justice, stated:

> The President's determination to authorize incursion into these Cambodian border areas is precisely the sort of tactical decision traditionally confided to the Commander-in-Chief in the conduct of armed conflict. . . . It is a decision made during the course of an armed conflict already commenced as to how that conflict shall be conducted, rather than a determination that some new and previously unauthorized military venture shall be taken.

STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG., 2D SESS., DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA 182 (Comm. Print 1970) (statement of W. H. Rehnquist).

President Nixon's decision to mine Haiphong harbor and North Vietnamese coastal waters also engendered controversy. *See* N.Y. Times, May 14, 1972, § 4, at 1, col. 3.

legality of American actions per se. In fact, courts have declared our participation in Vietnam to be congressionally authorized and hence legal,[3] and have declared the Cambodian invasion to be "tactical" and hence within the commander-in-chief's constitutional powers.[4] Rather, Vietnam raises once again a persisting constitutional question:[5] does the Constitution make proper provision for the making of war by the United States? The question arises because of that singular and unprecedented American institution, the separation of powers between the Executive, Congress, and the courts in our system of federal government.

To be sure, the question can be answered in more or less conventional constitutional terms, that is, in terms of who has the power to initiate, conduct, and terminate wars. But a closer examination reveals that what is involved is no ordinary legal or constitutional issue. 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. However, to the extent that there is domestic controversy about a war—as there most visibly has been about Vietnam—the issue should be seen primarily as one of domestic American politics rather than law. Profound questions about the soundness of our Vietnam war policy have given rise to a passionate debate on American foreign policy in general and indeed on our proper "role" in the world. One should be aware that this controversy has taken place within a specific domestic institutional setting. This domestic setting includes not only the sometimes shifting division of external and war powers between the President and Congress[6] (which is the focus of this article), but also phenomena such as the general historical relationship between the

[3] *E.g.*, Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971). *See also* Atlee v. Laird, Civil No. 71-2324 (E.D. Pa., filed Sept. 24, 1971).

[4] *See* Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970). Courts have also indicated that they were not prepared to consider the allegation that the Vietnam War violated international law. *E.g.*, United States v. Mitchell, 369 F.2d 323 (2d Cir.), *cert. denied*, 386 U.S. 972 (1967).

[5] Compare the celebrated debate between James Madison (writing as Pacificus) and Alexander Hamilton (writing as Helvidius) on the related subject of the power of President Washington to declare our neutrality in the war between Britain and France in 1793. *See* E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 7-32 (1917).

[6] In the words of former Undersecretary of State George W. Ball,

> [I]t was inevitable that effective distribution of powers would be subject to periodic tidal flows, with authority shifting from one branch to the other and then back again, reflecting changes in the objective situation faced by the nation, the differing personalities of the individuals from time to time dominating each branch, and fluctuations in the mood of the country.
>
> Nowhere has this been more conspicuously the case than in our external relations . . . .

Round table: The Role of Congress in the Making of Foreign Policy, PROC. AM. SOC'Y INT'L L., 65TH ANNUAL MEETING, April 29-May 1, 1971, at 173-74.

President and Congress,[7] the role of political parties,[8] the scope of government powers generally, and more short-term phenomena such as bipartisanship in foreign policy.[9]

I

THE NATURE OF THE ISSUE: MORE POLITICAL THAN LEGAL

The constitutional debate over Vietnam is the result of a fierce political disagreement over the soundness of our performance on the international stage. Paradoxically the constitutional dispute over the allocation of the war powers between the Executive and Congress, although provoked by disagreement over the soundness of our policy, centers largely on the issue of the democratic responsibility of the policy maker.[10] The question becomes whether the President has undemocratically usurped from Congress, alleged to be the most popular branch of government, the power to make war—both in Vietnam and generally.

One of the major themes of this article is that many critics of Vietnam have misconceived the nature of the constitutional issue presented by the war. Their desire to obtain injunctions against the President, to obtain writs of habeas corpus,[11] or to get laws passed[12] has largely been misplaced. Three variables usually not present in legal or constitutional problems have given rise to misunderstanding: the reality of the international system, the flawed character of the separation of powers in the foreign affairs area, and the almost total refusal of the judiciary to become involved. I shall analyze these three factors before proceeding to the *lege lata*—the actual law—of the war powers.

A. *The Reality of the International System*

An obvious truth, not always remembered,[13] is that the international order is very different from the domestic order. Whereas the do-

7 Very significant, for our purposes, was the emergence under Andrew Jackson of a presidency which no longer looked to the Congress for its lead. In the words of Professor Robert Dahl, "[W]ith Jackson a new type of president appeared, the plebiscitary, mass-based executive, operating with his own 'mandate' and often fighting fierce battles with the Congress." R. DAHL, CONGRESS AND FOREIGN POLICY 170 (1950) [hereinafter cited as DAHL].

8 *Id.* at 185-204.

9 *Id.* at 210-11.

10 *Id.* at 99-102.

11 *See* text accompanying notes 210-13 *infra*.

12 *See* text accompanying notes 179-209 *infra*.

13 *See generally* Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461 (1971); Tigar, *Judicial Power, the "Political Question" Doctrine, and Foreign Relations*, 17 U.C.L.A.L. REV. 1135 (1970).

mestic order is in large part subject to the rule of law, the international order more closely resembles a jungle.[14] Instability of relations among individual nation states is a prominent feature of the international order. More significant, for present purposes, is the view of the situation from the perspective of any individual nation state. Although many governments including, one hopes, that of the United States, have the power largely to control their domestic affairs,[15] they cannot always unilaterally control their foreign affairs; there will often be activities of

14 John Locke's statement on the distinction between the domestic order and the international order remains classic: "[F]or though in a commonwealth the members of it are . . . governed by the laws of the society, yet in reference to the rest of mankind they make one body, which is . . . still in the state of nature." J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 74 (J. Gough ed. 1966). Professor Raymond Aron has stated this concept in more modern terms:

> [S]o long as humanity has not achieved unification into a universal state, an *essential* difference will exist between internal politics and foreign politics. The former tends to reserve the monopoly on violence to those wielding legitimate authority, the latter accepts the plurability of centers of armed force. Politics, insofar as it concerns the internal organization of collectivities, has for its immanent goal the subordination of men to the rule of law. Politics, insofar as it concerns relations among states, seems to signify—in both ideal and objective terms—simply the survival of states confronting the potential threat created by the existence of other states. Hence the common opposition in classical philosophy: the art of politics teaches men to live in peace within collectivities, while it teaches collectivities to live in either peace or war. States have not emerged, in their mutual relations, from the *state of nature.*

R. ARON, PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS 6-7 (1966) (emphasis in original) [hereinafter cited as ARON].

Former Judge of the International Court of Justice Charles de Visscher has stated that the "instability [of social relations], exceptional in the internal order, is the more or less general condition of the international order, dominated and constantly troubled . . . by the factor of force." C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 135 (1957). Judge de Visscher acknowledges that the international order consists of and is defined by nation states, even though he seeks a new international order based on a humane concern for individuals. As to the sometimes seemingly irrational and bloody-minded behavior of nation states, no one has spoken more eloquently than Rinehold Niebuhr.

> [M]ost learned men would not he rational enough to penetrate and transform the unconscious and sub-rational sources of parochial loyalties, which determine the limits of community and which prompt inhuman brutalities to other human beings, who do not share the same marks of race, langnage, religion, or culture.

R. NIEBUHR, MAN'S NATURE AND HIS COMMUNITIES 93 (1965).

The difference between the international and domestic orders is thought to lead to a distinction between the foreign and domestic powers of our federal government as regards both their origin and nature. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). *But see* Penhallow v. Doane, 3 U.S. (3 Dall.) 54 (1795).

15 To be sure, control is not perfect. The division between federal and state governments in the United States creates many difficulties. So too one has only to think of racial issues to appreciate the difficulties in managing some domestic affairs and the social costs that can be involved in domestic control. Additionally, in an increasingly interdependent world the line between the foreign and domestic affairs of a particular nation state may become blurred. Nonetheless the basic generalization remains true.

other nation states over which they do not have control. This is one fact which the events of the last few years have brought home to us. The United States cannot make law for other countries; rather we act, they react, and we act again. The consequences of our actions cannot be certain; like those of all nation states, our actions involve a search for advantage. They are subject to risks and, as Professor Raymond Aron makes clear, they always take place in the "shadow of war."[16] In a country's external dealings foreign policy and war constitute a continuum. In the words of Karl von Clausewitz, "[W]ar is not merely a political act but a real political instrument, a continuation of political intercourse, a carrying out of the same by other means."[17] Diplomacy and strategy (the conduct of military operations as a whole) "are complementary aspects of the . . . art of conducting relations with other states."[18]

It is clear that today's international realities put a great and continuing pressure on all nation states, including the United States, and that this pressure is felt equally by our Executive, Congress, and courts.[19] Professor Aron has put well the impact of nuclear weapons, wars of liberation, and wars of escalation: "The 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."[20]

Just as the nature of international struggle has changed dramatically so has the role of the United States in the international order. Since 1787 the United States has moved from the sheltered margin of a European power system to the very center of a global power system.

> After this century's Second World War, the United States, which throughout its history had dreamed of standing aloof from the affairs of the Old World, found itself responsible for the peace, the prosperity, and the very existence of half the planet. GIs were garrisoned in Tokyo and Seoul in the Orient, in Berlin in Europe.[21]

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16 ARON 6-8.

17 K. VON CLAUSEWITZ, ON WAR 16 (1943). *See* ARON 23.

18 ARON 24.

19 *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (pressure on the courts); R. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS (1969) (pressure on the Executive); Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1 (1961) (pressure on Congress). The fact is that if the founding fathers in 1787 anticipated our foreign and war affairs decisions taking place in a situation without emergency, then reality has belied their anticipation. *See* text accompanying note 123 *infra*.

20 ARON 2.

21 *Id.* 1. Thus we have moved from a state of "no foreign entanglements" and virtually no standing army to membership in the United Nations and a leading role in a

As the United States has moved to the center of the international power system, the significance of hostilities in which it engages has changed. Much of the debate over Vietnam concerns the question whether the magnitude of the conflict makes necessary a formal declaration of war. But the magnitude of hostilities is not the only dimension to the problem; the centrality of the United States in the international system and the centrality of particular hostilities to the interests of the United States are other factors which must be considered. Vietnam, and to a lesser extent Korea before it, have made a coherent foreign policy in America more difficult.[22] It is too early to know how long this state of affairs will continue.

B. *The Reality of Separation of Powers: Some Possible Flaws*

American lawyers sometimes forget what students of government have frequently noted—that separation of governmental powers is in many ways an obsolete system. Professor Samuel Huntington has compared it to the government of Tudor England.[23] Montesquieu, whose paeans to the separation of powers probably exercised some influence on Jefferson, Madison, and other founding fathers, was describing a

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complex system of alliances, and from a disinclination to become involved in the wars of England and France in the 1790's to our involvement in World War I, our leadership in World War II, and our major role in the cold war. I do not believe that the events in Vietnam and recent efforts to redefine the United States's role, as exemplified by the so-called "Nixon Doctrine," substantially negate Arou's characterization. *See* note 294 *infra*.

22 *The Economist* has stated the matter well:

> The way in which the democracies appear to sidle up to the question of war . . . is largely a result of the problem their governments have with one fairly small, but important, section of their population. The name this section of the population gives to itself is the liberal intelligentsia. . . . [I]t has one over-riding characteristic when it applies itself to the problems of international politics. Its emotions understand the misery of war, but it does not possess a matching intellectual grasp of the way cause and effect continuously operate among the powers of the world. Its feelings are international, but its reasoning remains parochial. Because it is so nice itself, it is unwilling to look too closely into the minds of the adversaries its country has to deal with.

THE ECONOMIST, June 26, 1971, at 16. *See Hearings on Executive Privilege: The Withholding of Information by the Executive Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., at 454, 460 (1971) (statement of G. Reedy, Fellow, Woodrow Wilson International Center for Scholars).

23 In his words:

> [T]he principal elements of the English sixteenth-century constitution were exported to the new world, took root there, and were given new life precisely at the time that they were being abandoned in the home country. They were essentially Tudor and hence significantly medieval in character.

S. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 96 (1968). The Tudor system continued into Stuart times and began to change substantially only in the eighteenth century with the emergence of cabinet government. *See generally id.* at 119; text accompanying note 269 *infra*.

system which never existed in England in the form he described and whose apogee had in any event passed.[24] The United Kingdom had moved on to a system of cabinet government resting on the confidence of Parliament. This governmental system, which has been described as a fusion of executive and legislature, is generally considered more modern and mature.[25] It permits a "political" balance between executive and legislature with respect to both the power to declare war and the power to command the armed forces.

By "politics" I mean that "complicated interweaving" of a society's perceptions of reality, its preferences, and its actions.[26] In Professor Robert Dahl's terms, an effective political process permits a society to pursue "rationality," that is, soundness in its policies, to achieve "agreement" about those policies, and to do so through political institutions which are "responsible" in that they take account of and ultimately respond to the wishes of society.[27] I shall try to show that political balance is substantially lacking in the American scheme with respect to certain war decisions.[28]

The American Executive possesses great initiative with respect to foreign and war policy; its responses to the realities of the international order often confront Congress with what might be called *faits accomplis*. Indeed the initiative and momentum of executive action is so great

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24 *See* L. FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 3-5, 248-51, (1972). Professor Fisher quotes Holmes as saying of Montesquieu, "His England—the England of the threefold division of power into legislative, executive and judicial—was a fiction invented by him . . . ." *Id.* at 248.

25 *See* DAHL 169.

26 [T]he selection of a policy must be a complicated interweaving of interpretations about reality, the preferences relevant to dealing with that reality, and the ways of mediating between those preferences and reality; hence, competent or "correct" judgment in the policy area requires a special kind of skill. This is the political skill.

Id. at 104. Compare the remarks of George Reedy:

> [H]olding a nation together is a very difficult art. It is really the art of politics. I have never despised the word "politics" and I am very unhappy that in the English language, at least as spoken in America, it has become a pejorative word, because I think it is one of the necessary professions.
>
> I do not think any sort of decent orderly structure is possible without it. And the art of holding a country together in a democracy is the art of politics and that is the art of convincing everybody that he has had his say.

Hearings on Executive Privilege, supra note 22, at 469.

27 *See* DAHL 4-5.

28 A lack of political balance is not exclusively a characteristic of the war powers. The allocation and balance of the diplomatic and other foreign policy powers is not wholly clear. *See generally* E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957 (4th rev. ed. 1957) [hereinafter cited as CORWIN]; Wallace, *The President's Exclusive Foreign Affairs Powers over Foreign Aid* (pts. 1 & 2), 1970 DUKE L.J. 293, 453 (1970) [hereinafter cited as Wallace].

that the Executive may be able to ignore congressional restraints.[29] In the United Kingdom, Parliament can at least in theory bring an executive down in this situation by a vote of no confidence. Congress, to be sure, has the power of impeachment, but history has shown that this power is practically unusable.[30] Congress also has the power, as does the British Parliament, to withhold appropriations entirely. But this too is a difficult power to manage,[31] although there have been several attempts at improvisation in this country.[32] The answer of the founding fathers to the problem of executive initiative was to add the innovation that Congress alone has the power to declare war. It is the thesis of this article that this device does not constitute a realistic or effective check on the Executive. If so, this failure would demonstrate a basic flaw in the constitutional scheme of foreign affairs powers.[33]

I suggest that there may be a second flaw in the scheme, namely, the failure of the Constitution to reflect in domestic power arrange-

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29 *See* notes 166-71 and accompanying text *infra.*

30 CORWIN 291-92.

31 *See generally* R. FENNO, THE POWER OF THE PURSE (1966). Congressman Paul Findley has said,

> I am very concerned about the long-term effect of the nuclear proliferation treaty, and at one point I attempted to use the power of the purse in the House to shut off the salaries of any State Department personnel who might use their official time to advance that treaty.
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> . . . I must add my amendment did not get very far. The House is reluctant to use the power of the purse in specific matters like this.

Hearings on S. Res. 151 Relating to United States Commitment to Foreign Powers Before the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. 235-36 (1967) (remarks of Congressman P. Findley).

The British system, of course, has not relied solely on the power of the purse to check its executive. In the cabinet system based on the confidence of Parliament there is a fusion of legislature and executive and therefore a mutual, political check. *See* note 269 and accompanying text *infra.*

32 *See* notes 153-73 and accompanying text *infra.*

33 Senator Gale McGee seemed to be getting at this point in his testimony before the Senate Foreign Relations Committee when he questioned whether the hearings were not "missing the point, if we are not addressing ourselves to the wrong question. Maybe we ought to enlarge the constitutional process." *Hearings on War Powers Legislation, S. 731, S.J. Res. 18 and S.J. Res. 59 Before the Senate Comm. on Foreign Relations,* 92d Cong., 1st Sess., at 579 (1971) (remarks of Senator G. McGee) [hereinafter cited as *War Powers Hearings*].

There has certainly been a demonstrable shift in the treaty power—the other major innovation of 1787 with respect to foreign affairs. *See* Wallace 300-02. Thus while it was initially thought that the Senate would act as a council to the President in the negotiation and conclusion of treaties, it is now the practice for the President to negotiate treaties and for the Senate either to withhold or to give its consent with or without reservations. Moreover, the use of the treaty power itself has become secondary to executive agreements both of the congressional variety pursuant to congressional authorization or ratification and of the presidential variety pursuant to the President's own asserted powers. *See id.* at 302.

ments the continuum between a nation's foreign policy and war policy.[34] The great bulk of foreign policy powers have fallen to the President, yet the power to declare war was assigned to Congress. Was it not inevitable that as the Executive responded to the continuum of external pressures it would assume the war power so as to permit the United States to respond soundly and reasonably to an indivisible international reality? In point of fact the reality of foreign and war policy making in the United States is very different from the image conjured up by the phrase "separation of powers." It appears that what we have is an executive-bureaucratic policy-making model[35] with Congress merely forming a part of the setting in which policy is made.[36] In making policy, decision makers usually seek the consensus of interested constituencies[37]—and Congress has become one of those constituencies.[38]

If all this is so, then the problem is a deep constitutional one, and both the various attempts to stop the war in court and to pass laws to stop it, and the attendant scholarship, may be superficial and irrelevant. This article seeks to make clear that this is largely the case.

C. *The Absence of Substantial Judicial Control and Its Consequences*

The basic absence of judicial control over the war powers is possibly the most difficult point of all for lawyers to grasp, accustomed as they are to handling constitutional as well as other disputes largely through court adjudication.[39] The Supreme Court and other courts of the federal and state systems have on the whole refused to adjudicate war power issues.[40] War power issues are essentially and inherently political and not legal. The reluctance of the courts to adjudicate these issues has made them even less "legal" in the sense that they have not

34 *See* text accompanying note 22 *supra*. Professor Alfred Kelly has remarked that our "constitutional system . . . isolated war as a legal abnormality." *War Powers Hearings* 87 (statement of A. Kelly).

35 *See generally* B. SAPIN, THE MAKING OF UNITED STATES FOREIGN POLICY 49-53 (1966); Hilsman, *Congressional-Executive Relations and the Foreign Policy Consensus*, 52 AM. POL. SCI. REV. 725 (1958); Hilsman, *The Foreign Policy Consensus: An Interim Research Report*, 3 CONFLICT RESOLUTION 361 (1959).

36 B. SAPIN, *supra* note 35, at 34-64.

37 Hilsman, 52 AM. POL. SCI. REV., *supra* note 35, at 727.

38 *Id.* at 742. The worldwide decline of the power of legislatures relative to that of executives has been noted. *See* R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 139-42 (1967). Compare the assumption of James Madison and other founding fathers that it was Congress, rather than the Executive, whose powers might wax. L. FISHER, *supra* note 24, at 18-27.

39 *See generally* G. Christie, A Theory of Judicial Review of Legislation, Dec. 11, 1970 (unpublished paper on file at the *Cornell Law Review*).

40 *See* Henkin, *Constitutional Issues in Foreign Policy*, 23 J. INT'L AFF. 222 (1969); Wallace 485-87; notes 211-62 and accompanying text *infra*.

been subject to principled decision. On the other hand, they indisputably arise out of the Constitution and involve the allocation of governmental power and authority; in this sense they undoubtedly constitute normative and constitutional questions.

There are great gaps in the Constitution as written. The function of the commander-in-chief is undefined and its relationship to the requirement that Congress declare war is unstated. The President's exclusive power to conduct foreign affairs, recognized by the courts,[41] is nowhere expressly stated. Because the courts have not often spoken, the allocation of powers between Executive and Congress[42] has been left largely to the "verdicts of history."[43] These verdicts have been rendered with respect to matters on which the constitutional fathers were either silent in 1787[44] or wrong,[45] and with respect to matters to which international relations or the position of the United States in the international order have required a new approach.[46] Indeed, there are areas

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41 The Supreme Court has recognized the President as "the sole organ of the federal government in the field of international relations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

42 In the absence of a political balance, the ambignities in the allocation of foreign affairs powers have given rise to great contrasts. Thus Professor Dahl points out that during the 1930's when Congress was seeking to hobble the President with neutrality legislation, there was not the slightest political control on the President in formulatiug United States policy towards Japan. The attack on Pearl Harbor, of course, reduced neutrality legislation to a nullity. DAHL 172-73.

43 *See* Wallace 295 n.10; *cf.* Henkin, *supra* note 40, at 221-23. Justice Felix Frankfurter in his concurring opinion in *Youngstown* spoke of congressional acquiescence in a pattern of executive action giving rise to a constitutional norm. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (concurring opinion). Presumably, such acquiescence is one way that a verdict of history may be rendered. However, in *Youngstown* the Court found presidential power (to seize property during peacetime) to be lacking. This suggests the possibility that the verdicts of history can be judicially undone.

One should guard against taking too seriously precedents from prior low or high tides which may not be relevant to the level of the tide today. Examples of "tidal" shifts might include the neutrality legislation of the 1930's in reaction to President Wilson's interventionism and the current congressional efforts in reaction to Vietnam. *See* notes 149-51 and accompanying text *infra*.

44 The Constitution does not define the scope of the commander-in-chief power; the Constitution does not by its terms indicate that the President may repulse a sudden attack on the continental United States (*see* notes 92-100 and accompanying text *infra*); and the Constitution nowhere speaks of the executive branch as the sole organ of foreign affairs (*see* note 41 and accompanying text *supra*). Moreover, the Constitution nowhere speaks of judicial review.

45 In a number of instances the power allocated by the Constitution has in fact been reallocated. The evolution of the treaty powers is a possible example. *See* note 33 *supra*. In several instances power allocated to Congress has also been exercised independently by the Executive. *See* note 79 *infra* (commerce power); notes 79 & 80 *infra* (envoys); note 83 *infra* (calling up of troops).

46 The treaty power is certainly one example. *See* note 33 *supra*.

in which there is yet no verdict of history.[47] Even when a matter involving the allocation of foreign affairs powers is litigated, it is upon individual initiative, since our system does not provide for suits by the Attorney General seeking a declaration of government power or an advisory opinion. As a consequence, even when a court speaks on great issues of separation of powers, it often does so in dicta in cases primarily involving individual rights.[48]

Some citizens and public officials have been much disturbed by the apparent growth in the President's war powers. Although they frequently have been strong advocates of the expansion of federal power under the commerce clause and the expansion of individual rights under the Bill of Rights, they continue to revert to the "understandings" of 1787 to argue for limiting the scope of the President's power in foreign and war affairs.[49] Possibly what they find objectionable is the unlitigated and unadjudicated growth of the President's power. This growth is, however, a product of a "liberal construction" of the Constitution, a construction by executive and legislative practice and assertion rather than by principled judicial decision.[50] It is a construction now so strong, however, that it may permit a President to ignore legislation[51] without serious objection from the courts.

There is one final observation about the courts. Alexis de Tocqueville's comment that "[s]carcely any political question arises in the United States which is not resolved, sooner or later, into a judicial

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47 For example, may a declaration of war be revoked by Congress? *See* text accompanying notes 173-75 *infra.*

48 *E.g., Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (power and duty of the President as commander-in-chief to command American forces and conduct campaigns) (dictum); *Prize Cases,* 67 U.S. (2 Black) 635, 641 (1863) (power of the President to "recognize" a state of war) (dictum).

49 An example of "1787-ism" is the frequent citation to a passage by Hamilton, who was certainly no enemy of executive power, which reads:

> [T]he President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature.

THE FEDERALIST No. 69, at 465 (J. Cooke ed. 1961) (A. Hamilton) (emphasis in original).

50 This phenomenon is not without precedent. Thus Andrew Jackson asserted in 1832, with respect to the National Bank, that the President's authority was coequal with an independent of Congress and the Court. *See* CORWIN 21.

51 *See* notes 166-70 and accompanying text *infra.* A comparable development is exemplified by statements in presidential signing messages that certain provisions of the approved legislation are unconstitutional and will be ignored; this in effect is a presidential "item veto." *See* note 205 *infra.*

question,"[52] is well known. The instinct of lawyers to resort to an injunction or a writ of habeas corpus with regard to our actions in Cambodia and Vietnam thus was predictable. Former Secretary of State Dean Acheson, shortly before he died, stated of deTocqueville's dictum that "this is true, and it has been a disaster."[53] While this is certainly an overstatement, it does put deTocqueville's dictum into perspective. My guess, however, is that in the foreign affairs and war area the "political question" will not become a "judicial question."

II

THE WAR POWERS: *De Lege Lata*

A. *The Analytic Scheme*

I have elsewhere elaborated an analytic scheme in the diplomatic area;[54] with some modifications the same analytic scheme can also be applied in the war area. One must, however, take care to distinguish myth from reality. This article focuses on the constitutional development with respect to the war powers as it has actually taken place to date; it is not therefore principally concerned with the allocation of powers in the document of 1787. The analytic scheme is essentially this: there are some areas in which the President has no power under the

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52 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 106 (A. Hacker ed. 1964). Compare Justice Frankfurter's reference to the hunting blood in the general public:

> So-called constitutional questions seem to exercise a mesmeric influence over the popular mind. This eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncements may not unfairly be called one of our minor national traits. An English observer of our scene has acutely described it: "At first sound of a new argument over the United States Constitution and its interpretation the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (concurring opinion), *quoting* THE ECONOMIST, May 10, 1952, at 370.

53 *Hearings on Executive Privilege, supra* note 22, at 266.

54 Wallace 309-10. As I have elsewhere noted (*id.* at 296, 305 n.89), the allocation of powers in the domestic area is substantially different from that in the foreign affairs area: almost all domestic substantive powers that the President has—for example, program powers in the areas of commerce, health, housing, and so forth—are in fact delegated to him by Congress. The President does have certain independent and indeed exclusive substantive domestic powers, such as the pardon power. He also has been recoguized to have or to have asserted certain administrative executive powers: the power to appoint and remove executive officers, the power of executive privilege, the power to resist committee vetoes, and the power of unitary management. *See* notes 57-60 and accompanying text *infra*. *See also* Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 287 (1950). On the other hand, Congress has a certain power over administrative detail. Wallace 307-08.

Constitution and can only act if Congress delegates power to him;[55] there are other areas in which the President has independent constitutional powers.[56] These powers are of two classes, (*1*) substantive and (*2*) executive or procedural; the former class includes the diplomatic and commander-in-chief powers; the latter includes executive privilege,[57] the power to resist committee vetoes,[58] the removal and appointment powers,[59] and the attendant unitary management power.[60] Some of these independent powers of the President are exclusive, that is, the Constitution not only gives them to the President but Congress may not take them away.[61] I have elsewhere suggested that in the diplomatic and foreign assistance areas these exclusive executive powers pertain to what I call "core areas" of decision.[62] The exact definition and current content of the independent and exclusive powers is extremely difficult to ascertain.[63] Apart from the difficulty of detailing the actual decisions that the President is able to make pursuant to these powers, there is the conceptual problem of relating these powers to what are undoubtedly independent powers given by the Constitution to Congress—for example the power to declare war and the appropriations power.[64] Thus courts have suggested on a few occasions that certain independent

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55 This, of course, brings into focus one of the basic questions with respect to Vietnam. Did the President have the power to do what he did absent congressional delegation? As will be seen, at least one court has answered that Congress did in fact delegate power. Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *see* text accompanying note 138 *infra*. On the other hand, the Executive seems to have taken the position that it had power without any delegation. *See* note 116 and accompanying text *infra*.

56 I take the position that all federal executive (as well as congressional and judicial) power derives from the Constitution and that there are no powers "inherent" in the Executive which in some way antedate the Constitution. *See* Wallace 296-98. *But see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); Penhallow v. Doane, 3 U.S. (3 Dall.) 4, 91 (1795).

57 Wallace 296-302, 314.

58 *Id.* at 473-75. *See* note 51 *supra*.

59 The appointment power is shared with the Senate in important instances. *See* U.S. CONST. art. II, § 2.

60 *See* Grundstein, *supra* note 54, at 287.

61 *See generally* Wallace 314-28.

62 *Id.* at 314-21.

63 *See* text accompanying notes 145-47. Again, one can think of this definitional uncertainty as raising the Vietnam issue in another form. Does the admittedly exclusive commander-in-chief power, which is thought of as the power to conduct or wage war, include the power to initiate war in some circumstances? The Executive sometimes seems to have taken this view.

64 U.S. CONST. art. I, § 8. As a variant of the appropriations power, Congress is also given the power to raise and support the Army and the Navy (*id.*) and the power to regulate the Army and the Navy (*id.*), which is the basis of its power to regulate the administrative detail of the military. *See* notes 81 & 85 *infra*.

powers of the President may be exercised only as long as Congress has not legislated either against the President directly or at least in a manner affecting presidential power.[65] However, the courts have never indicated in any kind of systematic fashion the powers to which this approach will be applied; as a practical matter, it is not at all clear which independent executive powers will be considered exclusive and which will not.

There is another aspect to the scheme: there is a spectrum of devices of congressional control, from inquiries and advice to purportedly rigid legislation, which can take a variety of forms, including explicit directions, conditioned appropriations, and specific line item appropriations.[66] Just as the Supreme Court has not defined the outer limits of the independent and exclusive executive powers, so it has not addressed itself to the permissibility of these various devices of congressional control. For example, it is possible that certain independent powers of the President might be exclusive of certain varieties of congressional control but not of others. None of these matters has been explored.

The above scheme is itself—as an analytic framework or model—incomplete; this is because the substantive constitutional law of war and foreign policy powers is also incomplete, since the intervention of the courts is sporadic at best. The upshot is that the *lege lata* of the war powers—as of the foreign affairs powers—is inchoate. Much of it comprises "verdicts of history," and history may not be repeated as tides shift in underlying political institutions.[67] Given the realities of the international order and the possible flaws in the separation of powers, is there any rational explanation for the above constitutional scheme? I have elsewhere suggested that there are a number of factors which a court or scholars would consider in determining whether the President had certain independent powers or exclusive powers in the foreign affairs area. Briefly these factors are external necessity, executive efficiency and expertise, individual rights, democratic control, and congressional expertise.[68] These factors are subject to further refinement and adjustment in the war area.[69] Of course they are of a variety typically considered by courts, and even though the law has not developed by judicial decision in this area, they might be kept in mind. They

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65 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Little v. Barreme, 6 U.S. (2 Cranch) 465 (1804), is often cited in this connection. *See also* New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

66 *But see* notes 158-61 and accompanying text *infra*.

67 *See* note 6 *supra*.

68 Wallace 454-68.

69 *Id.* at 466.

might help to delineate the outer limits not only of independent powers, but exclusive powers as well; the factors pointing to independent executive power where present with greater intensity might indicate exclusive power. Interestingly, the actual patterns of congressional and executive participation in war-related foreign affairs decisions, although largely unadjudicated, reflect the factors that I have mentioned.

B. *Pre-war Powers*

Before analyzing the war powers, I shall deal briefly with those foreign policy and other powers which relate primarily to the "pre-war" period. I have indicated that foreign policy and war are on a continuum. In this sense, foreign policy can be thought of as pre- or post-war policy.[70] Indeed, the separation of pre-war from war policy may be artificial and a root cause of our difficulty.

Professor Edward Corwin has stated that the Constitution constitutes an invitation to the Executive and Congress to struggle for primacy in the formulation of foreign policy.[71] Corwin has also pointed out that the Executive has won the lion's share of the power in this area.[72] Most importantly, given the allocation of constitutional powers and the nature of the international order, the primacy of the Executive is inevitable.[73] A moment's reflection will bear this out. The executive department is on the job full time, scanning the world and gathering information about it;[74] the President receives the advice of a special assistant for national security affairs, the State Department, the Defense Department, the CIA, and supporting agencies and interagency committees;[75] and he constantly confers with foreign leaders,[76] making policy statements and commitments. It is the President who decides whether or not to negotiate with foreign governments, whether or not to recognize or to have diplomatic relations with them, how to interpret and carry out treaties, and to what degree to participate in such international agencies as the United Nations. In another dimension, it is

70 Professor Aron has pointed out that in a successfully conducted war, foreign policy continues throughout the war. He suggests that President Franklin Roosevelt sometimes forgot this during World War II. ARON 23-27, 36-40, 70.

71 CORWIN 208.

72 *Id.*

73 *Id.* at 200-01.

74 Wallace 458.

75 *See* B. SAPIN, *supra* note 35, at 83-90; Cooper, *The CIA and Decision-Making*, 50 FOREIGN AFFAIRS 223 (1972); Destler, *Can One Man Do?*, FOREIGN POLICY, WINTER 1971-72, No. 5, at 28; Halperin, *The President and the Military*, 50 FOREIGN AFFAIRS 310 (1972); Leacacos, *Kissinger's Apparat*, FOREIGN POLICY, Winter 1971-72, No. 5, at 3.

76 For example, President Nixon has recently met with Messrs. Pompidou, Trudeau, Heath, Brandt, Sato, Mao, Chou, and Brezhnev.

the President who takes the initiative with Congress with respect to the level of military forces and weapons systems. The President dispatches troops abroad,[77] as well as ships and planes, and decides upon their maneuvers in peacetime.[78]

It is recognized that the President has the independent and indeed exclusive power to recognize foreign governments and states, to commence and sever diplomatic relations, to decide whether or not to negotiate international agreements, and to assert claims of nationals against foreign governments in international courts or arbitral commissions.[79] These are the so-called diplomatic powers of the President.[80]

The problems of force levels,[81] weapons systems, peacetime deploy-

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77 *See* text accompanying note 83 *infra*.

78 One need only think of such episodes as the *Pueblo* incident, the flight of U-2 reconnaissance aircraft over Russia and Cuba, and the dispatch of naval forces to the Bay of Bengal in December, 1971.

79 Wallace 297-300. The President may also have certain independent powers in the foreign commerce area (*id.* at 313), and arguably in other areas such as foreign assistance both economic and military, clandestine operations, intelligence gathering, and information and cultural exchange. *See id.* at 471 n.309; *cf. Hearings on Separation of Powers Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 44 (1967) (statement of Senator J. W. Fulbright).

80 Wallace 314-21. The President is the sole organ of the government for foreigu affairs (see note 41 *supra*), and thus possesses the diplomatic functions I have just outlined. In addition, the President shares with the Senate the power to make treaties and has the duty to see that laws including treaties and other "international obligations" are enforced. *See In re* Neagle, 135 U.S. 1, 63-65 (1890). A difficult problem arises under treaties, such as those forming NATO and SEATO, which provide that the United States will respond to aggression in a manner consistent with our "constitutional processes." *See* note 101 *infra*.

81 Congress is given the power to raise taxes for the "common Defence" and to appropriate funds for the same. Similarly, it is given the power to raise and support the Army and the Navy. U.S. CONST. art. I, § 8. Congress also has the power to regulate the Army and the Navy. *Id.* The Supreme Court has recognized the power of Congress to specify certain items of military pay. United States v. Symonds, 120 U.S. 46 (1887).

Congressional power may, however, interfere with executive nnitary management. *See* Rogers, *Congress, the President, and the War Powers*, 59 CALIF. L. REV. 1194 (1971); Wallace 314-21. Professor Corwin has declared that Congress's rider to the Army Appropriations Act of 1867, ch. 170, § 2, 15 Stat. 485, by which Congress attempted to transfer part of President Andrew Johnson's commander-in-chief powers to General Grant, was "unquestionably unconstitutional." CORWIN 463 n.89. In a similar congressional action, an 1860 appropriations bill designated one Captain Meigs to supervise certain military construction. President James Buchanan asserted that snch action would be construed only as a congressional preference since the desiguation would otherwise constitute an unconstitutional interference with the commander-in-chief powers—presumably the unitary management aspect. *Id.* at 402 n.64. In this connection one might also consider executive resistance to attempted congressional vetoes—for example, with respect to the location of domestic military bases. *See* H.R. 3096, 82d Cong., 1st Sess. (1951); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 603 (1953).

In Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897), the

ment of troops, and the related control of the overall military budget are more difficult.[82] As a practical matter power over the sinews of war is of course as crucial to the war power as foreign policy decisions. The issue of the peacetime deployment of troops overseas is unresolved. Does this power fall within the commander-in-chief function? The President has often behaved as if it does.[83] Justice Robert Jackson suggested that Congress, pursuant to its power to raise and support the Army and Navy, controls the procurement of weapons.[84] On the other hand, the President has taken great initiative with respect to selection of weapons systems, and certain episodes suggest that the President and Congress consider this an area of at least independent if not exclusive executive power.[85]

Court of Claims stated, "[Although] Congress may increase the Army, or reduce the Army, or abolish it altogether . . . so long as we have a military force Congress can not take away from the President the supreme command." Or, as Justice Jackson put it in *Youngstown*, the President's position as commander-in-chief is "something more than an empty title." 343 U.S. at 641 (concurring opinion).

82 *The Federalist* makes clear that one of the principal purposes of the two-year limit on appropriations for the military and the grant of power to Congress to raise and support armies was to prevent the establishment of a standing peacetime army, an abuse of the British colonial governments. THE FEDERALIST Nos. 24-28 (A. Hamilton). The cold war finds us in a very different situation, however, and Congress regularly authorizes and appropriates funds for the military services. Although it has sometimes been suggested that Congress has an obligation to appropriate funds for essential purposes—for example the maintenance of the State Department, the White House, and possibly the military service —I have indicated elsewhere that I do not believe this to be the case. Wallace 302-05. The Constitution provides that no funds may be appropriated except by law. U.S. CONST. art. I, § 9. Nowhere in the Constitution is it suggested that the Congress is under an obligation to pass appropriations bills, and, as a practical matter, the Supreme Court could never so require.

83 President Franklin D. Roosevelt dispatched troops to Greenland and Iceland in 1940 in the face of a provision in the Selective Training and Service Act of 1940, ch. 720, § 3(e), 54 Stat. 885, that no troops could be sent outside the Western Hemisphere. *See* note 167 *infra*. Former Secretary of State Elihu Root stated in 1912 that he believed it was within the power of the President to commit troops anywhere in the world and that a proposed provision in an appropriations bill barring such deployment was unconstitutional. *See* Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 289 ANNALS 145, 154 (1953). *See also* C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 34 (1920).

84 "Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643 (1952) (concurring opinion).

85 For example, President John F. Kennedy in 1962 indicated he would not develop the RS-70 manned bomber although Congress might direct him to do so. Wallace 322. Congressman Perkins Bass, suggesting that the President asserts an exclusive power in this area, stated: "It is inconceivable to me that Congress should tell a Commander in Chief what weapons system to develop any more than it should attempt to tell a general in the field which weapons to fire." 108 CONG. REC. 4719 (1962). *But see* Stassen, *Separation*

It has been suggested that the President, in the exercise of the above-mentioned powers, can in effect "provoke" war by the dispatch of troops, the enforcement or denunciation of a treaty, or the severance of diplomatic relations. Of course, Congress can also be provocative. One need only recall the activities of Senator Joseph McCarthy in the 1950's, various reductions in the amount of and restrictions on the foreign aid program, the creation and cutting of sugar quotas,[86] as well as the comments of individual Senators or Congressmen to imagine the possible responses of adversely affected nations.[87] In a sense, the neutrality legislation which sought to hobble the President in the late 1930's might be seen as provocation if one believes that appeasement can provoke aggression.[88]

Although congressional participation in a range of foreign affairs activities exists, especially with respect to appropriations, the role of the Executive is clearly predominant. Although one authority has spoken of a broad foreign affairs power in Congress,[89] it is misleading to think of this area merely as one of divided or unclear distribution of powers.[90]

C. *The War Powers: The Power To Initiate, Conduct, and Terminate War*

1. *Initiation of War*

The decision to initiate a war or lesser hostilities is an intensely political decision made in response to international events. How have we got into our wars? There is, plainly, no single pattern of starting or resisting all wars; we have found ourselves in different positions in different eras. The magnitude of hostilities has also varied, as has their significance. We probably sought some wars, for example, by our actions

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of Powers and the Uncommon Defense: The Case Against Appropriations, 57 GEO. L.J. 1159, 1176-95 (1969).

86 The cutting of sugar quotas seems especially provocative. *Cf.* South Puerto Rico Sugar Co. Trading Corp. v. United States, 334 F.2d 622 (Ct. Cl. 1964), *cert. denied*, 379 U.S. 964 (1965).

87 Many congressional and senatorial remarks can only be described as provocative. Consider, for example, the remarks of Senators Bourke Hickenlooper, Jack Miller, and Wayne Morse when Argentina attempted to invalidate certain contracts with foreign oil companies in 1961. 109 CONG. REC. 21,758-64 (1963).

88 *See* note 42 *supra*.

89 *See* Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959).

90 *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-38 (1952) (concurring opinion).

in Florida in 1819, Polk's initiatives in Mexico in 1846, and congressional pressure with respect to Cuba in 1898.[91] But from 1914 to 1917 we avoided involvement in World War I, and from 1939 to 1941 in World War II. Since World War II we have acted in Korea and in other areas of conflict.

a. *The President's Power To Repulse Sudden Attacks.* The Executive has often initiated American participation in hostilities without explicit congressional authorization;[92] to be sure, many of these episodes have involved relatively minor use of force. Although the Constitution nowhere authorizes this initiative on its face, the history of the 1787 Convention makes clear that the President was expected to repulse a sudden attack on the United States. What might be termed the independent presidential "sudden repulse" power seems to have broadened considerably over the years by usage, so as to be no longer limited to situations involving a sudden attack on United States territory.[93] Thus Presidents have used military force to repulse attacks on our citizens and their property abroad,[94] on our diplomats,[95] and on our troops.

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91 *See* C. BERDAHL, *supra* note 83, at 45-46, 70-74, 91-92; *cf.* Wallace 298.

92 U.S. Dep't of State, *supra* note 1, at 11,206; Rogers, *supra* note 81, at 1198-1203.

93 Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 RICHMOND L. REV. 1, 17-18 (1971) [hereinafter cited as Spong]. Interestingly, there was no suggestion in 1787 that the President would have to request Congress to ratify his repulse of a sudden attack as soon as possible after he acted; perhaps it was assumed that he would do so. *Id.* at 4. The Constitution gives the states the power to repulse sudden attacks without congressional authorization. U.S. CONST. art. I, § 10. Congress passed statutes in 1795 and 1807 giving the President a comparable power to resist rebellion without congressional authorization. Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424; Act of March 3, 1807, ch. 39, 2 Stat. 443; *see Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863); *cf.* Burmah Oil Co. v. Lord Advocate, 1965 A. C. 75, 100 (1964), quoting a 1703 English statute:

> [N]o person being King or Queen of Scotland and England shall have the sole power of making war . . . without consent of Parliament: . . . this shall no wise be understood to impede the Sovereign of this Kingdom to call forth, command and employ the subjects thereof to suppress any insurrection within the Kingdom, or repell any invasion from abroad, according to former laws.

Presumably, the President could have resisted the attack on Pearl Harbor without congressional authorization under the sudden repulse theory.

The growth of an independent sudden repulse power in the President is analogous to the emergence of presidential power with respect to foreign commerce and captures, in that these matters were originally thought to be assigned by the Constitution to Congress. U.S. CONST. art. I, § 8. For a discussion of the President's independent commerce power, see Feller, *The International Antidumping Code—The Confrontation and Accommodation of Independent Executive and Legislative Powers in the Regulation of Foreign Commerce*, 5 J. INT'L L. & ECON. 121 (1971).

94 Protection of citizens was the nominal justification for our intervention in the Dominican Republic in 1965 (Spong 15), although later phases of the intervention were justified as coming under the auspices of the Organization of American States. *See* note 107 and accompanying text *infra*.

95 *E.g.*, President McKinley sent troops to China in 1900 to help suppress the Boxer

This power has been acknowledged by the courts.[96] Presumably, the President would consider himself empowered to order resistance to an attack on our ships and planes.[97] In fact, it has been suggested that this sudden repulse power goes even further and permits presidential use of force to protect undefined national security interests. I find the latter assertion difficult to reconcile with any notion of control over presidential power.[98]

An interesting "expansion" of the sudden repulse power may have taken place at the time of the Cuban missile crisis. Neither Russia nor Cuba was in a position to attack the United States, since there were no warheads in the intermediate range missiles installed in Cuba at that time.[99] Thus it appears that the President acted solely to preserve the balance of power in the Western Hemisphere[100] or perhaps in the world.

The post-World War II period has seen a special change in presidential activity, largely because of the network of treaties into which we have entered,[101] including the United Nations Charter, the agreements

Rebellion, in part to protect American and third country diplomats. *See* S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 807 (1965).

96 *E.g.*, Durand v. Hollins, 8 F. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860). In the *Slaughter-House Cases*, 3 U.S. (16 Wall.) 36 (1873), the Court stated that "another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government." *Id.* at 79. *See* United States *ex rel.* Keefe v. Dulles, 22 F.2d 390 (D.C. Cir. 1954).

97 Consider, for example, President Jefferson's defense of United States merchantmen against the Barbary pirates in 1801. Spong 3. If action had been taken with respect to the *Pueblo* it might have fallen in this category.

98 Senator Spong suggests that the Supreme Court has in effect recognized this extension of the sudden repulse power in *In re* Neagle, 135 U.S. 1, 64-65 (1890), where the Court acknowledged the President's power to carry out not only domestic laws but the obligations generated by international relations. Spong 14. This strikes me as troublesome; even if Senator Spong is right, must there not be some limit on the scope and magnitude of the President's power under this rubric?

99 R. KENNEDY, *supra* note 19, at 29.

100 *Id.* at 166.

101 The extent to which such treaties enhance the President's powers is dependent, at least in part, on the meaning of the phrase "constitutional processes," which first appeared in the ratification provision of the NATO treaty. North Atlantic Treaty, April 4, 1949, art. 11, 63 Stat. 2246 (1949), T.I.A.S. No. 1964. Professor Dahl suggests that Congress sought to create ambiguity as to the nature of the Executive's powers. DAHL 256-57. Presumably, Congress thought it had preserved its power to declare war; possibly the Executive thought it could act under a treaty either as commander-in-chief or as enforcer of our legal obligations. The fact of the matter is that the phrase "constitutional processes" in a treaty begs the question if we do not know what the Constitution provides with respect to the carrying out of treaties, and we do not. Professor Leonard Ratner has suggested that in effect the phrase permits the President to do that which he could do in the absence of a treaty. Ratner believes that that includes the power to station troops abroad but not

establishing NATO[102] and SEATO,[103] the Rio Pact,[104] and others. Thus the President acted in Korea pursuant to recommendations of the Security Council and General Assembly of the United Nations,[105] without express initial congressional authorization.[106] So too the President's action in the Dominican Republic in 1965 was ultimately rationalized as action under the charter of the Organization of American States and the Rio Pact.[107] Even Vietnam has from time to time been asserted to be justified by our "commitment" under SEATO.[108] In all these cases, the President has argued[109] that he was carrying out his duty to see that laws—which include treaties and other international law obligations—were faithfully enforced.

Congressional resolutions authorizing the President in advance of hostilities to use force if necessary have been another post-World War II feature encouraging presidential activity. Professor Dahl in 1950 predicted that such resolutions would be necessary if the United States were to be in a position to move quickly to resist Soviet expansion and pressure.[110] The Tonkin Gulf Resolution[111] is only the most recent of such resolutions; others have concerned the Middle East, cited at the

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the power to commit them to combat (except presumably in a "sudden repulse" situation). Ratner, *supra* note 13, at 476.

Article 5 of the treaty provides that "an armed attack against one [party] . . . shall be considered an attack against them all." North Atlantic Treaty, April 14, 1949, art. 5, 63 Stat. 2244 (1949), T.I.A.S. No. 1964. This formula does not appear in any other defense treaty. Is it possible that this international obligation, which is to be sure, somewhat qualified by the remainder of the treaty, enlarges the President's powers in some way, notwithstanding the later reference in article 11 to "constitutional processes"? This question remains unanswered.

102 North Atlantic Treaty, April 4, 1949, 63 Stat. 2244 (1949), T.I.A.S. No. 1964.

103 Southeast Asia Collective Defense Treaty, Sept. 8, 1954, [1955] 1 U.S.T. 81, T.I.A.S. No. 3170.

104 Rio de Janeiro Pact, Sept. 2, 1947, 62 Stat. 1681 (1948), T.I.A.S. No. 1838.

105 Professor Fisher suggests that President Truman in fact acted on his own authority and not in response to the recommendations of the United Nations. L. FISHER, *supra* note 24, at 194-95.

106 It has been reported that the Republican and Democratic senatorial leadership advised President Truman not to seek congressional support. D. ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 414 (1969). Justice Jackson, concurring in *Youngstown*, noted but did not question the presence of United States troops in Korea. 343 U.S. at 642. To be sure, in Korea as in Vietnam the Congress eventually participated extensively through appropriations, selective service legislation, and other legislation. *See generally* Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

107 *See* A. CHAYES, T. ERLICH, & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS 1179-82 (1969).

108 *E.g.*, U.S. Dep't of State, *supra* note 1, at 11,204-05.

109 *See id.* at 11,206-07.

110 DAHL 251-52, 260.

111 More accurately known as the Southeast Asia Resolution, 78 Stat. 384.

time of the landing of marines in Lebanon in 1958,[112] Formosa,[113] and Cuba.[114] The constitutional significance of these resolutions is not clear. Some of them, in their wording, in effect acknowledge that the President has the power to which they refer.[115] President Nixon, in agreeing to the repeal of the Tonkin Gulf Resolution, indicated that the resolution conferred no power which he did not already have.[116] Do such congressional resolutions constitute part of a "verdict of history" on the expanded power of the Executive? The answer to this question depends in part on the status of the remaining unrepealed resolutions.[117] Certainly, further resolutions might not be welcomed by Congress today.[118]

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112 22 U.S.C. §§ 1961-65 (1970).

113 69 Stat. 7.

114 76 Stat. 697.

115 For example: "[I]f the President determines the necessity thereof, the United States is prepared to use armed forces . . . ." 22 U.S.C. § 1962 (1970). *See* Note, *Congress, the President, and the Power To Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1802-03 (1968); note 118 *infra*.

116 President Nixon signed the repeal, included as a rider to the Foreign Military Sales Act of 1971, § 12, 84 Stat. 2055. The President's position, stated at the time of his signature, was that he did not need the authority of the resolution to "wind down" the war, since that power was contained within his commander-in-chief power. *See* N.Y. Times, Jan. 1, 1971, at 1, col. 8. However, the authority for the start of the war is thus left uncertain. In many ways, the repeal of the Tonkin Gulf Resolution is a paradox. Senator Spong has stated that the repeal has left a vacuum. Spong 24.

117 There were suggestions in Congress at the time Communist China took the Chinese seat at the United Nations that the Formosa resolution be repealed. *See* S.J. Res. 48, 92d Cong., 1st Sess. (1971).

118 *See* Spong 19. These resolutions have also been attacked as an improper grant or delegation of power to the President—in those cases where they are worded as giving power. *See, e.g.*, 22 U.S.C. §§ 1961-65 (1970) (the Formosa resolution). I feel that this argument is a nonissue. One may, I suppose, consider such resolutions to be a partial exercise of the declaration of war power. Certainly the Tonkin Gulf Resolution by its terms seemed to give the President all the power he required in Vietnam. The Resolution provided in relevant part

> [t]hat 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. . . . Consonant with the Constitution of the United States . . . 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 . . . requesting assistance in the defense of its freedom.

Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (1964).

It has been suggested that this resolution was obtained by fraud. *See* A. AUSTIN, THE PRESIDENT'S WAR 153-60 (1971). In this connection it is interesting to note several colloquies at the time of the introduction of the resolution by Senator Fulbright. Senator Daniel Brewster asked whether the resolution would authorize sending a large American army to Vietnam. Fulbright replied: "It would authorize whatever the Commander in Chief feels is necessary . . . . Whether or not that should ever be done is a matter of wisdom un-

It is, of course, this post-World War II development which is at the heart of the current controversy over the independent power of the Executive to initiate hostilities. What is the constitutional significance of these post-World War II events? The Executive has never stated clearly whether its currently asserted powers are merely an extension of the commander-in-chief power or whether they are based on other executive powers.[119] Neither the Executive nor post-World War II events has made clear whether this executive power is limited to military engagements of some maximum size. The finding of the Second Circuit in *Orlando v. Laird*[120] that congressional appropriations legislation, selective service legislation, and other Vietnam-related legislation constitute congressional authorization and ratification of the war[121] may conceivably have rendered moot the narrow legal question of whether the President could have acted in Vietnam under an independent sudden repulse power. However, the congressional acts the court saw as constituting ratification are inevitable during any prolonged hostilities and possibly whenever Congress is confronted with an executive *fait accompli*.

b. *Declarations of War.* The requirement that Congress declare war has been called one of the great innovations of the Constitution.[122]

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der the circumstances that exist at the particular time it is contemplated." 110 CONG. REC. 18,403 (1964). Similarly Senator Gaylord Nelson asked:

> Am I to understand that . . . we are saying to the executive branch: ". . . [W]e agree now, in advance, that you may land as many divisions as deemed necessary, and engage in a direct military assault on North Vietnam if it becomes the judgment of . . . the Commander in Chief, that this is the only way to prevent further aggression [against South Vietnam]"?

Id. at 18,406. Fulbright replied:

> If the situation should deteriorate to such an extent that the only way to save it from going completely under to the Communists would be action such as the Senator suggests, then that would be a grave decision on the part of our country.
>
> . . .
>
> I personally feel it would be very unwise under any circumstances to put a large land army on the Asian Continent.

Id. It is also interesting to note that a similar charge of fraud was raised in 1798 against legislation authorizing the President to use force against France, in lieu of a declaration of war which Congress was unwilling to give. *See* C. BERDAHL, *supra* note 83, at 82.

119 *See generally* U.S. Dep't of State, *supra* note 1, at 11,206-07.

120 443 F.2d 1039 (2nd Cir.), *cert. denied*, 404 U.S. 869 (1971).

121 *Id.* at 1043.

122 The democratic rationale of this congressional power was well stated by President Lincoln in these words:

> Kings had always been involving and impoverishing their people in wars . . . . This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us.

1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 451-52 (R. Bosler ed. 1953) (emphasis in

It is my thesis that it may never have been a practicable requirement and that if viable in 1787, when the United States was distant from the center of the European system, it it not viable in 1972, when we have moved to the center of the international system and order.[123] We continue to give ritual obeisance to the necessity of a declaration of war,[124] even while recognizing that the President has often involved the United States in hostilities without such a declaration.[125] Some have suggested that the declaration of war may only be required for hostilities above a certain magnitude.[126] But even this approach appears highly unrealistic. There has not been a declaration of war anywhere in the world since 1945,[127] and many have categorized the declaration of war as obsolete.[128] This aversion to formal declarations of war has been attributed to the proscription of the use of force in article 2(4) of the United Nations Charter and to the impropriety of a formal declaration in the cold war age of nuclear weapons.[129] In any event, the aversion to formal declarations of war is an international fact of life, one which has undermined and indeed eliminated the formal role assigned to Congress by the Con-

original). The grant to Congress of the power to declare war was not without early critics; John Quincy Adams called it the "great error" of the Constitution. C. BERDAHL, *supra* note 83, at 46 n.12, 79.

123 In 1787 the line between peace and war seemed clear, and a declaration of war was seen as marking the "disruption" of peace and the descent into war. *See* L. FISHER, *supra* note 24, at 194. Professor Dahl has referred to the "relative stability of power relations vis-à-vis the United States in the nineteenth century." DAHL 254. In the cold war era the declaration of war appears outmoded. *See* notes 127-32 and accompanying text *infra*.

124 Thus the Hatfield-McGovern amendment to the Military Procurements Act of 1971, 84 Stat. 905, as first introduced, began "[u]nless there has been a declaration of war by the Congress." Amend. No. 605 to H.R. 17123, 91st Cong., 2d Sess., 116 CONG. REC. 13,547 (1970). The Massachusetts statute which was the subject of Massachusetts v. Laird, 400 U.S. 886 (1970), referred to the necessity of a "declaration of war" before citizens of that state could be drafted. It is interesting that a number of courts have found for such purposes as military liability insurance that the term "war" as used in various statutes does not apply to Vietnam because of the absence of a formal "declaration of war." *See* United States v. Averette, 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

125 *See* note 92 and accompanying text *supra*.

126 Note, *supra* note 115, at 1795.

127 N.Y. Times, May 19, 1966, at 11, col. 2.

128 Senator Javits has stated, "In this thermonuclear age, it may well be unlikely that we will be faced again with 'declared wars.'" *War Powers Hearings* 136. Undersecretary of State Nicholas Katzenbach in 1967 stated:

> I do not think the declaration of war as such is better, considering the consequences a declaration of war has. I would say almost flatly it has nothing in the way of international law consequences today. It is a term that is in effect outmoded in international law unless it is used to denote some sort of aggression one is performing when one declares war.

Hearings on S. Res. 151, *supra* note 31, at 161-62.

129 Note, *supra* note 115, at 1772-73.

stitution with respect to declarations of war.[130] It is indeed possible that the declaration of war, even as contemplated by the Constitution, is functionally of use today only in circumstances which would also permit the President to use his sudden repulse power—especially as that power has been enlarged through usage. In other words, it can be maintained that the declaration of war power is limited to "defensive" wars,[131] which are just the kind of situations in which the President asserts the right to act pursuant to his own independent power.[132]

The most important point about declarations of war is that even when used they have largely been procured from Congress at the instance of the Executive; scholarship seems to have established this,[133] and one need only consider America's major wars to appreciate the essential truth of the statement.[134] If the President did not request a

130 Of course, congressional action short of a formal declaration of war occurred as early as 1798 when the Congress passed legislation authorizing presidential use of force against France. Act of May 28, 1798, ch. 48, 2 Stat. 561. Congress was unwilling to pass a formal declaration of war at the time. *See* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); note 118 and accompanying text *supra*; note 139 and accompanying text *infra*.

131 Professor Aron has pointed out that it is very difficult to distinguish a "defensive" war from an "offensive" war and that one must view war as part of the foreign policy continuum. ARON 82-88. He suggests that it is possible for a country to conduct an "offensive" foreign policy which may put it into a "defensive" position vis-à-vis the war which the foreign policy has forced. *Id.* at 85.

132 The Supreme Court, in Fleming v. Page, 50 U.S. (9 How.) 603, 614 (1850), suggested that the United States under its Constitution can only engage in defensive wars:

> [T]he genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become uecessary, its own rights and the rights of its citizens.

If this is so, and if it can be maintained that all such defensive wars fall within the sudden repulse power of the President, the question as to what kinds of wars can ouly be authorized by Congress is answered—in fact, none. Offensive wars it cannot authorize, defensive wars it need not authorize. *Cf.* U.N. CHARTER art. 2, para. 4 (proscrihing use of force in international conflict); *id.* art. 51 (preserving the inherent right of individual and collective self-defense of member states). These Charter provisions also seem to proscrihe offensive war.

Alexander Hamilton suggested that when another nation commenced war on the United States, there was nothing left for Congress to do as we were "already at war" and "any declaration . . . is nugatory." 7 WORKS OF ALEXANDER HAMILTON 203 (H. Lodge ed. 1886). The Supreme Court stated in the *Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), that the President "does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."

133 *See, e.g.*, Garner, *Executive Discretion in the Conduct of Foreign Relations*, 31 AM. J. INT'L L. 289, 292 & n.9 (1937).

134 The Spanish-American War might be thought of as an exception. Congress sought to force President McKinley to favor Cuba and to oppose Spain. The President did not, however, seek the declaration of war until lie was ready to do so. *See War Powers Hearings* 298. Once sought by the President, declarations of war have always been voted overwhelmingly. *See generally* C. BERDAHL, *supra* note 83, at 93.

particular declaration of war, he might veto it or refuse to comply with it as commander-in-chief.[135] Of course the President may also so conduct the foreign affairs of the country as to make a war a great likelihood.

I suggest that just as there has been a great practical shift in the relative power of the Executive and Congress with respect to the treaty power,[136] so there has been a great shift with respect to the formal power to declare war from the situation originally contemplated in the Constitution. It is unrealistic not to recognize this fact. Of course Congress may exercise influence on war policy through appropriations votes, selective service legislation, veterans' benefits legislation, and so forth.[137] But the fact remains that the great purpose of democratic control sought to be served by a congressional declaration of war can easily be emasculated. Moreover, the declaration of war device is inherently unsuited to situations such as that in Vietnam of gradually escalating engagement, which may begin at a level well within the President's sudden repulse power—at least as that power has been expanded by usage and the emergence of our treaty network. By the time such a conflict becomes a major hostility, in terms of its significance both in the domestic and international orders, the possibility of an express prior congressional authorization has been precluded.

2. *Conduct of War*

The decision to initiate war or lesser hostilities is analytically distinguishable from the conduct of war. There has been so much dispute about the propriety of the initiation of fighting in Vietnam that the distinction between initiation and conduct has not always been made.

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135 Compare this with the proposition that the President need not undertake the negotiation of a treaty or other agreement, notwithstanding congressional direction, if he does not choose to do so. *See* Wallace 317. Nor need he implement a treaty although consented to by the Senate. *Id.*

136 *See* note 33 *supra.*

137 *See* Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800). The result in *Orlando*, although resting largely on the political question doctrine (notes 228-29 *infra*), unfortunately also seemed to establish that through measures which Congress cannot easily avoid, such as appropriations, extensions of selective service legislation, and the like, Congress will be considered to have given assent to a war. Senator Thomas Eagleton, in a resolution which he proposed (S.J. Res. 59, 92d Cong., 1st Sess. (1971)) suggested that any such congressional action will not amount to an exercise of the declaration of war power unless Congress explicitly states this to be the case. Were such a resolution passed, however, I do not believe that a court would be precluded from finding that other legislation amounted to such a declaration, along the lines of *Orlando*. The Supreme Court has indicated it would permit such ratification in other contexts. *See* Greene v. McElroy, 360 U.S. 474, 506 (1959) (dictum); *Ex parte* Endo, 323 U.S. 283, 303 n.24 (1944) (dictum).

Now that courts have in fact found the initiation of the War to be at least impliedly authorized by Congress,[138] the focus has shifted from the initiation to the conduct of the War.

The conduct of war is normally thought to be the exclusive province of the President as commander-in-chief, but there remain a number of problems. For one thing, the conduct of foreign policy continues during the conduct of war and may be inseparable from it.[139] For another, there is the suggestion that the commander-in-chief power is not limited to the conduct of campaigns and the management of operations, but may have within it the power to initiate hostilities by means of the sudden repulse power[140] and certainly to broaden the scope of previously initiated hostilities.[141] Even if we limit the commander-in-chief function exclusively to that of the conduct or waging of war, there are problems of definition. Certainly the function must include tactics and military strategy.[142] It has normally been thought that the commander-in-chief controls the movement of troops within a theater of operations; that he controls the use of weapons, including bombing; and that he controls the timing of various military movements, the level of fighting, and the use of espionage and other devices. The Executive also determines whether to establish second fronts.[143] For example, in Korea the President made the decision not to cross the Yalu; in World War II the President determined second fronts, as well as global strategy and the policy of unconditional surrender.[144] As a practical matter, the Presi-

138 *See* cases cited in notes 3-4 *supra.*

139 *See* text accompanying note 17 *supra.* Even during the height of a war when a nation's emotions are most strongly engaged and when the conduct of a nation state seems to take on an aspect of animal force, an intelligent government will be fitting war tactics and strategy into its foreign policy and looking towards post-war foreign policy. *See* note 70 *supra.*

140 *See* notes 92-100 and accompanying text *supra.*

141 On the question whether the Cambodian invasion represented a tactical maneuver within the commander-in-chief's power to conduct war or the initiation of a new war, see note 2 *supra;* note 143 *infra.*

142 *See* ARON 36-40, where the author considers the range of military tactics and strategies. Senator William Fulbright has sought to distinguish "detail" and "policy" in foreign policy, arguing that control over the latter lies with Congress. *Hearings on Separation of Powers, supra* note 79, at 43-44. I have elsewhere demonstrated that a good deal of control over the formulation of foreign policy in fact has come to reside exclusively in the President. Wallace 320-21.

143 The court in Mottola v. Nixon, 318 F. Supp. 538, 540, (N.D. Cal. 1970), indicated that Cambodia was a "necessary incidental, tactical incursion." In some ways, including its length and apparent purpose, the invasion seems more "tactical" than the strategic second fronts of World War II. *See* Moore, *Legal Dimensions of the Decision To Intercede in Cambodia,* 65 AM. J. INT'L L. 38, 63 (1971). Any attempt, however, to draw fine distinctions between "tactics" and "strategy" in the military sphere seems somewhat futile.

144 *See* ARON 27.

dent also makes decisions with respect to the production of weapons and the raising of troops during a war.

There are few statements by the courts as to the exact extent of even the basic, war-conducting area of the commander-in-chief power. In *United States v. Sweeny*,[145] the Supreme Court stated that the purpose of the commander-in-chief clause "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."[146] Although the exact scope of the President's independent commander-in-chief power is thus somewhat ill-defined, the Court has made clear that at least the core of such power, however defined, is exclusive and not subject to congressional control. On another occasion the Supreme Court stated,

> 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 interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.[147]

As in foreign affairs, so in the "command of the forces and the conduct of campaigns" the country must speak with one voice.[148]

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145 157 U.S. 281 (1895).

146 *Id.* at 284. *See also* note 49 *supra.*

147 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (concurring opinion). *See* Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897).

Senator William Borah once stated,

> Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President will undoubtedly be bound by it. But the Congress could not, through the power of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find. . . .

Quoted in CORWIN 403 n.64. On another occasion, when Congress voted legislation requiring President Theodore Roosevelt to maintain marines on all ships equal to at least 8% of each ship's complement (Act of March 3, 1909, ch. 255, 35 Stat. 773), Senator Borah was even more explicit:

> Congress has not the power to say that an army shall be at a particular place at a particular time or shall maneuver 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).

148 *See* Baker v. Carr, 369 U.S. 186, 211 (1962).

This principle has recently been tested by the attempt of Congress to control the "conduct" of the war in Vietnam, or more accurately in Indochina, through such efforts as the Cooper-Church[149] amendments restricting military activity in Laos, Thailand, and Cambodia, and the successful Mansfield[150] and unsuccessful Hatfield-McGovern amend-

149 The Cooper-Church amendment to the Department of Defense Appropriations Act of 1970, § 643, 83 Stat. 469, reads as follows: "[N]one of the funds appropriated by this Act shall be used to finance the introduction of American ground 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 defense.

Some months after the enactment of the latter Cooper-Church amendment there was a good deal of dispute as to whether or not its terms had been violated when American planes engaged in close air support were alleged to have touched Cambodian ground. The Executive maintained the aircraft were involved in rescue operations; some Congressmen maintained they were involved in ground combat. After this incident, Senator John Stennis indicated that there might have to be a revision of the Cooper-Church amendment to permit certain additional activities in Cambodia. N.Y. Times, Jan. 28, 1971, at 1, col. 8. One can only wonder about the wisdom and propriety of legislation which requires congressional consideration of such "tactical" detail.

The original amendment to § 47 of the Foreign Military Sales Act—Amendment of 1971 (84 Stat. 2053) proposed by Senators Cooper and Church, as reported out of the Senate Foreign Relations Committee, passed in somewhat modified form by the Senate, but rejected by the House, had read:

> [U]nless specifically authorized by law hereafter enacted, no funds authorized or appropriated pursuant to this Act or any other law may be expended for the purpose of—
>
> 1) retaining United States forces in Cambodia;
>
> 2) paying the compensation or allowances of, or otherwise supporting, directly or indirectly, any United States personnel in Cambodia who furnish military instruction to Cambodian forces or engage in any combat activity in support of Cambodian forces;
>
> 3) entering into or carrying out any contract or agreement to provide military instruction in Cambodia, or to provide persons to engage in any combat activity in support of Cambodian forces; or
>
> 4) conducting any combat activity in the air above Cambodia in support of Cambodian forces.

Amend. to H.R. 15628, 91st Cong., 2d Sess. § 47, 116 CONG. REC. 15,400 (1970).

150 The Mansfield amendment 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:

ments.[151] It is not the purpose of this article to consider the wisdom of such provisions, although as binding legal strictures their wisdom does seem questionable. Rather, I shall address myself to the constitutionality of such provisions. My position is that they constitute an improper congressional encroachment on the exclusive powers of the President as commander-in-chief and are thus unconstitutional.[152]

Presumably, such legislation is based either on the congressional power over appropriations[153] or on Congress's power to declare war.[154] I have elsewhere explored the power of Congress to condition appropriations.[155] I do not believe that merely because restrictive legislation may also be based on the declaration of war power the analytic framework need be changed.

As then Congressman Martin Van Buren noted with respect to the diplomatic power, Congress could not give directions to the President with respect to that portion of the diplomatic power which was exclusively his. In a well-known statement, Daniel Webster added that what

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(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.

Military Procurement Authorization Act of 1972, § 601(a), 85 Stat. 430.

151 Amend. No. 862 to H.R. 17123, 91st Cong., 2d Sess., 116 CONG. REC. 30,080 (1970); Amend. No. 605 to H.R. 17123, 91st Cong., 2d Sess., 116 CONG. REC. 13,547 (1970); *see* note 124 *supra;* note 172 *infra*. The recent Case-Church "amendment" to the Foreign Relations Authorization Bill (S. 3526, 92d Cong., 2d Sess. § 701 (1972)) represents a similar effort.

152 Congressional activity runs the gamut from inquiry and investigation, advice and resolutions to rigid, mandatory legislation. The scope of permissible congressional conditions and pressures is considered at notes 158-71 and accompanying text *infra*. *See also* Wallace 302-09.

153 The appropriations power has not been greatly litigated or adjudicated. *See* Wallace 302-05. It is to be distinguished from the taxing power, to which it is of course related. *See* U.S. CONST. art. I, § 8. Congress may entirely withhold or deny appropriations; it may vote them on a fiscal year basis (indeed the Constitution requires that appropriations for the military be voted for only two years (U.S. CONST. art. 1, § 8)); and it can reduce appropriations and thus legitimately pressure the Executive. *But see* note 147 *supra*.

154 The question might be raised in terms of whether Congress can revoke a declaration of war or revoke its support of an undeclared war. *See* notes 172-78 and accompanying text *infra*. There is no authority on this subject.

155 Wallace 302-08.

Congress could not do directly, it could not do indirectly by conditioning appropriations to be available only if the President complied with congressional directions.[156] This is what Congress has sought to do with respect to the commander-in-chief powers by its legislative riders regarding action in Laos, Thailand, and Cambodia.[157] There has been some judicial recognition of the impermissibility of congressional interference in matters of exclusive presidential power.[158] Additionally,

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156 9 ABRIDGEMENT OF THE DEBATES OF CONGRESS 94 (T. Benton comp. 1858).

157 *See* notes 149-52 and accompanying text *supra*.

158 Thus, in *Lovett v. United States*, Judge Madden stated: "Section 304 is asserted by the plaintiffs to be unconstitutional because . . . it purports to remove the plaintiffs from executive offices, and no power of removal resides in the legislative branch of the Government, except, by impeachment . . . ." 66 F. Supp. 142, 151 (Ct. Cl. 1945) (concurring opinion), *aff'd*, 328 U.S. 303 (1946). He later concluded: "I do not think, therefore, that the power of the purse may be constitutionally exercised to produce . . . a trespass upon the constitutional functions of another branch of the Government." *Id.* at 152. Justice Frankfurter, concurring in the opinion of the Supreme Court in *Lovett*, spoke of the "grave constitutional" issue that would be raised by an attempted invasion of the removal power by the refusal to appropriate funds for the salaries of certain government employees. 328 U.S. at 328-29.

The Supreme Court in Butler v. United States, 297 U.S. 1, 74 (1936), stated in a slightly different context, "An affirmance of the authority of Congress . . . to condition the expenditure of an [educational] appropriation [on the assumption of a contractual obligation to submit to federal regulation] would tend to nullify all constitutional limitations upon legislative power." James Madison's view is also interesting:

> The legislative department derives superiority in our government from other circumstances. Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real-nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend beyond the legislative sphere.

THE FEDERALIST No. 48, at 334 (J. Cooke ed. 1961) (J. Madison).

Congressman James Mann once stated that it would be appropriate to "limit appropriations . . . [so that] no money shall be given in this bill except to red-headed men." N.Y. Times, March 23, 1922, at 17, col. 2. Would such a restriction be the equivalent of withholding all appropriations, or would it be an unconstitutional condition on approved appropriations? Should an attempt be made to plumb congressional intention, much as the intention of a private testator or settlor is examined, to determine whether Congress would or would not have intended the appropriation to fail if the condition were struck? I doubt that a court would take such an approach. I have urged elsewhere a simpler approach: any condition or line item or other legislative provision putting "pressure" on what are otherwise the exclusive powers of the President should be struck. Wallace 314-28.

The following hypothetical examples demonstrate how sophisticated legislative provisions can become. (*1*) Congress votes money to the State Department for its general operations. In a separate bill it provides that the President may not maintain diplomatic relations with Soviet Russia or have an embassy in Moscow. Presumably this would be unconstitutional. (*2*) Congress in the appropriations bill provides that none of the appropriation may be spent if an embassy is maintained in Moscow. Presumably the Executive would maintain this was an unconstitutional condition. (*3*) Congress provides money for the State Department but provides that none of it may be spent in Moscow. (*4*) Line item

commentators have alleged the impropriety of imposing conditions of conduct, in appropriations measures or otherwise, upon benefits for individuals such as government contracts, licenses, and grants when a constitutional provision would be violated if such conduct were expressly ordered.[159] However, the President has commander-in-chief powers by virtue of the Constitution; they are not granted to him by Congress as is the case with governmental benefits.[160]

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by line item, Congress votes specific amounts of money for embassies all over the world, but votes no money for a Moscow embassy. All four of these approaches would achieve the congressional purpose of preventing diplomatic relations with Moscow; however, an attack on the constitutionality of the congressional action would be vastly more difficult if approach (*4*) rather than approach (*1*) were taken. Compare Congressman John McCormack's attempt in 1940 to abolish the embassy in Moscow. Nobleman, *supra* note 83, at 157.

Direct instructions to the President, such as those hypothesized in (*1*) above, have largely been resisted by the Executive. For example President Kennedy resisted, and the House eventually scuttled, a proposal to direct the President to develop the RS-70. *See* note 85 *supra*. President Truman stated that he would treat a congressional directive that he make a particular loan to Spain as no more than an authorization. Nobleman, *supra* note 83, at 161.

159 *See, e.g.*, Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1596-98 (1960).

Former Attorney General Herbert Brownell, Jr. had this to say about an attempt to condition an appropriation: "If the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of Government would be placed in the gravest jeopardy." 41 OP. ATT'Y GEN. 233 (1955).

Concerning an attempt by Congress to withhold certain funds from the Executive unless it disclosed certain information, Senator A. Willis Robertson once stated:

> If the President, in keeping with the well established principle under the Constitution of the right of the President to handle foreign policy, decides that the disclosure of some phase of foreign policy would be against the public interest, he can so certify, and the Congress will not be able to get the information.

HOUSE COMM. ON GOV'T OPERATIONS, AVAILABILITY OF INFORMATION FROM FEDERAL DEPARTMENTS AND AGENCIES, H.R. REP. No. 818, 87th Cong., 1st Sess. 165 (1961).

160 *Cf.* notes 55-62 and accompanying text *supra*. A condition on an independent presidential power is, of course, a more serious matter than a condition on a power delegated to the President by Congress. Even with respect to delegated powers, however, the Executive has resisted congressional restrictions. It has done so with respect to executive secrecy. "To admit that . . . what Congress creates it may control—would be to emasculate the separation of powers." Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755, 771 (1959). President Woodrow Wilson resisted an attempt at a committee veto with respect to delegated domestic powers with the following words:

> The Congress has the power and the right to grant or deny an appropriation, or to enact or refuse to enact a law; but once an appropriation is made or a law is passed, the appropriation should be administered or the law executed by the executive branch of the Government. In no other way can the Government be efficiently managed or responsibility definitely fixed. The Congress has the right to confer upon its committees full authority for purposes of investigation and the accumulation of information for its guidance, but I do not concede the right, and certainly not the wisdom, of the Congress of endowing a committee of either House or a joint Committee of both Houses with Power to prescribe regulations under which executive departments may operate.

Of course, there remains an unanswered question: just what are the exclusive executive powers which cannot be subjected to congressional conditions?[161] Putting to one side this question, which the courts have not answered, the fact is that the impropriety of congressional restrictions seems to be borne out by the verdict of history.[162] Many efforts to restrict the President's diplomatic and commander-in-chief powers have been beaten back in Congress.[163] Moreover, Congress, confronted with presidential resistance to proposed restrictive legislation, has frequently responded with ambiguous legislation, "sense of Congress" or "sense of Senate" resolutions,[164] or mere resolutions of advice.[165] In other cases, for example with respect to the conduct of foreign negotiations,[166] the stationing of troops abroad,[167] the exchange of used destroyers for bases,[168] and the assertion of claims of United States

Quoted in Hearings on Separation of Powers, supra note 79, at 203 (statement of F. Wozencraft, Assistant United States Attorney General). *See also* Ginnane, *supra* note 81, at 569.

161 *See* notes 142-48 and accompanying text *supra.*

162 *Cf.* text accompanying notes 42-47 *supra.*

163 *See* Wallace 322-26.

164 Thus the 1967 resolution introduced by Senator Fullbright stated

> [t]hat it is the sense of the Senate that a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment.

S. Res. 151, 90th Cong., 1st Sess. (1967). *See Hearings on S. Res. 151 Relating to United States Commitments to Foreign Powers Before the Senate Comm. on Foreign Relations,* 90th Cong., 1st Sess. (1967). The resolution which emerged from these hearings, S. Res. 187, 90th Cong., 1st Sess. (1967), expressed a similar sentiment.

165 *E.g.,* Foreign Assistance and Related Agencies Appropriations Act of 1969, § 105, 82 Stat. 1139 (recommending that Communist China not be admitted to the United Nations).

166 A law enacted in 1913 provides that the President shall attend no international conference without specific congressional authorization. Act of March 4, 1913, § 1, 22 U.S.C. § 262 (1970). However, Presidents have participated in hundreds of conferences, including Versailles, without such authorization. Nobleman, *supra* note 83, at 155 states:

> This provision appears clearly to be an unconstitutional interference with the President's prerogatives. Since the United States participates in approximately three hundred international conferences each year, it is difficult to determine the extent to which attention has been paid to the act in recent years. In any event, it appears that when the Congress appropriates funds each fiscal year to enable United States participation in international organizations, either by way of regular annual appropriations for contributions and administrative expenses or for the international contingencies fund of the Department of State, implied consent is given.

167 The Selective Service Act of 1940 provided, "Persons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands." Act of Sept. 16, 1940, ch. 720, § 3(e), 54 Stat. 885. The President stationed troops in Greenland and Iceland in 1940, in the latter case maintaining that they were not "beyond the limits of the Western Hemisphere." *See* note 83 *supra.*

168 *E.g.,* Act of June 28, 1940, ch. 440, § 14(a), 54 Stat. 681 (1940), provided that no

nationals wronged by a foreign government,[169] the President has in fact ignored restrictive legislation. To this extent he may be illustrating Alexander Hamilton's observation, made in another context, that laws which do not fit the necessities of society will be flouted.[170] Professor Myres McDougal long ago anticipated this possibility:

> Moreover, if the subject . . . is a matter within the President's special constitutional competence—related, for example, to the recognition of a foreign government or to an exercise of his authority as Commander-in-Chief—a realistic application of the separation of powers doctrine might in some situations appropriately permit the President to disregard the statute as an unconstitutional invasion of his own power.[171]

3. *Termination of War*

Congressional attempts[172] to restrict the war in Indochina can be considered a further effort to control the President's conduct of the war or can be thought of as an attempt to revoke a "declaration of war."[173] Not only have there been no adjudicated cases on the validity of such congressional action, but there have been almost no historical episodes which might serve as precedent.[174] A revocation of a declaration of war

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military property of the United States could be disposed of without a certification by the Chief of Naval Operations or the Chief of Staff of the Army. The President exchanged overaged destroyers for British bases without such approval. *See* 39 OP. ATT'Y GEN. 484 (1940). So too, the President sent armed convoys to Britain in the face of neutrality legislation prior to World War II.

169 The President seems to have ignored the strictures of the Hickenlooper Amendment (Foreign Assistance Act of 1961, § 620(e), 22 U.S.C. § 2370(e)(1) (1970)) in continuing to provide assistance to Peru, notwithstanding Peru's seizure of private American property without compensation. *See* Wallace 294.

170 THE FEDERALIST No. 25, at 163 (J. Cooke ed. 1961) (A. Hamilton).

171 McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181, 317 (1945) (footnote omitted).

172 *See* notes 149-51 and accompanying text *supra*. Such attempts appear to be based on the appropriations power. The unsuccessful Hatfield-McGovern amendment of August 26, 1970, to the Military Procurements Act of 1971 (84 Stat. 905) provided that "[a]fter April 30, 1971, funds . . . hereafter appropriated may be expended . . . only to accomplish . . . [*inter alia*] the orderly termination of military operations there [in and over Indochina] and the safe and systematic withdrawal of remaining armed forces by December 31, 1971." Amend. No. 862 to H.R. 17123, 91st Cong., 2d Sess., 116 CONG. REC. 30,080 (1970).

173 *See* note 154 and accompanying text *infra*.

174 Presumably, a war should be ended when the political purposes for which it was entered have been achieved, have become impossible of attainment, or have become no longer worth their cost. The consequences of war are often quite different from those initially anticipated. There is no international law on termination of war.

The history of the 1787 Convention indicates that whereas it was intended that Congress would commence wars by declaring them, the President and Senate would end

is conceivable;[175] certainly the significance of a nation's wars and international conduct, the notion that war is a continuation of foreign policy,[176] and the recognition of the President's exclusive diplomatic and tactical-strategic military powers are components of this question. In practice, of course, it is the President who ends most wars and hostilities by concluding armistices under his diplomatic and commander-in-chief powers.[177] In short, the power of Congress to end hostilities—except of course through its theoretical power to stop all appropriations—is not clear.[178]

III

De Lege Ferenda—Solution by Legislation or Litigation?

The preponderance of power over foreign affairs and war has devolved on the President under our separation of powers system, and existing law reflects this fact. I have noted certain legislative efforts by Congress to change this situation. I shall now examine some addi-

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them through the treaty power. *See* C. Berdahl, *supra* note 83, at 228. President Wilson actually vetoed as unconstitutional a joint resolution of Congress purporting to terminate hostilities in 1920, indicating that formal termination could only be accomplished through the treaty power; President Harding, however, later requested such a resolution from Congress. *Id.* at 230 n.28. *See also* Corwin, *The Power of Congress To Declare Peace,* 18 Mich. L. Rev. 661 (1920). The actual fighting in most American wars has been ended by the President pursuant to the armistice power. *See* note 177 and accompanying text *infra.* Of course, a historical pattern does not mean that Congress may not also enjoy this power.

A seventeenth-century English episode has been cited as a possible precedent for the Hatfield-McGovern or Mansfield type amendment. *See* Memorandum, Indochina: The Constitutional Crisis, *supra* note 2, at 15,414 n.60; Legal Memorandum on the Amendment To End the War, *supra* note 2, at 16,121. An appropriation of the House of Commons in 1678 directed that certain troops be brought from Flanders and be "disbanded and discharged on or before 26 August 1678." J. Kenyon, The Stuart Constitution 396 (1966). However, Parliament was "induced to vote money for [this] . . . disbandment" by the King. Parliament added the quoted provision, not with the view of influencing war policy, but rather so that the King would not apply the money to other purposes. *See id.* at 389. Moreover, the provision was thought to constitute a clear infringement of the King's prerogative of peace and war. In one respect the episode may be relevant: the relationship between the seventeenth-century English King and Parliament may be more akin to that of President and Congress today than would the relationship between executive and Parliament in England today. *See* note 23 *supra.*

175 Henkin, *supra* note 40, at 216.

176 Aron 7; *see* notes 16 & 17 and accompanying text *supra.*

177 *See* Mathews, *The Constitutional Power of the President To Conclude International Agreements,* 64 Yale L.J. 345, 352-54 (1955).

178 Other "end the war" efforts, outside the halls of Congress, have had a legal aspect. *See* New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (pressure on the Executive through distribution of classified government documents protected under the first amendment).

tional proposed congressional responses and shall also review efforts to correct the present "imbalance" of war powers through litigation. I think it will appear that neither legislation nor litigation is a sufficient answer to the fundamental problem.

A. *Correction by Legislation*

I have noted efforts by Congress through the Cooper-Church and Mansfield amendments and the unsuccessful Hatfield-McGovern amendments to use the power of the purse to curb the President's conduct of war. These efforts were addressed to the Vietnam War and were designed to bring about an early end to that war.[179] A bill introduced by Senator Jacob Javits,[180] passed by the Senate and currently pending in the House of Representatives, addresses future presidential conduct and seeks to elaborate Congress's power to declare war. In essence it provides that in the absence of a declaration of war the President may use his sudden repulse power only in specified situations—when United States territory or the armed forces are under attack or in imminent danger of attack, when United States nationals abroad need protection, or when there is specific statutory authorization.[181] The bill further provides that Congress, within thirty days of

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179 *See* notes 149-51 & 172 *supra*. There of course have been many other resolutions over the last few years addressed to Vietnam and wars generally. *E.g.*, S. Res. 271, 91st Cong., 1st Sess. (1969); *see* Spong 18-20. There have also been a number of resolutions addressed to foreign policy generally. *See* notes 285-91 and accompanying text *infra*. Congressional efforts have had two objectives: (*1*) to establish substantive policy, especially with regard to the Vietnam War (the Mansfield riders fall in this category); and (2) to shift the balance of foreign affairs power between Congress and the Executive on an institutional basis (*see* notes 266-71 *infra*). One reporter has suggested that the high tide of both these developments may have been reached some months ago. Finney, *Congress Leaders Break Deadlock over Aid Funds*, N.Y. Times, Dec. 11, 1971, at 18, col. 4. *But see* notes 2 & 151 *supra*.

180 S. 2956, 92d Cong., 1st Sess. (1971); *see* S. REP. No. 606, 92d Cong., 2d Sess. (1972) (report of the Senate Foreign Relations Committee); *War Powers Hearings* (hearings on S. 2956 and its predecessors). S. 2956 passed the Senate by a vote 68 to 16. 118 CONG. REC. S 6101 (daily ed. April 13, 1972).

181 The Javits bill provides in relevant part:

> In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—
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> (*1*) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;
>
> (2) to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;
>
> (*3*) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a

the initiation of hostilities, must approve even authorized uses of force by specific legislation; otherwise such force must end.[182] One section of the bill provides that authority to introduce United States forces in hostilities "shall not be inferred . . . from any provision . . . contained in any appropriation Act, unless such provision specifically authorizes

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direct and imminent threat to the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country; or

(*4*) pursuant to specific statutory authorization, but authority to introduce the Armed Forces of the United States in hostilities or in any such situation shall not be inferred (A) from any provision of law hereafter enacted, including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in such situation and specifically exempts the introduction of such Armed Forces from compliance with the provisions of this Act, or (B) from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction of such Armed Forces from compliance with the provisions of this Act. Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such Armed Forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities. No treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States in hostilities or in any such situation, within the meaning of this clause (4); and no provision of law in force at the time of the enactment of this Act shall be so construed unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in any such situation.

S. 2956, 92d Cong., 2d Sess. § 3 (1972), *amending* S. 2956, 92d Cong., 1st Sess. § 3 (1971).

For some possible problems raised by the treatment of treaties in subsection (*4*), see note 188 *infra*.

182 The use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act shall not be sustained beyond thirty days from the date of the introduction of such Armed Forces in hostilities or in any such situation unless (*1*) the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of Armed Forces of the United States engaged pursuant to section 3(1) or 3(2) of this Act requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities; or (*2*) Congress is physically unable to meet as a result of an armed attack upon the United States; or (*3*) the continued use of such Armed Forces in such hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.

S. 2956, 92d Cong., 2d Sess. § 5 (1972), *amending* S. 2956, 92d Cong., 1st Sess. § 5 (1971).

. . . [such] introduction."[183] This is an attempt to avoid the situation, possibly inevitable in any long hostility, that congressional consent will be inferred from congressional support.[184] Another section requires the President promptly to report hostilities involving United States forces to Congress.[185]

I shall only address a few general problems raised by the Javits bill. The bill, which authorizes unilateral executive action only in "hostilities" or situations of "imminent involvement in hostilities," does not define the word "hostilities." The difficulties encountered by the United Nations in attempting for the last twenty years to define "aggression" and the difficulty in applying the Geneva conventions on land warfare[186] to various occupation situations may suggest some of the definitional problems in this area. Possibly this is why Javits's bill does not define the term. Unquestionably this definitional uncertainty will give rise to disputes. Executive actions such as the dispatch of an aircraft carrier to the Bay of Bengal during the recent Indo-Pakistani war, the dispatch of ships to the area of the *Pueblo*, and even the mobilization of troops during the Berlin crisis of 1961, illustrate the problem of defining with precision those executive actions that would be considered a response to "hostilities."

The proposed legislation also seems to be based on what I believe to be a false notion: that there are emergency situations in which the President may act alone, readily distinguishable from nonemergency situations in which he may not. The assumption that nonemergency hostilities permit congressional participation is, of course, the principal notion behind the grant to Congress in 1787 of the power to declare war.[187] But must not the President be able to threaten to use force even in "nonemergency situations" if subsequent emergencies are to be avoided? The danger is that Congress, by failing to recognize the continuum of emergency and nonemergency situations and by limiting the

183 *Id.* § 3(4).

184 *See* notes 3 & 120-21 and accompanying text *supra*.

185 The introduction of the Armed Forces of the United States . . . under any of the conditions described in section 3 . . . shall be reported promptly in writing by the President to the Speaker of the House of Representatives and the President of the Senate, together with a full account of the circumstances . . . , the estimated scope . . . , and the consistency of the introduction of such forces . . . with the provisions of section 3 of this Act.

S. 2956, 92d Cong., 2d Sess. § 4 (1972), *amending* S. 2956, 92d Cong., 1st Sess. § 4 (1971).

186 *See* ARON 121-24.

187 If the intent of the Founding Fathers is to be fulfilled and the public's expectations of what the Constitution requires are to be realized, there should be congressional participation in decisions committing the nation to hostilities other than of an emergency nature.

President's discretion to emergency situations only, will in effect create such situations by prohibiting executive action at earlier times. For example, would proponents of the Javits bill consider the 1962 Cuban missile crisis a nonemergency situation? The answer to this question is not clear. It has been pointed out that the attempt to specify the situations in which the President may act will certainly result in action being prohibited in some situations in which it should not be. In those cases the President will either be powerless or he will simply stretch the language of restrictive legislation to exclude such situations.[188]

With regard to the requirement of congressional ratification of unilateral executive action within thirty days, it has been noted that of the 192 times the United States has committed armed forces abroad, in ninety-three cases actions lasting more than thirty days have resulted.[189] In addition, a principal purpose in permitting the President to repulse sudden attacks should be to enable him to threaten to do so. How credible will this threat be to other nations if it is known that the use of force must cease within thirty days, absent congressional ratification? To be sure, an aggressor cannot be certain what Congress will do; however, the belief that Congress may bar prolonged use of force may enter into its calculations, even if that belief later proves to be inaccurate.

Senator William Spong, one of the co-sponsors of the Javits bill, has called such legislation an attempt to seek an interpretation of the war powers of the Constitution.[190] Certainly Congress has the right to legislate with respect to its powers, in this case its power to declare war. If Congress is within its powers in the Javits bill, one can only speak of the lack of wisdom in the effort.[191] But one may also question the con-

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188 *See War Powers Hearings* 470-71 (statement of J. Moore, Professor of Law).

> I cannot imagine that any President, who wanted to do something, could not do it within the framework of the restrictions which have been proposed tonight [the Javits proposal], though it might be a little more tortured and a little less fair to the American people.

Round Table, supra note 6, at 176 (remarks of G. Ball, member of the New York Bar).

The Javits bill (S. 2956, 92d Cong., 1st Sess. § 4 (1971)) explicitly states that no existing treaty can be deemed to authorize the use of force in hostilities or in a situation of imminent threat of hostilities. What does this do to our possible NATO obligations? *See* note 101 *supra*. Does the Javits bill in effect constitute an authorization for breaches of treaties? *Cf.* United Nations Participation Act of 1945, § 6, 22 U.S.C. § 287d (1970).

189 Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53, 70-71 (1971).

190 Spong 21.

191 Referring to earlier English experience, Lord Reid remarked,

> The reason for leaving the waging of war to the King (or now the executive) is obvious. A schoolboy's knowledge of history is ample to disclose some of the disasters which have been due to parliamentary or other outside attempts at control.

Burmah Oil Co. v. Lord Advocate, [1965] A.C. 75, 100 (1964).

stitutionality of the effort. To the extent that the Javits bill seeks to control the independent sudden repulse power of the President, it raises the question whether the sudden repulse power is exclusive to the Executive.[192]

Another form of legislation, complementary to the Javits approach, has also been proposed. It would provide that when Congress authorizes hostilities, as for example through a formal declaration of war, it could specify their duration, the geographic area in which American action was authorized, and possibly even the magnitude of the force that might be used.[193] Thus the Senate Foreign Relations Committee has suggested that any future resolution of the Tonkin Gulf variety should make clear that it "authorizes" or "empowers" the President rather than that it merely supports him or recognizes his power; and it should state "as explicitly as possible under the circumstances the kind of military action that is being authorized and the place and purpose of its use . . . and . . . a time limit on the resolution."[194] The constitutionality of such an approach is far from clear. Congress in the exercise of its independent power to declare war may authorize a special or limited war,[195] but it may not, under the aegis of this power, be able either to inhibit the President's sudden repulse power or to control his independent commander-in-chief power.[196]

Certain general observations about these various legislative attempts to control the President are in order. Congress should of course participate in foreign policy and war decisions; the impropriety, however, of specific rigid legislation with respect to foreign affairs has often been marked.[197] A nation's decisions in the foreign sphere and with

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192 *See* notes 92-98 and accompanying text *supra*.

193 Merlo Pusey has proposed machinery of this kind. M. PUSEY, THE WAY WE GO TO WAR 177-78 (1969). It has been suggested that congressional participation may be required if a war is above a certain magnitude. *See* Note, *supra* note 115, at 1775. It has also been suggested that Congress can impose "reasonable conditions" on the President's war power. Memorandum, Indochina: The Constitutional Crisis, *supra* note 2, at 15,411-12. It is interesting to note how broad the operative provisions of our declarations of war have been. For example:

> [T]he President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.

Declaration of War on Japan, Dec. 8, 1941, 55 Stat. 795.

194 SENATE COMM. ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, S. REP. No. 129, 91ST CONG., 1ST SESS. 33 (1969).

195 *See* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

196 *Cf.* notes 175-78 and accompanying text *supra*.

197 Many authors have spoken against rigid legislation with respect to foreign affairs.

respect to war involve a constant assessment of risk and advantage, an extremely fine calculation.[198] Because legislation cannot always anticipate all variables and because it is not easy to change rigid legislation, it is quite possible that the President would, in what he deems to be the national interest, ignore legislation restricting his alternatives in the foreign affairs field.[199] For Congress knowingly to pass legislation which it may reasonably suppose the President will ignore is, it seems to me, most unwise.[200] Senators and Congressmen should not create a situation in which the law will be flouted.[201]

There is, to be sure, another rationale for this sort of legislation: not rigidly to proscribe executive actions, but rather only to put pressure on the Executive. This would be the case not only if the President were prohibited from acting, but also were he only told that there would be a penalty on his action, such as the loss of appropriations for another purpose.[202] Any congressional effort to infringe upon the Executive's exclusive powers, either directly or indirectly, however, seems objectionable.[203]

There is a third significance to such legislation. Proposed legislation may be used not as a specific proscription or as specific pressure but rather only as a political signal. The attempts to enact the Hatfield-McGovern and Mansfield amendments may perhaps be understood in this sense. It can be assumed that the President will look carefully at the closeness of the votes and at the tightness and pattern of various provisions. Arguably such efforts at legislation represent a rough substitute for a vote of no confidence. There are several difficulties with this argnment, however. Are such efforts really effective? Have they actually changed the President's course in Cambodia or Vietnam?[204] Does the use of laws solely as a political signal not contribute to a certain cynicism about the law?[205] It could be argued that although the President

E.g., J. BRYCE, THE AMERICAN COMMONWEALTH 244 (3d ed. 1906); G. KENNAN, MEMOIRS: 1925-1950, at 409 (1967).

198 *See Hearings on Administration of National Security Before the Subcomm. on National Security Staffing and Operations of the Senate Comm. on Government Operations*, 88th Cong., 2d Sess., pt. 1, at 86 (1965).

199 *See* notes 166-71 and accompanying text *supra*.

200 *But see* Spong 28-31.

201 *See* note 170 and accompanying text *supra*.

202 *See* Wallace 472.

203 *See id.* 477. Provisions creating such pressure may in fact be deemed unconstitutional conditions. *See* notes 157-60 and accompanying text *supra*.

204 When President Nixon announced, on January 25, 1972, that he would accept a "date certain" for withdrawal from Vietnam if certain conditions were accepted by North Vietnam and the Viet Cong, Senator Mansfield was reported to be pleased. N.Y. Times, Jan. 27, 1972, at 1, col. 6.

205 Consider President Nixon's statement on the occasion of his signing the Military

might not feel specifically bound by all of the Javits bill, he would accept the legislation as a political signal and would therefore seek ways to consult more closely with Congress with respect to the use of armed forces abroad.[206] Certainly the object is admirable. But is this not an abuse of legislation?[207]

This is not the place to review at great length the relative competence of Congress and the Executive. Even after the Vietnam War, I think it clear that most people would still conclude, however reluctantly, that the Executive is the most capable of the three branches with respect to the conduct of foreign and therefore war affairs.[208] Congress of course must have a role in the basic policy making of the country. It might be argued that wars, or at least some of them, are expressions of more basic streams of policy but are not themselves basic.[209] In any event, the inherent deficiencies of Congress as a sole or ultimate policy maker in the foreign affairs field, and the inherent problems of rigid, restrictive legislation seem to make such legislation an unacceptable device in the formulation of foreign and war policy.

B. *Attempts at Litigation*

The desire to litigate the legality of the Vietnam War has been widespread.[210] The effort to litigate may be in part owing to the general

Procurement Authorization Act of 1972, 85 Stat. 423, which contained the Mansfield amendment, § 601, 85 Stat. 430: "I wish to emphasize that § 601 of this Act—the so-called 'Mansfield Amendment'—does not represent the policies of this administration . . . . [I]t is without binding force or effect." 7 WEEKLY COMP. PRES. DOCS. 1531 (Nov. 22, 1971). This statement elicited a full page advertisement in the *New York Times* headed, "We are suing Nixon." N.Y. Times, Nov. 21, 1971, § 4, at 5. The advertisement says, in part, "Then on November 17, Nixon announced that he will disregard the Mansfield Amendment, which he has signed, and which is now law." *Id.* The advertisement quotes Senator Church as saying, "[T]he Mansfield Amendment is now part of the law and, as such, is not subject to dismissal by the President." *Id.* It concludes by saying, "Nixon is fond of talking about law and order. Well, the law exists. Now we need a court order to get him to obey it." *Id; see* Gravel v. Nixon, Civil No. 945-72 (D.D.C., filed May 11, 1972).

206 *See* S. REP. No. 606, *supra* note 180, at 30 (remarks of Senator J. S. Cooper).

207 *See* text accompanying notes 199-201 *supra.*

208 Most citizens perceive [the President] to be uniquely mandated to act in foreign and military policy, areas in which they are apt to feel insufficiently well-informed and in which they are inclined to doubt the judgment of legislators as well.

Legere, *Defense Spending: A Presidential Perspective,* FOREIGN POLICY, Spring 1972, No. 6, at 84, 88.

209 Professor Dahl and others point out that if we are to have a healthy democracy, the public and its representatives in Congress must participate in some way in the making of basic and broad policy. DAHL 82. Nelson Polsby has suggested that the Vietnam War does not represent such basic policy, but is rather a "mere" episode in our basic policy of containment. *See generally* N. POLSBY, THE CITIZEN'S CHOICE, HUMPHREY OR NIXON (1968). By any criterion, however, the decision whether to continue with the Vietnam War has become a basic policy issue.

210 *See* G. GUNTHER & N. DOWLING, CASES AND MATERIAL ON INDIVIDUAL RIGHTS IN

"social activism" recently evident in the legal profession and to the belief that the courts can solve our "social" problems,[211] among which the frustrations generated by the Vietnam War certainly can be counted. On the other hand, deTocqueville's famous dictum that political questions in the United States are usually resolved into judicial questions[212] suggests that such litigation was inevitable. Indeed there seems to be a tendency in our society to examine all problems, even philosophical ones, in a legal light.[213] The efforts of lawyers to litigate the issues of the War have largely been frustrated, however, and it appears that they will continue to be.

The courts are extremely reluctant to involve themselves in problems of the international order, preferring to leave such problems to the "political departments" of government.[214] Notwithstanding occasional remarks to the contrary,[215] this reluctance seems to preclude consideration of the extent of executive power or indeed of the relationship of executive to congressional power in the foreign affairs area.[216] The Supreme Court has used various devices to avoid adjudication of foreign affairs issues, for example, the standing doctrine, the denial of certiorari,

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CONSTITUTIONAL LAW 601 (1970); DaCosta v. Nixon, Civil No. 72C626 (E.D.N.Y., filed May 11, 1972); Gravel v. Nixon, Civil No. 945-72 (D.D.C., filed May 11, 1972).

211 *See* Barron, *The Ambiguity of Judicial Review: A Response to Professor Bickel*, 1970 DUKE L.J. 591. This activism, which extends to questions involving the poor, the environment, civil rights, prison reform, consumers' rights, and so forth, may have received some of its impetus from the relative success of the desegregation and reapportionment cases.

212 A. DE TOCQUEVILLE, *supra* note 52, at 106. Of course such resolution may take time. For example, it took the Supreme Court 137 years to address certain questions concerning the removal power, first raised in the "great debate" of 1789. *See* Myers v. United States, 272 U.S. 52 (1926).

213 This tendency is exemplified, it seems to me, in the area of the first amendment. Certainly the question of free speech is a profound problem of political philosophy. *See* J. S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 13-48 (R. McCallum ed. 1948). Because of our written Constitution and judicial review these profound questions have become substantially involved with law and the courts. I do not think it is an exaggeration to say that many Americans today focus on the outer limits of the legality or constitutionality of speech rather than on the philosophy underlying freedom of speech. I believe this possibly unintended side effect of the "legalization" of philosophic issues to be unfortunate. It is compatible, however, with an often noted American tendency to prefer rules to ambiguity and norms to politics and judgment.

214 *E.g.*, Oetjen v. Central Leather Co., 246 U.S. 297 (1918) (recognition of legitimate government of Mexico).

215 Baker v. Carr, 369 U.S. 186, 211-213 (1962).

216 The Supreme Court has, however, concerned itself with separation of powers in certain areas. *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (power to seize domestic property during war is a legislative rather than executive power); Myers v. United States, 272 U.S. 52 (1926) (removal power resides in Executive, not Congress); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (power to grant pardons resides in Executive, not Congress).

and the political question doctrine. Overriding all of these devices—and in this respect the approach of the Court is quite different from that in domestic cases—is the substantial Supreme Court deference to the Executive, a deference which may often be indistinguishable from the judicial view that, on the merits, many war and other foreign policy decisions are committed to the Executive and are therefore not examinable by the judicial branch. In other words, the Court is extremely reluctant to adjudicate the merits of war and foreign policy cases.[217]

The matter of standing may be disposed of briefly. As the Supreme Court pointed out in *Flast v. Cohen*,[218] this is a shifting area. One requirement for standing to exist is that there must be a "nexus" between the plaintiff who asserts standing and a right guaranteed to him by statute or by the Constitution.[219] Federal courts have continued to refuse standing to raise war power issues to inductees[220] and to persons merely asserting the status of citizen or taxpayer;[221] however, soldiers on the verge of dispatch to Vietnam have, at least implicitly, been given standing to raise war power issues—albeit in cases ultimately unsuccessful on the merits.[222] Although *Flast* is not as clear on the matter as it might be,[223] the Supreme Court's later language in *Association of Data Processing Service Organizations, Inc. v. Camp*[224] suggests that there can be no standing if there is no substantive right with respect to

217 The Court's deference takes many forms. *E.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state doctrine); *Ex parte* Peru, 318 U.S. 578 (1943) (sovereign immunity doctrine); United States v. Pink, 315 U.S. 203 (1942) (power to recognize a foreign government); United States v. Belmont, 301 U.S. 324 (1937) (executive agreements); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) (executive interpretation of treaties).

218 392 U.S. 83 (1968).

219 *Id.* at 102.

220 *E.g.*, United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967); *cf.* United States v. Bolton, 192 F.2d 805 (2d Cir. 1951) (Korean War).

221 *E.g.*, Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970).

222 Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971) (authority of executive branch to wage war in Vietnam implied from congressional acquiescence); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967) (injunction preventing member of armed services from being sent to Vietnam denied); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970) (court rejected plaintiff's attempt to classify himself as about to be dispatched to Cambodia specifically, rather than Indochina geuerally).

223 Although indicating that standing is part of the issue of justiciability, the Court in *Flast* suggests that it is to be determined separately from other aspects of justiciability, such as the political question doctrine. 392 U.S. at 95.

224 397 U.S. 150, 153 (1970): "The question of standing . . . concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

which the individual litigant can demonstrate some nexus.[225] On the one occasion the Supreme Court spoke to the matter of standing with respect to war issues, it appeared to indicate—albeit in dicta and before the later convolutions of *Flast*—that a private litigant had neither a recognized substantive interest nor the required nexus. In *Johnson v. Eisentrager*[226] the Court stated,

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.[227]

The main bulwark erected by the Court to avoid a decision on the merits appears to be the political question doctrine.[228] The political question doctrine is an exceedingly complicated subject,[229] and one cannot begin to understand its operation unless one appreciates that in the area of foreign affairs and war it is merely one expression of an overriding Supreme Court attitude of noninterference with regard to the functioning of government in the international order.[230] The Court recognizes that the requirements of international affairs make it largely inappropriate for it to become involved.[231] Notwithstanding the sug-

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225 *Cf.* Reservists Comm. To Stop the War v. Laird, 323 F. Supp. 833 (D.D.C. 1971).

226 339 U.S. 763 (1950).

227 *Id.* at 789.

228 The Supreme Court has in fact usually resorted to a denial of certiorari without giving reasons. *E.g.*, Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967). Dissenting justices, however, have often suggested the political question doctrine to be the Court's real reason. *See, e.g.*, Mora v. McNamara, 389 U.S. 934, 934 (1967); United States v. Mitchell, 386 U.S. 972, 972 (1967).

229 *See generally* Michelman, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 63-71 (1969); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Tigar, *supra* note 13.

Professor Alexander Bickel, who has addressed the issues involved in the political question doctrine in two books, *The Least Dangerous Branch* and *Politics and the Warren Court*, takes the position that the Supreme Court need not articulate when and why it will invoke the various devices of judicial self-restraint available, including the political question doctrine. A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); A. BICKEL, POLITICS AND THE WARREN COURT (1965). Others think that the Court should articulate the basis of the application of the political question doctrine, much as if it were a principled rule of law. *E.g.*, Hughes, *Civil Disobedience and the Political Question Doctrine*, 43 N.Y.U.L. REV. 1, 14-15 (1968).

230 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

231 The cases are legion. *E.g.*, Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Foster v. Nielsen, 27 U.S. (2 Pet.) 253 (1829).

Justice Jackson expressed a comparable sentiment, concurring in *Youngstown:*

> I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is

gestion in *Baker v. Carr* that not all matters of foreign affairs come within the political question doctrine,[232] and indeed that questions of separation of powers belong pre-eminently to the Court,[233] the record clearly indicates that the Court will not consider foreign affairs questions, or that if it does so, it will usually uphold decisions of other branches of government.[234] In any event, the crux is this: there are certain matters and decisions committed to the political departments. Such matters, as the Court stated in *Marbury v. Madison*,[235] are not "examinable by courts."[236] *Marbury* itself suggested that one such area was foreign affairs.[237]

Of course, if an area of political decision is not examinable by courts, then a fortiori a court cannot recognize and create individual rights with respect to such decisions. This is the answer to the suggestion of commentators such as Professor Leonard Ratner that the Vietnam dispatchee has a "life-expectancy interest," a right which the courts

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turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (concurring opinion); *cf.* United States v. Debs, 249 U.S. 211 (1919). *See also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 322 (1936).

In *In re Neagle*, Justice Lamar went so far as to suggest that the "balance" inherent in separation of powers may not be applicable in the area of foreign affairs: "[T]o foreign nations . . . the internal adjustment of federal power, with its complex system of checks and balances, [is] unknown, and the only authority those nations are permitted to deal with is the authority of the nation as a unit." 135 U.S. 1, 85 (1890) (dissenting opinion).

232 369 U.S. 186, 211 (1962); *cf.* note 216 *supra.*

233 369 U.S. at 210-214.

234 *See* cases cited in note 217 *supra.* The Court's sentiments are well reflected in its dictum in Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948):

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

235 5 U.S. (1 Cranch) 137 (1803).

236 *Id.* at 166. Compare Professor Abram Chayes's interesting observation that the immunity from judicial scrutiny of executive-legislative relations and activity in the foreign affairs area resembles the immunity of nation states from international judicial scrutiny. Chayes, *A Common Lawyer Looks at International Law*, 78 HARV. L. REV. 1396, 1410 (1965).

237 5 U.S. (1 Cranch) at 164-66.

may protect against the government.[238] The fact of the matter is that no such right is recognized. If there is no such right then the application of the political question doctrine or a decision on the merits yields the same result. Before passing to the merits, however, let me suggest a further point. When the Supreme Court pursuant to the political question doctrine refuses to examine separation of powers in the foreign affairs area, notwithstanding its suggestion in *Baker v. Carr* that it has the power to do so[239] and notwithstanding that it has passed on separation of powers problems in other areas,[240] it may be acknowledging that separation of powers is not a wholly viable device in the foreign affairs area.[241] This is of course speculative. My principal point is only that the Court is basically committed to the idea that powers in this area are given to the political branches and that therefore it will not become involved.

The Court has not extensively addressed the merits of cases involving foreign affairs issues. Additionally, there would appear to be somewhat of a theoretical impasse when the merits of foreign affairs cases are approached, an impasse which extends far beyond Vietnam dispatch cases or the propriety of the initiation of the war.[242] Although this is not the place to explore this theoretical impasse in detail, it may be noted that the Court appears not to have developed any general analytical framework by which to weigh and evaluate the assertion of individual claims on the one hand and the foreign policy or national security of the government on the other. For example, there is no theoretical framework similar to either the "preferred position" of freedom of speech under the first amendment,[243] the "compelling state interest" required to validate an "invidious classification" or infringe-

238 Ratner, *supra* note 13, at 489.

239 369 U.S. at 210-14.

240 *See* cases cited in note 216 *supra*.

241 In *Orlando v. Laird* the Second Circuit indicated that once a minimum mutual participation by the Executive and Congress in hostilities had occurred, it was a political question as to what degrees of congressional participation would be necessary for differing degrees of hostilities. 443 F.2d 1039, 1043 (2d Cir. 1971). In a sense the court decided that the matter was beyond its competence—even in the face of an elaborate demonstration by the plaintiff that judicially manageable standards existed. *Id.* at 1041.

242 This impasse is discernible in a wide variety of cases. *E.g.*, Derecktor v. United States, 128 F. Supp. 136 (Ct. Cl.), *appeal dismissed per stipulation*, 350 U.S. 802 (1955) (contract rights and foreign policy); Duncan v. Kahanamoku, 327 U.S. 304 (1946) (application for writ of habeas corpus during war for military court convictions of civilians for nonmilitary offenses in Hawaii); Korematsu v. United States, 323 U.S. 214 (1944) (Japanese-American citizen convicted for remaining in a "military area" contrary to wartime Civilian Exclusion Order); *Ex parte* Quirin, 317 U.S. 1 (1942) (petition for habeas corpus upon imprisonment for espionage during war).

243 *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949).

ment upon a "fundamental interest,"[244] or the required "rational basis" of exercises of the police power.[245]

When the Court feels compelled to address the merits of claims, it inevitably leans towards the Executive or Congress and away from the individual. It seems fairly clear that neither the individual soldier, nor the individual citizen, nor anyone else has a legally enforceable right to question whether a President's decision to dispatch troops is made pursuant to congressional authority or not.[246] The President's decision is political in the *Marbury* sense of not being "examinable by courts."[247] One can say broadly that the Court will be very slow to examine the executive use of force when that force is directed outward;[248] the Court will rather say that it is committed to the Executive. This would very clearly appear to be the implication of decisions or dicta in a number of celebrated cases: *United States v. Curtiss-Wright Export Corp.*,[249] *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Co.*,[250] *Koremastu v. United States*,[251] and *Youngtown Sheet & Tube Co. v. Sawyer*.[252]

To be sure, many foreign affairs questions are unlitigated and we have only fragmentary historical precedent; but I believe that future decisions will not be inconsistent with those to date.[253] I think the Supreme Court appreciates that it is an institution of dissimilar competence from the Executive and Congress.[254] On the one hand, the Executive has certain characteristics and resources which the Court could never obtain or develop, including access to information, full time specialization in foreign affairs, substantial expertise, and a political mandate.[255]

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244 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

245 *See, e.g.*, Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935).

246 *Cf.* Johnson v. Eisentager, 339 U.S. 763 (1950).

247 *See* note 213 and accompanying text *supra*. *See also* Shachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955).

248 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (concurring opinion).

249 299 U.S. 304 (1936).

250 333 U.S. 103 (1948).

251 319 U.S. 432 (1943).

252 343 U.S. 579, 645 (1952) (concurring opinion).

253 If the holding of Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1970), *cert. denied*, 404 U.S. 869 (1971), that a sufficient exercise of the congressional declaration of war power had been manifested through appropriations, selective service legislation, and the like, and that a prior express exercise of the declaration of war power was not required under the Constitution, were to be adopted and embraced by Congress, the original constitutional intention might well be thwarted and the path of future verdicts of history shifted considerably. *See* note 137 *supra*.

254 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431-33 (1964).

255 *See* notes 208 & 209 and accompanying text *supra*.

On the other hand, there are inherent Supreme Court deficiencies with regard to international issues: its capacity to find facts is limited by the adversary process[256] and its members are uncomfortable with the frequent requirement of keeping facts having to do with national security secret.[257]

Because the Court has largely stayed out of the foreign affairs area, it has not had to delineate the limits of possible judicial remedies; the difficulty of formulating remedies in this area is of course a classic ingredient of the political question doctrine.[258] But there is a more profound fact: the point might be reached when the Executive would ignore the Court. I have argued that the Executive might ignore Congress if it tried to restrict the exercise of his commander-in-chief powers;[259] if the Executive were to ignore the Court it would not be acting entirely without precedent.[260] Moreover, as Professor Alexander Bickel has suggested,[261] the Court does not have the political or democratic base or mandate to justify its involvement in this area. In short, just as rigid legislation is not appropriate to decisions in the foreign affairs area, so principled decision—the great hallmark of the judicial role—is not appropriate. The instability and fluid nature of the international order is simply different in kind from the nature of the domestic order.[262]

256 *See* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 114 (1948).

257 United States v. Reynolds, 345 U.S. 1, 7-8 (1953); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); United States v. Curtiss-Wright Export Corp., 299 U.S. 103, 111 (1936).

258 *See* Baker v. Carr, 369 U.S. 186, 211-14 (1962).

Certain limits on remedies against the President are more formal than real. Thus although the President himself cannot be subject to a mandatory injunction (Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866)), cabinet officers can be given directions by the Court (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)). *Cf.* Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) (cabinet officer directed to carry out ministerial duty to pay funds).

259 *See* notes 166-71 and accompanying text *supra.*

260 In *Ex parte* Merryman, F. Cas. 144 (No. 9487) (C.C.D. Md. 1861), Justice Roger Taney, on circuit, ordered a writ of habeas corpus to issue to General George Cadwalader. When the general failed to comply with the writ, Justice Taney observed that he had done his duty and that the matter now lay with General Cadwalader's superior, President Lincoln—who also did not comply. CORWIN 144-45; *cf.* Duncan v. Kahanamoku, 327 U.S. 304 (1946). More recently, the President has undercut contrary court rulings by proposing a busing moratorium. For the President's statement, see *Educational Opportunity and Busing*, 8 WEEKLY COMP. PRES. DOCS. 590 (March 20, 1972).

261 A. BICKEL, THE LEAST DANGEROUS BRANCH 184-86 (1962).

262 Foreign affairs matters are political rather than justiciable in both the domestic and international sense. As Judge de Visscher has pointed out, the instability of the international order limits the subjection of nation states to international law; the international order remains largely a function of the power relations among nation states. C. DE VISSCHER, *supra* note 14, at 135-36. Conditions in the international order are simply less

IV

CAN OUR POLITICAL INSTITUTIONS BE ADJUSTED? PROPOSED AND UNPROPOSED SOLUTIONS

It can be argued that there have been two failings with respect to our involvement in Vietnam: the policy pursued has been irrational, and the manner in which we entered and persisted in the war was not sufficiently democratic in that Congress was deprived of its power to declare war.[263] This article has been addressed to the second failing. Is there anything that can be done to prevent failings of the second type, recognizing that but for the first the second would not be nearly so urgent? In other words, can we adjust our political institutions so as to ensure a more meaningful foreign and war policy role for Congress?

I have sought to demonstrate that the origin of the constitutional problem lies in the system of separation of powers created in 1787 and in its subsequent (I would submit inevitable) development, which has revealed the absence of suitable political mechanisms to ensure democratic responsibility with respect to war and foreign policy decisions. Neither the legislative approach of the Cooper-Church amendments[264] based on the appropriations power, nor that of the Javits bill[265] based on the declaration of war power, nor litigation is a sufficient solution. I shall now examine other solutions that have been proposed and some that have not.

A. *A New System?*

One proposed solution would be a substantial overhaul of the present system. Essentially, the "replacers" would substitute the British

static than those in the domestic order. The facts upon which a judicial decree could be formulated might be radically different several days following the decision; one need only think of the progress of the Arab-Israeli War in 1967 or the recent Indian-Pakistani War for evidence of this fact. The courts neither have access to, nor can they effectively handle, a sufficient range of facts about the international order. *See* text accompanying notes 255-56 *supra*.

I do not suggest that there will be no adjudication with respect to foreign affairs. Of course there will continue to be cases involving conflict of laws, enforcement of foreign judgments, and foreign evidence. *See* Tigar, *supra* note 13, at 1152-58. And there will continue to be cases involving the interpretation and application of treaties, sovereign immunity, and the act of state doctrine. And although there will also continue to be cases involving martial law, military justice, espionage, and wartime seizure of property, none of these issues should be confused with the central issue of the nation's response by war to the pressures of the international order; this issue the courts will not adjudicate.

263 *See* DAHL 4.

264 *See* note 149 *supra*.

265 *See* notes 180-92 and accompanying text *supra*.

ministerial system[266] for our own. Given the historical reluctance of Americans to tamper with the basic constitutional scheme[267] and the perceived quality of the system's domestic performance, such a change seems highly unlikely. A second faction, the "improvers," presents a variation on this theme. Basically, their idea is to associate more closely the Executive and Congress through participation by senior members of Congress in an executive-congressional cabinet. The purposes of this plan are several: (*1*) to put members of the Congress on career paths leading to the Executive;[268] (*2*) to develop a greater sense of executive responsibility to Congress; and (*3*) to give the Executive greater access to the thinking of members of Congress.

I am skeptical of these proposals. The ministerial or cabinet system, based on the confidence of Parliament, represents a fusion of the executive and legislature with many subtle cross-controls and balances which are not present in our system.[269] Although not all of these cross-controls work today in the way they have in the past, their presence leads to an entirely different system of political balance.[270] Additionally, our Constitution would appear to bar members of Congress from serving in the executive department, and to change the rule would presumably require a constitutional amendment.[271]

It is true that the British scheme avoids some of our most serious problems; that the top members of the executive department come from the legislature tends to assure a shared administrative and foreign experience. "Improvers" such as Professor Dahl would seek to achieve this shared experience as well as the creation of more responsible—that is to say disciplined—political parties.[272] All this is interesting but in my opinion unlikely to occur.

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266 *See generally* DAHL 169. Presumably, the American innovation of Supreme Court judicial review, not present in the United Kingdom, would be retained.

267 Consider, for example, recent discussion over a proposed six-year presidential term. *See* Schlesinger, *The Presidency Under Glass*, N.Y. Times, Jan. 4, 1972, at 33, col. 4.

268 Congress does not at present often constitute a career path to high executive office in the field of foreign affairs. *See* Wallace 460.

269 These cross-controls and balances include the power of the executive to pick ministers from the legislature, the power of party discipline, and the power of Parliament to vote no confidence in the executive. *See generally* K. BRADSHAW & D. PRING, PARLIAMENT AND CONGRESS (1971).

270 *See* notes 23-25 and accompanying text *supra*.

271 U.S. CONST. art. I, § 6 provides in pertinent part, "[N]o Person holding any Office under the United States shall be a Member of either House during his Continuance in Office." Dahl calls this provision a "blunder." DAHL 173.

272 *See* DAHL 226-38.

B. *Improvement of the Executive*

A second proposed solution focuses on the American Executive. Basically, the idea is to improve the efficiency of the Executive and consequently the rationality of its foreign policy, thus in effect avoiding the "problem" of democratic responsibility which inheres in the legislative process.[273] Some would center even greater power in the White House, or indeed think this is inevitable;[274] others seek an improved State Department restored to greater power, and a generally improved bureaucracy.[275]

C. *Increases in Congressional Power*

Many now seem to believe that the Executive's "failure" to get more explicit congressional authorization for Vietnam was in reality a failure of Congress to assert itself.[276] More recently there have been a considerable number of proposals and initiatives to increase the power of Congress and to improve its operations. In the face of the troubled international order and the phenomenon of legislative decline relative to the executive throughout the world,[277] it is not clear what the effect of these proposals will be. The proposed modifications have taken several forms. The most basic suggests a revision of the seniority system and new methods of selection of leadership and committee chairmen.[278] Although some energy has recently been put into this proposal, its ultimate prospects are problematical.[279] Another proposal seeks to strengthen the hand of Congress by replacing the present foreign affairs and armed services committees and related appropriations committees with a new committee structure which would act somewhat as a "foreign affairs" directorate for Congress.[280] Related proposals speak in terms of

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273 *See* Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1 (1961).

274 Destler, *supra* note 75, at 31-32.

275 *See generally* Cooper, *supra* note 75; Destler, *supra* note 75; Halperin, *supra* note 75.

276 *See, e.g., War Powers Hearings* 706 (remarks of Senator J. Stennis).

277 Note 38 *supra*.

278 *See* 116 CONG. REC. 29,780-95 (1970) (remarks of Senator Packwood).

279 In fact, however, some changes have recently been made: a rule has been adopted that a Congressman may hold only one committee or subcommittee chairmanship. Legislative Reorganization Act of 1970, § 132(d), 84 Stat. 1140 (amend. to Senate R. 6, ¶ 25). The effect of this provision, however, may be merely to endear more Congressmen to the seniority system by making their committee positions irreplaceable.

280 Senator Hubert Humphrey has proposed a Joint Congressional Committee on National Security. S. 2290, 92d Cong., 1st Sess. (1971). *See* 117 CONG. REC. S 11,088 (daily ed. July 15, 1971) (remarks of Senator Humphrey).

improvement of the congressional staff[281] and of Congress's general information gathering facilities.[282] The thrust of some of these proposals would seem to be the creation of a congressional leviathan to counter the executive leviathan. My feeling is that this is not the proper development of the separation of powers system and would certainly not facilitate the conduct of foreign affairs.

Another set of proposals focuses on better use by Congress of its present facilities. Congress might investigate problems more vigorously, using the subpoena power if necessary.[283] Of course the congressional investigation of national security functions presents serious problems. A related device would be a requirement of greater reporting to Congress by the Executive, including reports with respect to the transport of troops abroad.[284] Senator Clifford Case has suggested that all international agreements—whether in the form of treaties or executive agreements—be submitted to the Senate for its information.[285] So that the Senate may give its advice and consent, Senator William Fulbright would also have the Executive use treaties more frequently than executive agreements[286] and have the President submit to the Senate the names not only of proposed ambassadors but of all foreign envoys.[287] Fulbright has in fact succeeded in having the State Department's annual budget made subject to review by both appropriations and foreign

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281 The total congressional staff is already very large, amounting in 1970 to 11,687 employees, of which a significant number are professionals. 116 CONG. REC. S 17,131 (daily ed. Oct. 5, 1970). In recent years Senators have employed personal foreign affairs advisers.

282 It is thought that additional general staff, systems analysts, and computers might enable Congress to review the Pentagon budget in a more meaningful way.

283 The investigative power of Congress is only as effective as its subpoena power, and that power has occasionally been stymied by the invocation of executive privilege. *See* N.Y. Times, April 16, 1972, § 4, at 6, col. 4.

284 The Javits bill contains a provision of this kind. S. 2956, 92d Cong., 1st Sess. § 4 (1971). Of course the Executive will be reluctant to disclose all details of a foreign affairs or military matter to the entire Congress; therefore, such executive reports might necessarily be quite general, and might exclude many of the factors on the basis of which fine calculations as to foreign or war policy are made. *See* DAHL 171-72.

285 N.Y. Times, Dec. 3, 1970, at 15, col. 1. This proposal was submitted to the Senate in February, 1971 as a resolution, S. Res. 36, 92d Cong., 1st Sess. *Cf.* N.Y. Times, Dec. 8, 1971, at 14, col. 4.

286 For example, Senator Fulbright has suggested that any guarantees to Israel take the form of a treaty rather than an executive agreement. *See* Fulbright, *Old Myths and New Realities—II: The Middle East*, 116 CONG. REC. 29,796 (1970). S. 3475, 92d Cong., 2d Sess. (1972), introduced by Senator Sam Ervin, which would require all executive agreements to be submitted to Congress and be subject to disapproval by concurrent resolution within 60 days of submission, might meet both Senator Fulbright's proposal and Senator Case's proposal (note 285 and accompanying text *supra*).

287 115 CONG. REC. 16,080 (1969) (remarks of Senator Fulbright).

affairs committees of both houses.[288] In addition, Senate Resolution 151 of 1967[289] states it to be the "sense" of the Senate[290] that all "national commitments" require congressional participation.[291] I have already considered the effort to pass the Hatfield-McGovern and Case-Church amendments, the status of the Javits bill, and the actual passage of the Cooper-Church and Mansfield amendments.

What are the prospects for these proposals? It is agreed that the appropriations power is the bulwark and the heart of congressional power.[292] No doubt many of the proposals are aimed towards facilitating a more efficient exercise of that power by Congress. Basically, congressional power can be exercised through withholding or reducing of appropriations, and legislative efforts such as those by Senators Case, Cooper, Church, Hatfield, McGovern, and Mansfield. The former require great congressional will and expertise, and involve the possible creation of a competing leviathan. The latter to some extent involve measures which in my opinion are constitutionally impermissible under a proper understanding and working of our delicate system of separation of powers.[293] On the other hand, the adroit use of some or all of these devices, if truly reflective of a new congressional will to influence the Executive, may have some effect despite executive resistance.

D. *America's Place in the International System*

Before examining some other developments which might affect the working of our constitutional system, we might pause briefly to look at the international system. What are the prospects for the international order to change so radically as to alter significantly the nature of the external problems confronting the United States? Here one must be skeptical. One must remember that the international order is exceedingly

288 Foreign Assistance Act of 1971, §§ 407(a)-(b), 86 Stat. 35.

289 S. Res. 151, 90th Cong., 1st Sess. (1967).

290 A "sense of the Senate" resolution may be intended as no more than "advice" or indeed as a political show. Presumably S. Res. 151 is intended as something more.

291 In fact executive "commitments" are still common. President Nixon, for example, recently assured Chancellor Willy Brandt of West Germany that "American commitments in Europe will remain unchanged, and that, in particular, no reductions in American troops stationed in Europe will be made." THE ECONOMIST, Jan. 1, 1972, at 28.

292 The orchestration of the appropriations power either to withhold or to reduce funds will be difficult. To some it may seem a war on the war power.

293 *See* Massachusetts v. Mellon, 262 U.S. 447, 488 (1923):

> To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other.

complex, and the expected move to multi-polarity from present bi-polarity will not make it less complex. In any case a multi-polar international order will still be composed of nation states; one will still have to think about the relations among the United States, Russia, and China; among the United States, Europe, and Latin America; between Russia and Europe; between India and Pakistan, Israel and the Arab nations, and so forth. To be sure the American role in the world could be significantly changed under the "Nixon doctrine."[294] My own belief is that American dependence on foreign economic resources, the foreign activity of United States investors and traders,[295] and our general concern with world affairs will mean a continual, substantial international involvement. One question, however, will probably remain unresolved —whether the United States can eschew idealism for realism in foreign affairs.[296]

E. *A Balance Between Rationality and Responsibility: Cooperation Between the Executive and Congress*

The domestic cousin to a more realistic attitude towards foreign affairs is a more cooperative attitude in both executive and legislative branches towards the separation of powers. Although I reject the overall approach of the Javits bill, it is possible that some portions of it, such as the reporting requirement and the direction that the President come to Congress with a strong justification for participation in any substantial hostility, combined with a more adroit use of the appropriations power by Congress, might exert pressure on the Executive to increase

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294 The "Nixon Doctrine" represents the attempt of the Nixon administration to redefine the American foreign policy role without destroying "confidence abroad." The President detailed the three elements of the "new partnership" as follows:

> First, *the United States will keep all of its treaty commitments. . . .*
>
> Second, *we shall provide a shield if a nuclear power threatens the freedom of a nation allied with us or of a nation whose survival we consider vital to our security. . . .*
>
> Third, *in cases involving other types of aggression we shall furnish military and economic assistance when requested in accordance with our treaty commitments. But we shall look to the nation directly threatened to assume the primary responsibility of providing the manpower for its defense.*

United States Foreign Policy for the 1970's: Building for Peace, 7 WEEKLY COMP. PRES. Docs. 305, 309 (Feb. 25, 1971) (emphasis in original).

295 The current problems of international trade and investment are discussed in Javits & Freeman, *Two Responses to Senator Hartke*, N.Y. Times, March 5, 1972, § 3, at 16, col. 3.

296 Our tendency towards idealism in foreign affairs, exemplified by the foreign policy of Woodrow Wilson, has often been pointed out, as has the necessity for realism. *See generally* G. KENNAN, REALITIES OF AMERICAN FOREIGN POLICY (1954). Are we on the verge of finally achieving such realism? Some hope that the Vietnam experience will produce this result. *E.g.*, Shannon, *America Comes of Age*, N.Y. Times, Jan. 3, 1972, at 27, col. 1.

congressional participation. The President might reexamine, for example, the constitutional implications of the extensive power of a "national security adviser" such as Henry Kissinger, or he might seek to increase consultation with Senators or Congressmen, either as individuals or as representatives of Congress. Of course a great deal depends on personalities: Dean Acheson and Arthur Vandenberg, for example, cooperated because both were strong and both insisted on cooperation.[297]

There is also a somewhat more metaphysical point. Americans —especially lawyers—are accustomed to think in terms of external checks and balances, of the adversary system, of economic competition, of the marketplace of ideas, and of similar mechanisms and notions. Much of this may be rooted in our peculiar form of democracy; the objective, whether it be truth, a low price, or consensus, is thought best achieved through a process in which ideas and practices freely conflict. This approach has served America reasonably well. On the other hand it may, in itself, no longer be sufficient. We may increasingly have to look to the Greek notion of *sophrosyne,* or moderation. We may have to learn, as a habit, to strike internal balances—in this case between executive perceptions and congressional preference—to achieve rationality and responsibility.[298] Quite frankly I believe Congress will have to continue to give quite a lot to the Executive. But if important officials in the executive branch and important members of Congress can acquire or strengthen an attitude of cooperation, a good deal may be accomplished.[299]

We thus seem to return to the usual adjuration for the necessity of cooperation between the Executive and Congress if our system is to work. Let me pose some questions without answering them. How might greater cooperation work, or have worked, in the following situations?

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297 D. ACHESON, *supra* note 106, at 71-72; A. VANDENBERG, THE PRIVATE PAPERS OF SENATOR VANDENBERG 72 (1952).

298 Senator Stennis has stated:

> The most important balance to be restored is the balance in the minds of the Nation's citizens, both those who are inclined to surrender their own responsibilities of decision to the executive, as many in the Congress have too often done, and those who believe that no cause is worth fighting for.

War Powers Hearings 707.

299 Senator Ervin has said:

> We must be ever mindful of the necessity for cooperation between the Congress and the Executive if the Government is to operate efficiently. That pressing requirement makes it mandatory that we seek and find an amicable settlement of the problems involved in the invocation of executive privilege to prevent Congress and the American people from knowing the details of executive actions.

Hearings on Executive Privilege, supra note 22, at 7.

1. *World Wars I and II*

What should a President do with respect to a succession of events such as those preceding both World Wars? Is consultation on each event realistic?[300]

2. *The Cuban Missile Crisis*

Senator Fulbright actually participated in the executive decisions. Did he represent the Senate or only himself? Would it have been feasible for the full Congress to have been involved in decisions on such fast moving events? To what extent could Fulbright and his colleagues have sounded out Congress and obtained a true reading of congressional sentiment? To what extent would the Executive have adhered to that sentiment? To what extent did Congress have relevant information which would lead the Executive to respect its opinion?[301]

3. *Vietnam*

President Johnson obtained the Tonkin Gulf Resolution from Congress in 1964. Should he have gone back to Congress, say in 1967, for reaffirmation of his authority? Should he have submitted the decision to escalate the conflict to Congress for its affirmative approval? The Javits bill would not appear to require such reaffirmation, but under that bill there would theoretically have been proper and fully informed congressional authorization at the beginning of hostilities. Can Congress, realistically, be consulted at various stages of an escalating war?[302]

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300 Can another Versailles be avoided? The President has since World War II invited senatorial observers to important treaty negotiations, and this practice should of course be continued. Thus the President invited Senators to participate in the drafting of the United Nations Charter in San Francisco in 1945. *See* Wallace 318 n.175. Congress, possibly because the power to regulate foreign commerce is assigned to it by the Constitution, has provided for congressional participation in trade negotiation delegations. *See generally* A. CHAYES, T. ERLICH, & A. LOWENFELD, *supra* note 107, at 307. No congressional participation was invited at the recent Strategic Arms Limitations Talks (SALT).

301 Presidents Eisenhower and Kennedy apparently consulted frequently with members of the Senate Foreigu Relations Committee on major foreigu policy initiatives. So too, President Truman consulted with congressional leadership over Korea. *See* note 106 *supra*.

302 Von Clausewitz, prior to the existence of nuclear weapons and theories of limited war, was of the opinion that all wars tend to escalate: "War is an act of force, and to the application of that force there is no limit. Each of the adversaries forces the hand of the other, and a reciprocal action results which in theory can have no limit." K. VON CLAUSEWITZ, *supra* note 17, at 5.

4. *Cambodia*

Was the incursion a second front or more akin to a new war? If it is seen as part of the larger Vietnam War, was the lack of consultation proper under the Executive's commander-in-chief power? On the other hand, since the problems in Cambodia did not evolve with the urgency of the Cuban missile crisis, would not congressional consultation have been appropriate?

CONCLUSION

What is likely to happen as a result of the Vietnam experience? Will we change our ways or will new external pressures merely lead to a further development of virtual executive monopoly over foreign policy initiative? Personalities may be crucial; a congressional leadership sufficiently able and determined effectively to assert its authority while cooperating with the Executive, and a President equally able and willing to cooperate, can provide a satisfactory solution.