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CONGRESS, CONSTITUTIONAL RESPONSIBILITY AND THE WAR POWER

*by Allan Ides**

I. INTRODUCTION

That the national government has the power, both practical and constitutional, to place this nation at war is a given. That this power, potentially the most destructive and despotic of all powers vested in governments, is a necessity is no less plain. But our Constitution does more than create a national government with specified powers. Just as plainly as the Constitution grants or creates powers, it places limitations upon the exercise of those powers. Some of those limitations are specific negatives on governmental action, such as the proscriptions found in the Bill of Rights; others are structural devices designed to prevent the exercise of arbitrary power and to promote the ideals of a republican government. The specific negative restraints tend to wilt at the invocation of the war power.¹ As a consequence, limitations of the structural type provide, perhaps, the most important constitutional restraint upon exercises of that power. In this regard, the separation of powers principle is of prime importance. That principle is designed, in part, to prevent the exercise of arbitrary war making power by placing in Congress the primary responsibility for determining the nation's military policy. If the dog of war is to be unleashed, if our freedoms are to risk dilution, then it shall only be upon a conscious choice by our most representative branch.

It would not be overstating the case to remark that of late the separation of powers principle has not fared well in the war making context. Congress, as a practical matter, retains only a small residuum of its constitutionally mandated authority and responsibility. Power has de-

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1. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47, 52 (1919), in which Justice Holmes, writing for the Court, observed: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *See also* *Korematsu v. United States*, 323 U.S. 214 (1944).

volved to the presidency through a combined process of abdication, usurpation and political complacency. Presidential predominance over the power to make war is a given. Yet, unless one views the Constitution as a mere technicality to be followed only when convenient or accepts the theory that the Constitution can be amended by consistent violation of its most basic principles, the current allocations of war making authority ought to be cause for deep concern.

The War Powers Resolution of 1973² was ostensibly designed to insert congressional responsibility back into the war making power and by so doing to reestablish the lines of authority and responsibility mandated by the Constitution. The specific question now to be pursued is whether, or the extent to which, the Resolution has succeeded in so doing. Events in 1983, particularly the invasion of Grenada and the Marine deployment in Lebanon, provide ominous insight regarding the Constitutionality and effectiveness of the War Powers Resolution. These issues, however, cannot be addressed without first examining the structural allocations of authority provided by the Constitution. Nor can the efficacy of the War Powers Resolution be fully appreciated without some awareness of the constitutional breakdown that preceded its adoption.

II. THE BASIC CONSTITUTIONAL ALLOCATIONS

The Constitution grants political power to the national government; it assigns responsibilities over that power to the separate branches. Aside from internal housekeeping matters, no single branch is given complete political authority over any particular substantive power. This describes, in simple terms, the mechanics of the principle of separation of powers. It would be more accurately called a principle of separation of functions or authority since it does not involve a separation of substantive powers, but a division of duties over powers granted to the national government. Thus, article I, section 8 of the Constitution appears to grant to Congress a vast array of powers. For example, it states that, "Congress shall have Power To regulate Commerce . . . among the several States" Although this language literally grants only Congress the power to regulate interstate commerce and although neither article II (the executive branch) nor article III (the judicial branch) mentions the interstate commerce power, this power is quite plainly lodged in the national government as a whole. Specifically, the authority to exercise that or any other sub-

2. 50 U.S.C. §§ 1541-1548 (1973).

stantive power is, under the structure of our government, separated into its legislative, executive and judicial components with each branch assuming its appropriate sphere of responsibility.

The respective role of each branch can be demonstrated by a simple hypothetical. During the administration of President Carter the nation was faced with a severe energy shortage. The President made the adoption of a national energy policy a top priority for his administration. Indeed, he described the energy problems facing our nation as, "The moral equivalent of war."³ The negotiations between the President and Congress in developing a comprehensive energy package were long and tedious with some observers speculating that the two branches would never reach a suitable compromise. However, eventually a consensus was achieved and, among other things, Congress enacted and the President signed into law, the Public Utility Regulatory Policies Act of 1978 (PURPA).⁴ PURPA was a comprehensive set of regulations and guidelines designed to apply to both public and private utilities throughout the nation. Presumably, with this enactment a serious crisis was averted. But suppose that Congress and the President had failed to agree upon any specific legislation in this area. And suppose that upon a careful examination of the facts the President correctly concluded that this moral equivalent of war was being lost and that the nation was seriously threatened by rapidly dwindling energy supplies. Could the President have declared that under his authority as Chief Executive the policies and regulations that would have been embodied in PURPA were, despite the lack of affirmative congressional action, the law of the land? Certainly, this assertion of authority would come within the national government's power over interstate commerce.⁵ But would the unilateral exercise of that power by the President have been constitutional? Both instinctual reaction and Supreme Court precedent suggest a negative answer.

Youngstown Sheet & Tube Co. v. Sawyer,⁶ provides ample guidance. Just prior to the commencement of a nationwide steel strike, President Truman ordered the Secretary of Commerce to seize the nation's steel mills. Truman believed that the strike would seriously jeopardize the war effort in Korea. The mill owners immediately sought an injunction. They argued "that the President's order amounts to law-making, a legislative function which the Constitution has expressly

3. J. CARTER, KEEPING FAITH 91 (1982).

4. Pub. L. No. 95-617, 92 Stat. 3117 (1978).

5. See *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982).

6. 343 U.S. 579 (1952).

conferred upon Congress and not the President."⁷ In fact, the Government did not claim that the President's order was authorized by any legislation. Rather, the Government argued that the President's action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States.⁸

Since the parties agreed that no act of Congress had authorized the action taken by the President, the sole question for the Court was whether the Constitution did. The Court rejected outright the government's reliance on inherent powers of the Commander-in-Chief. The decision of whether to permit such a taking of private property was a "job for the Nation's lawmakers, not for its military authorities."⁹ At a later point in the opinion, the Court made it quite clear that Congress would have had ample authority to permit the seizure.¹⁰ In so doing, the Court underscored its rejection of Truman's unilateral exercise of war power.

The Court similarly rejected the Government's argument that the vesting of "the executive power" in the President supported the seizure. The Court stated,

[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.¹¹

That the President had overstepped those bounds here was evident.

The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution.¹²

7. 343 U.S. at 582.

8. *Id.*

9. *Id.* at 587.

10. *Id.* at 588.

11. *Id.*

12. *Id.*

The Court held that this lawmaking role assumed by the President was one to be performed by "Congress alone in both good and bad times."¹³ An emergency did not alter the scheme of separation of powers.

Importantly, the duties and responsibilities vested in the national government were not dispersed among the three branches in a haphazard manner. The placement of authority in a particular branch was done consonant with the republican philosophy that animated the framers of the Constitution. A key aspect of *Youngstown* is its recognition of Congress as the repository of lawmaking power. As an abstract proposition, that observation seems all too obvious; but it nonetheless signifies an essential aspect of our constitutional system. At the very heart of republican philosophy is the concept of self governance. Consistent with this philosophy, the framers of the Constitution adopted a form of government in which the most representative branch, Congress, would be empowered to create the laws and policies to be advanced by the young nation. The history of the British Constitution was in general a movement away from monarchy and autocracy and toward representative government.¹⁴ The framers saw the government they designed as a further step in that progression, a grand experiment in representative democracy.¹⁵ To place the lawmaking authority in either of the other branches would have been anathema to republicanism and a clear step backwards. This explains Madison's observation that, "[i]n republican government, the legislative authority necessarily predominates."¹⁶

It was no mistake, therefore, that the powers granted to the national government are largely to be found in article I which more specifically deals with the establishment of Congress. Congress, as a primary matter, determines when the powers granted will be exercised. Thus although in terms of immediate result and efficiency, President Truman's seizure of the steel mills may have been a good or wise public policy, the precedent of such a usurpation of legislative authority

13. *Id.* at 589.

14. See generally D. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN: 1485-1951* (8th ed. 1966); W. STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* (1979); E. WADE & A. BRADLEY, *CONSTITUTIONAL LAW* (7th ed. 1965).

15. See A. KOCH, *POWER, MORALS, AND THE FOUNDING FATHERS: ESSAYS IN THE INTERPRETATION OF THE AMERICAN ENLIGHTENMENT* 103-21 (1961).

16. *THE FEDERALIST* No. 51, at 356 (J. Madison) (B. Wright ed. 1966); see also *id.* No. 48, at 344-45; see generally C. MONTESQUIEU, *THE SPIRIT OF THE LAWS* (T. Nugent trans. 1949).

presented a stark threat to a most basic premise of our system of government.

Applying *Youngstown* to the PURPA hypothetical described above, one must conclude that had Congress failed to enact PURPA, the President would not have had the authority to impose a PURPA-like scheme as the law of the land. This is so even though the national government as a unit would have had the power to implement identical legislation and even though Congress' failure to enact PURPA would place the nation in a severe energy crisis. Since the power to legislate is one plainly vested in Congress, the President's unilateral action would be a clear usurpation of congressional prerogative; and, as indicated above, a crisis does not alter the basic framework of our governmental system. The President's action would violate the principle of separation of powers and the basic republican philosophy of our government. It would be a step backwards toward autocracy. As in *Youngstown*, it would be the duty of the judicial branch to declare in an appropriate judicial proceeding that the action taken by the President was unconstitutional.

III. ALLOCATIONS IN THE WAR MAKING CONTEXT

This basic structural framework should be equally applicable in the war making context unless some provision in the Constitution or something about the overall structure of the Constitution can be said to indicate a contrary allocation. Certainly, these principles would not be overridden if the grant of the power over war simply mirrored the grant of the power over interstate commerce. The lines of authority would be expected to break down in a similar pattern and for similar reasons. A decision to embark upon a war or military activity is to be made by the representative branch. The prosecution of that chosen policy is the responsibility of the executive branch.

Suppose that the only mention in the Constitution of the powers over war came in article I, section 8, and read as follows, "Congress shall have the power to make war." This, quite plainly, would place the power to make war in the national government. It would not, under our theory of government, place the entire power in Congress. Even more clearly, the power would not be placed solely in the President. Rather, as outlined above, such a grant of power would place only the legislative authority over the war powers in Congress. Presumably, executive and judicial authority over this important power would reflect a pattern consistent with the allocation found under the commerce clause.

In short, Congress' power to make war would be treated no differently in terms of lines of authority than Congress' power to regulate commerce among the states. Congress would have the primary responsibility for determining when and how the war power would be exercised. The ability of the executive branch to exercise its constitutional authority over this power would derive from action taken by Congress. In the absence of congressional action, the executive authority would lie dormant. Of course, Congress would be required to respect the constitutional prerogatives of the executive branch in the prosecution of a national war policy; and, the judiciary would play constitutional referee to the extent that one branch undermined the other's constitutional authority. However, unquestionably, Congress would be the predominant branch with respect to the nation's power to make war. Under this model, applying *Youngstown*, if Congress refused to authorize our entry into a war or some lesser military skirmish, the President could not override that decision regardless of the perceived necessity. Executive authority could be exercised only pursuant to congressional authorization.

Such a framework of war power authority may be objected to for its failure to account for the complexity and urgency of the national defense. Certainly, the nation's need to defend itself against sudden attack or imminent security risks cannot be held hostage to a structure that effectively disarms the nation in emergency situations. In an age of terrorism, world wide aggression and nuclear threat, a world power such as the United States must have the flexibility to protect its vital interests. Only the executive branch with its relative efficiency can effectively shoulder this responsibility. To place such responsibility in a deliberative body, separated into two houses, would be tantamount to disarming the nation. In this narrow sphere of activity efficiency and effectiveness must take precedence over principles of representative democracy. To conclude otherwise, would place our constitutional system at the mercy of foreign powers insensitive to the fine tunings of our Constitution. These are weighty objections that must be satisfactorily accommodated. Even a government based on lofty theory must survive in a non-theoretical world.

Of course, the Constitution is somewhat more specific than the hypothetical grant of power quoted above. But only somewhat. A draft of the Constitution considered by the Committee of Detail of the Federal Convention of 1787 contained the following grant of power to

Congress: "To make war and raise armies & equip Fleets."¹⁷ The document was in the handwriting of Edmund Randolph with emendations by John Rutledge. It also contained a significant grant of power to the proposed executive branch: "to command and superintend the militia, to be Commander in Chief of the Land & Naval Forces of the Union & of the Militia of the sevl. states."¹⁸ Even at this early drafting stage, the framers recognized that there was something special about the national war power that would require specific attention with respect to the separation of powers. The mere grant of the executive power to the President did not adequately describe the authority of the President in the war making context. But, equally important, the drafters of this document were not satisfied with merely giving Congress a generalized power to make war. Specific authority is given with respect to the raising of armies and fleets. The Constitution as finally adopted followed this somewhat more precise approach. The inquiry, therefore, must focus more narrowly upon specific allocations of war making power found in the Constitution and the extent to which those allocations revise or reaffirm the general separation of powers principle.

We begin with article I, section 8 of the Constitution which provides that

Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . .; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and] to provide for organizing, arming, and disciplining, the Militia and for governing such Part of them as may be employed in the Service of the United States¹⁹

Of course, this language cannot be construed as granting Congress the exclusive power over these matters. The power is vested in the national government. Congress is given the legislative or lawmaking authority. But, as indicated earlier, in our republican form of government, that legislative authority is quite significant. In essence, it is a trigger device that must be activated before national power can be exercised.

The practical power and responsibility vested in Congress by these

17. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 137 n.6, 143 (rev. ed. 1966) [hereinafter cited as FARRAND].

18. *Id.* at 145.

19. U.S. CONST. art. I, § 8, cls. 12-16.

clauses is quite extensive. The power is one to create and regulate armed forces. Hence, Congress must make the initial determination of whether—or the extent to which—we should have any armed forces and, it would seem, the general uses to which those forces may be applied. The power is, after all, to raise, govern and regulate. The President may participate in this determination through the executive branch's enormous powers of persuasion and, negatively and less effectively, through the exercise of the veto. In other respects, the executive power arises only upon affirmative action taken by Congress. If Congress fails to act affirmatively, the President lacks the constitutional wherewithal to raise his own army or navy. He also lacks the general authority to use authorized forces in a manner inconsistent with specific congressional determinations.²⁰ To conclude otherwise would be to permit the President to assume an authority plainly reposed by the Constitution in Congress; it would permit him to treat as law that which Congress has failed to enact.

In *The Federalist* Nos. 24 and 26, Alexander Hamilton discussed the significance of the legislative power over the armed forces under the proposed Constitution. He was responding to charges that the Constitution was deficient in that it permitted the national government to keep troops in time of peace and in that it vested the executive with plenary power to levy troops. Hamilton refuted the first charge on policy grounds—the need for some military establishment being a practical necessity—and the second by demonstrating that the Constitution vested no such authority in the executive. With respect to the second, Hamilton noted that the power to raise armies under the Constitution was lodged in the legislative branch, a branch whose composition would be controlled by the electorate. Moreover, even that branch would have significant restraints placed upon it.

[T]hat the whole power of raising armies was lodged in the *Legislature*, not in the *Executive*; that this legislature was to be a popular body, consisting of the representatives of the people periodically elected; and that . . . there was to be found . . . an important qualification even of the legislative discretion, in that clause which forbids the appropriation of money for the support of an army for any longer period than two years—a precaution which, upon a nearer view of it, will appear to be a great and real security against the keeping up of troops without evident necessity.²¹

20. *But see infra* notes 28-37, 120-23 and accompanying text.

21. *THE FEDERALIST* NO. 24, at 204 (A. Hamilton) (B. Wright ed. 1966).

The requirement that no appropriation for the army would be for a period of more than two years was, according to Hamilton, designed to oblige Congress to actively oversee the armed forces and to determine at regular intervals "the propriety of keeping a military force on foot."²² Today the appropriations limitation does not operate in the precise fashion anticipated by Hamilton and the framers of the Constitution.²³ As a practical matter, a peacetime standing army of substantial dimensions will be with us for the foreseeable future regardless of whether the appropriation for those forces be for two years or for some other time configuration. The appropriations process, however, does present Congress with the opportunity to express its attitude toward particular uses to which the armed forces may be put and, accordingly, to exercise control over those forces. In fact, the spirit of the restraint

22. In THE FEDERALIST NO. 26, Hamilton stated:

The legislature of the United States will be *obliged*, by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not *at liberty* to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence.

Id. at 216. See also FARRAND, *supra* note 17, at 326-27, 330.

23. Apropos of this, an interesting and disturbing dialogue between Professor Alexander Bickel and Reps. Mallison, Fountain and Fascell took place during hearings on the proposed War Powers Resolution:

Mr. Mallison. It seems to me we are underestimating the role of the House in providing indispensable funds for the Executive decisions and the carrying out of treaties.

Mr. Fountain. Gentlemen, they keep enough money in the pipeline to keep on running several years, regardless of what we do.

Mr. Bickel. In that case you are violating the provisions of the Constitution, which limit you to 2 years in military appropriations.

Mr. Fountain. What I am referring to is money carried over year after year. I understand there are billions in the pipeline for military purposes right now.

Mr. Bickel. It does violate the provision limiting it to 2 years.

Mr. Fascell. You have a 1-year limitation in each appropriation bill. That satisfies the constitutional requirement.

Mr. Bickel. Not if you circumvent it by giving the President free funds to raise and support armies, which he can spend over a longer period than 2 years.

Mr. Fascell. The Constitution does not say spending money. It does not have a limitation of the time within which the money should be spent.

Mr. Bickel. They must have meant that you should so order affairs that the President does not really have at his disposal what the British Crown used to have before the Parliament rose up against it; namely, unlimited funds to spend on a standing army to wage war.

Mr. Fascell. That is exactly what Presidents have had ever since there has been a Congress.

Mr. Bickel. I think that runs counter to the only intent that I can divine in that constitutional clause.

Hearings Before the Subcomm. on Nat'l Security Policy & Scientific Developments of the House Comm. on Foreign Affairs, 91st Cong., 2d Sess. 64 (1970).

and the role it was intended to play in the structure of authority over military affairs is no less significant today than it was in 1787. It indicates a strong constitutional sense that Congress is to retain primary jurisdiction over the armed forces and to be a constant watchdog of military activity.

For Hamilton, the essence of liberty was in popular control over the armed forces through the representative branch. And the proposed Constitution embodied the wisdom and necessity of popular control as a reflection of historical experience.

[I]t was not till the revolution in 1688, which elevated the Prince of Orange to the throne of Great Britain, that English liberty was completely triumphant. As incident to the undefined power of making war, an acknowledged prerogative of the crown, Charles II. had, by his own authority, kept on foot in time of peace a body of 5,000 regular troops. And this number James II. increased to 30,000; who were paid out of his civil list. At the revolution, to abolish the exercise of so dangerous an authority, it became an article of the Bill of Rights then framed, that 'the raising or keeping a standing army within the kingdom in time of peace, *unless with the consent of Parliament*, was against law.'

In that kingdom, when the pulse of liberty was at its highest pitch, no security against the danger of standing armies was thought requisite, beyond a prohibition of their being raised or kept up by the mere authority of the executive magistrate. The patriots, who effected that memorable revolution, were too temperate, too well-informed, to think of any restraint on the legislative discretion. They were aware that a certain number of troops for guards and garrisons were indispensable; that no precise bounds could be set to the national exigencies; that a power equal to every possible contingency must exist somewhere in the government: and that when they referred the exercise of that power to the judgment of the legislature, they had arrived at the ultimate point of precaution which was reconcilable with the safety of the community.²⁴

In short, the only valid objection to a standing army arose in the context of autocratic control over the military establishment. Our Constitution, Hamilton explained, reflected the lessons of history and was

24. THE FEDERALIST No. 26, at 214-15 (A. Hamilton) (B. Wright ed. 1966).

specifically designed to prevent such a dangerous accumulation of power in any individual. Certainly our executive branch would not be vested with such authority. In fact, the Constitution was specifically designed to ensure that control over the military would be retained by the representative branch and ultimately by the people.²⁵

In a passage fraught with irony for contemporary readers, Hamilton disparaged the notion that the elected representatives of the people could successfully undermine this carefully structured system of constitutional authority and obligation.

Schemes to subvert the liberties of a great community *require time* to mature them for execution. An army, so large as seriously to menace those liberties, could only be formed by progressive augmentations; which would suppose, not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time. Is it probable that such a combination would exist at all? Is it probable that it would be persevered in, and transmitted along through all the successive variations in a representative body, which biennial elections would naturally produce in both houses? Is it presumable, that every man, the instant he took his seat in the national Senate or House of Representatives, would commence a traitor to his constituents and to his country? Can it be supposed that there would not be found one man, discerning enough to detect so atrocious a conspiracy, or bold or honest enough to apprise his constituents of their danger?²⁶

These observations indicate a firm constitutional sense of the responsibilities of Congress. In Hamilton's view, only a traitor to our republican system of government would tolerate such an abdication of that responsibility.

Article I, section 8 contains another significant grant of authority to Congress: "Congress shall have the Power . . . To declare War . . ." Indeed, this power has been the focal point of much of the debate regarding the war power. The issues have ranged from whether a particular conflict is a war within the technical meaning of the clause

25. See Bickel, *Congress, the President, and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 132 (1971) (The framers, "authorized Congress to 'raise and support Armies,' and then tried to ensure that the exclusive power of Congress would be jealously guarded, by providing that no appropriation of money to raise and support armies 'shall be for a longer Term than two Years.'" [hereinafter cited as Bickel].)

26. THE FEDERALIST No. 26, at 217 (A. Hamilton) (B. Wright ed. 1966).

or whether a particular action taken by Congress amounts to the required declaration to the larger question of whether declarations of war are outmoded in the modern world.²⁷ Such inquiries are not without their validity, but they overlook a fundamental structural question. Before attempting to ascertain microscopically the meaning of a single phrase found in the Constitution, one ought to consider the manner in which that phrase fits into the overall constitutional scheme. In this instance, the question is whether the grant to Congress of the power to declare war alters or affirms the basic principle of separation of powers, a principle which gives Congress the predominant lawmaking role in our government. In fact, it plainly affirms that principle. If anything it underscores the proposition that Congress has the initial authority to determine the military policy to be prosecuted by this nation through the executive branch. The power to declare war, when coupled with other authorities vested in Congress and when viewed as a component of basic constitutional structure, makes it clear that the authority of Congress in this regard covers a broad spectrum, from the creation and regulation of the armed forces through any decision to embark upon sustained hostilities. This is not to suggest that congressional authority arises only at the endpoints of the spectrum. Rather, consistent with the separation of powers principle, the authority of Congress encompasses both the endpoints and the vast territory in between.

A more specific understanding of the "declare war" language derives from an examination of the authority of the President over the national war making power. Article II, section 2 of the Constitution states: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States" The purpose of vesting this authority in the President was primarily to avoid some of the pitfalls that had arisen during the Revolutionary War when, under the Articles of Confederation, Congress had exercised "the sole and exclusive right and power of determining on peace and war."²⁸ Congress as a deliberative body had proven itself to be an entirely unsatisfactory vehicle for the day-to-day prosecution of war. That failing was remedied in the Constitution by placing the authority to prosecute war in the executive branch, the arm of the national government uniquely suited to that purpose:

Of all the cares or concerns of government, the direction

27. See, e.g., Wallace, *The War-Making Powers: A Constitutional Flaw?*, 57 CORNELL L. REV. 719, 741-44 (1972).

28. ARTICLES OF CONFEDERATION art. IX.

of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of executive authority.²⁹

This power to direct the war effort did not, however, vest the President with the constitutional authority to override the more pervasive authorities of Congress. Again, turning to Hamilton,

The 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.³⁰

Thus, the Commander-in-Chief's authority, although created by the Constitution, derives its power from congressional will. Without Congress, the President would have neither the forces with which to operate nor, assuming forces had been supplied, the authorization to use those forces.

This brings us to the question of whether the President may ever exercise his authority as Commander-in-Chief in the absence of specific congressional authorization (assuming that Congress has provided the President with a standing army). The general answer is that he may not. However, general propositions must give way to more particular circumstances.

Initial drafts of the Constitution had given Congress the power to "make war." On the motion of James Madison and Elbridge Gerry, however, that language was altered to give Congress the power to "declare war." The purpose, according to Madison's notes, was to make clear that the President, in his capacity as Commander-in-Chief, would have the authority to repel sudden attacks upon the nation.³¹ The pub-

29. *Id.* No. 74, at 473.

30. *Id.* No. 69, at 446.

31. FARRAND, *supra* note 17, at 318-19 ("Mr. Madison and Mr. Gerry moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks.").

lished records of the Federal Convention of 1787 indicate that the adopted language was not meant to dilute congressional power, but rather was a recognition of a special instance of Executive competence to represent the interests of the nation.³² Just as a deliberative body cannot effectively conduct a war, it cannot make quick and precise decisions with respect to sudden attacks. In this sense, the power to repel sudden attacks is not an exception to the overall separation of powers framework. It is a responsible recognition of the relative functions of each branch.³³

In fact, the Madison and Gerry motion was made in part as a response to a suggestion by Pierce Butler that the entire power to make war be vested in the President.³⁴ Speaking to this suggestion, Gerry observed that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."³⁵ Similarly, George Mason stated that he "was agst [sic] giving the power of war to the Executive because not [safely] to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace."³⁶ There is no record of any support for the Butler position. In adopting the Madison and Gerry motion, the framers plainly rejected Butler's suggestion of broad executive war making authority. They did, of course, recognize that the President's power to conduct war included the authority to repel sudden attacks. But nothing in this reasonable deference to Executive competence indicates an intent to alter the basic roles of the legislative and executive branches.³⁷

Thus, article I of the Constitution grants a substantial array of

32. According to Madison's notes, the initial vote on the motion was seven ayes, two noes and one absent, Connecticut being one of the no votes. However, "[o]n the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function, Mr. Elseworth gave up his objection (and the vote of Cont was changed to—ay.)" 2 FARRAND, *supra* note 17, at 319 n.*. The records of the Journal of the Convention, however, present a slightly different picture. The Journal indicates that although the final vote was, as Madison indicated, an eight to one approval, the initial vote was four to five against the motion. Under that scenario, the "remark by Mr. King" places a significant interpretive gloss on the meaning of the adopted language. *Id.*, at 313-14; 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at xii-xiv, xvi-xvii (discussing the relative accuracy of the notes of the Journal and the notes of Madison).

33. See Bickel, *supra* note 25, at 132.

34. FARRAND, *supra* note 17, at 318.

35. *Id.*

36. *Id.* at 319. See also *id.* (statement of Mr. Elseworth).

37. See also A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 3-6 (1973) [hereinafter cited as SCHLESINGER]; Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 675-77 (1972).

powers to the national government. Among those powers are the power to regulate interstate commerce and the power to make war or engage in military conflict. Congress is vested with the primary authority to determine whether and, if so, under what circumstances those powers are to be exercised. Article II of the Constitution establishes the President's authority and duty to execute the lawfully enacted will of Congress. It also establishes the President's role as Commander-in-Chief. And although the Constitution treats the war powers somewhat more precisely than it does the power over interstate commerce, nothing in that treatment indicates a constitutional intent to alter the basic separation of powers scheme. In fact, if anything, the primary authority and responsibility of Congress is underscored in the war making context by the detailed specification of congressional authority and responsibilities found in the Constitution. This is not surprising in light of the grave threat to liberty presented by the power to make war. One would expect a republic to carefully supervise such a dangerous power and its attendant weapons of destruction. It is also not surprising that the Constitution vests in the President as Commander-in-Chief the authority and responsibility to defend the nation against sudden attacks. Such a task is, like the conduct of war itself, beyond the competence of a deliberative body and necessary to the preservation of the nation.

This is the basic separation of powers framework. The primacy of Congress is established while at the same time the need for a centralized executive branch is recognized. The constitutional structure is, however, not rigid. For example, while the Constitution vests the President with the authority to use military force to repel sudden attacks, i.e., to defend the nation in emergency situations, there is no precise definition of what those circumstances might entail. Political considerations may define the boundaries of that discretion. Nor does the Constitution specifically define the constitutional responsibility of Congress with respect to the execution of its authority over the armed forces. Some delegation is required unless Congress is to oversee the day to day operations of the military, but some substantial oversight must remain if Congress is to carry out its assigned task in the constitutional structure. There is no bright line. Separation of powers describes a framework from which a philosophy of representative government might successfully function. It does not provide a precise roadmap to that end. As a consequence, the separations are less lines of demarcation than indications of spheres of primary competence and jurisdic-

tion. To the extent lines exist, they are fluid. A certain amount of give and take is expected.³⁸

Because of this fluidity, this give and take, there is a great potential for conflict among the branches. As one branch attempts to stretch its line of authority and the others resist, a certain amount of friction must arise. This friction is an inevitable and healthy by-product of the separation of powers.

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.³⁹

It has been observed that in the arena of foreign affairs, of which the war making power is an aspect, the potential for friction is particularly great. Edward S. Corwin described the Constitution as "an invitation to struggle for the privilege of directing American foreign policy."⁴⁰ This was no happenstance. So long as the struggle continues and the combatants remain in rough parity of constitutional authority, minor deviations from strict lines of authority are both acceptable and inevitable. The government would cease to function if each branch insisted upon its full range of constitutional prerogatives. But when the struggle for authority ceases, when the friction dissipates, the threat to our system of government becomes acute. Here, the Constitution's primary structural protection of liberty breaks down as one branch takes on the gloss and accoutrements of an autocracy.

Quite plainly, to be effective, the principle of separation of powers requires that each branch accept, and exercise when appropriate, the constitutional authority imposed upon it. It requires that each branch sensibly protect its constitutionally mandated role within our system of government. Indeed, it is the constitutional responsibility of each branch to reasonably defend its constitutional prerogative from en-

38. Chief Justice John Marshall's observation in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), is apropos:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

Id. at 407.

39. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

40. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 200 (1940).

croachment or desuetude. This is, in a sense, a constitutional trust we place in the members of each branch. To the extent that this responsibility is evaded, a vacuum of authority is created. Vacuums of political power do not long remain empty. Certainly if external pressures demand a governmental response and none is forthcoming from the constitutionally appropriate sector, it would not be surprising to see the solution achieved in other quarters. Indeed, under certain circumstances the other branches may feel compelled to fill the void.⁴¹ Certainly, with respect to the national defense, it would not be surprising for the President to take strong initiatives when confronted with a relatively complacent Congress. This perceived proclivity of the executive was one of the reasons for placing the war making power primarily in Congress. "The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."⁴²

IV. DEVIATIONS FROM CONSTITUTIONAL STRUCTURE

Madison's observation regarding the executive branch's proclivity toward war has been verified by practice under our Constitution. Despite the clear framework of congressional predominance ordained by the Constitution, primary authority over the war power has shifted from that representative body to the executive branch. The transfer of authority was not abrupt, but instead occurred through a lengthy process of evolution that picked up pace as the United States emerged in the twentieth century as a recognized world power. The shift was not inevitable; that it has taken place is, however, undeniable.

During the eighteenth and nineteenth centuries, unilateral exercises of the war power by the executive branch were relatively trivial and largely inconsequential in terms of their effect upon our overall political structure.⁴³ Presidents did take action to suppress piracy, the American slave trade and the like, but beyond this, deference to Congress in larger scale conflicts was the rule rather than the exception.⁴⁴

41. *Shelley v. Kraemer*, 334 U.S. 1 (1948), seems to have been an example of this phenomenon.

42. Letter from Madison to Jefferson, April 2, 1778, reprinted in VI MADISON, WRITINGS 312-13 (G. Hunt ed. 1906).

43. S. REP. NO. 797, 90th Cong., 1st Sess. 9-12 (1967) [hereinafter cited as S. REP. NO. 797]; SCHLESINGER, *supra* note 37, at 51.

44. With respect to the nineteenth century, S. REP. NO. 797, *supra* note 43, states:

This dividing line between the proper spheres of legislative and executive authority was sufficiently flexible to permit the President to use military force in the

Of course, deference comes in degrees and some nineteenth century administrations took a broad, potentially unconstitutional, view of presidential prerogative. President Polk's military intervention into the territorial dispute between Mexico and the then sovereign nation of Texas certainly fits into this category.⁴⁵ To a similar effect is Grant's naval intervention in the war between Santo Domingo and Haiti.⁴⁶ On the other hand, a number of eighteenth and nineteenth century Presidents scrupulously adhered to the model designed by the framers. Presidents Adams and Jefferson were quite reticent to tread upon the war making authority of Congress.⁴⁷ Jefferson's reluctance to take offensive military action against the Bey of Tripoli is one such example.⁴⁸ Presidents Buchanan and Cleveland were of a similar strict constructionist frame of mind.⁴⁹ In any event, notwithstanding sporadic exam-

unimportant cases, while preserving the role of Congress in important decisions. The acts of war doctrine was probably a step beyond what the framers intended when they changed the congressional power from "make" war to "declare" war, and was certainly a move in the direction of Presidential power compared to the cautious stance of Washington, Adams, Jefferson, and Madison. The central objective which the Constitution sought—congressional authority to approve the initiation of major conflicts—was undamaged, but a certain fraying of the edges had occurred. This slight deterioration was greatly accelerated during the following 50 years.

Id. at 11-12 (quoting Russell, *The United States Congress and the Power to Use Military Force Abroad*, FLETCHER SCHOOL OF LAW AND DIPLOMACY 242-43 (1967)).

45. Commenting on the Mexican War in a letter to William Herndon, then Congressman Abraham Lincoln stated, "Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion . . . and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect . . ." 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN 451 (R. Basler ed. 1953). Lincoln went on to explain that under the Constitution, "no one man" was granted such a power. *Id.* at 452. Lincoln took a much broader view of presidential prerogative during the Civil War. See SCHLESINGER, *supra* note 37, at 61-67. But neither the Congress with its Committee on the Conduct of the War nor the Supreme Court, see *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), was willing to accede to his philosophy. In any event, Lincoln as President faced a domestic insurrection, not a foreign war. Thus regardless of the merits of his position, it presents a constitutional issue of a different sort.

46. SCHLESINGER, *supra* note 37, at 78. Stung by congressional rebuke of his order, Grant reassessed his philosophy of presidential prerogative in subsequent exercises of the war power. *Id.*

47. A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 139-47, 196-227 (1976) [hereinafter cited as SOFAER]; SCHLESINGER, *supra* note 37, at 22-23.

48. See D. MALONE, JEFFERSON THE PRESIDENT: FIRST TERM 97-99 (1970); but see SOFAER, *supra* note 47, at 214-15 (suggesting that Jefferson's report to Congress on this incident was somewhat disingenuous).

49. See P. KLEIN, PRESIDENT JAMES BUCHANAN 183-90, 319, 321-25, 335-40 (1962) [hereinafter cited as KLEIN]; A. NEVINS, GROVER CLEVELAND: A STUDY IN COURAGE 549-62, 629-48, 713-22 (1932); see generally SCHLESINGER, *supra* note 37, at 56-57, 78. Klein described Buchanan's presidential philosophy as follows:

Buchanan considered the presidential office not as a place of leadership but as a post of executive agency. The president should faithfully implement and enforce

ples of presidential war making during these formative years, as the nation entered the twentieth century, the constitutional model was basically intact, albeit somewhat bruised.⁵⁰

The turn of the century marked a clear shift in presidential attitude. A tone of presidential prerogative was established quite early when, in 1900, President McKinley, without congressional authorization, deployed 5000 troops to China to aid in suppressing the Boxer rebellion.⁵¹ Subsequent administrations drew upon this example. Both in act and word, Theodore Roosevelt marked broad boundaries for presidential initiative in the war making sphere.⁵² Both Taft and Wilson followed suit, each deploying United States Armed Forces in the Caribbean and Central America as unilateral exercises of presidential power.⁵³

None of these Presidents claimed an inherent power to make war beyond the power to repel sudden attacks, but subtle theories of "interposition" and "intervention" were created to justify a broad range of presidential military action.⁵⁴ With respect to technical war, Wilson

the policies defined by deliberative bodies: the party convention, the Congress of the United States, and the federal courts. He should shoulder the responsibility not of invention but of action; he should not initiate policy but execute it with skill and efficiency.

KLEIN, *supra*, at 313. This philosophy applied to the war power. *Id.* at 337. Buchanan's position is remarkable in that he advocated an active United States involvement in the affairs of Mexico and Central America. In the absence of congressional authorization, he declined to implement that policy other than through diplomacy. *Id.* at 335-40.

50. *See supra* note 44.

51. SCHLESINGER, *supra* note 37, at 88-89.

52. *See* H. PRINGLE, THEODORE ROOSEVELT 279-314 (1931) [hereinafter cited as PRINGLE ON ROOSEVELT]; SCHLESINGER, *supra* note 37, at 88-90, 308. Just prior to leaving office, Roosevelt wrote, "[t]he biggest matters, such as the Portsmouth peace, the acquisition of Panama, and sending the fleet around the world, I managed without consultation with anyone; for when a matter is of capital importance, it is well to have it handled by one man only." VI ROOSEVELT, LETTERS 1497-98 (S. Morison ed. 1951-56). In addition, Pringle quotes Roosevelt as having written, "I did not usurp power, but I did greatly broaden the use of executive power." PRINGLE ON ROOSEVELT, *supra*, at 254.

53. *See* 2 H. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 678-99 (1939); S. REP. NO. 797, *supra* note 43, at 12-13; SCHLESINGER, *supra* note 37, at 89-91, 137, 286; *see generally* W. SCHOLES & M. SCHOLES, THE FOREIGN POLICIES OF THE TAFT ADMINISTRATION (1970); E. ROBINSON & V. WEST, THE FOREIGN POLICY OF WOODROW WILSON (1917); P. CARTER, CONGRESSIONAL AND PUBLIC REACTION TO WILSON'S CARIBBEAN POLICY, 1913-1917 (1977).

54. *See* THE DEPARTMENT OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (3d rev. ed. 1933). Originally published in 1912, this memorandum draws a distinction between military intervention into the affairs of a foreign sovereign and the interposition of United States Armed Forces into a foreign nation for the purposes of protecting American lives and property. With respect to the latter, the memorandum concludes that the landing of United States Armed Forces for such purposes is not an act of war. *Id.* at 38-40. Therefore such an act may be accomplished without a declaration of war.

did acknowledge that Congress alone possessed the constitutional authority to place this nation into protracted or sustained hostilities with foreign sovereigns. In his message to Congress on April 2, 1917, requesting a declaration of war upon Germany, he stated, "I have called the Congress into extraordinary session because there are serious, very serious, choices of policy to be made, and made immediately, which it is neither right nor constitutionally permissible that I should assume the responsibility of making."⁵⁵ Nonetheless, the overall model of these administrations was of increasing presidential war making authority.

President Franklin Roosevelt followed and arguably expanded upon the model provided by his early twentieth century counterparts.⁵⁶ His undeclared naval war in the Atlantic was an unabashed exercise of raw power, not easily distinguished from Polk's unconstitutional adventurism at the Rio Grande, except perhaps on grounds of pure expediency. Moreover, it is no secret that long before we entered World War II, this nation, largely through efforts emanating from the White House, had become closely allied to the British war effort. And while Roosevelt plainly recognized that hostilities on a larger scale required the political support of Congress, he was willing to extend his authority as Commander-in-Chief (for example, the "destroyers for bases" deal) to ensure that Britain survived to the day that political consensus could be achieved.

Presidential war making authority was pushed a step further and elevated to a constitutional principle during the Administration of President Truman through its prosecution of the Korean War. Truman committed United States troops to that conflict without congressional authorization based on the theory that "the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof."⁵⁷ Congress was seemingly out of the picture.

Moreover, "it is not believed that Congress may, merely because it is authorized to declare war against a foreign country, be considered as possessing the power to direct the President in the employment of forces in operations not amounting to war against a foreign country." *Id.* at 40. In essence, the memorandum propounded the theory that the President has an inherent power to use military force abroad except in circumstances that would require a declaration of war. This interpretation of the Constitution ignores completely the basic constitutional structure including article I's specific grant of the legislative power to Congress. *See supra* text accompanying notes 3-16. Moreover, it mistakes a substantive grant of power to the national government—the power to make war—as a narrow grant of authority to Congress.

55. PRESIDENT WILSON'S STATE PAPERS AND ADDRESSES 372-73 (Review of Reviews Co. ed. 1918).

56. *See* J. BURNS, THE LION AND THE FOX 437-42, 457-61 (1956); SCHLESINGER, *supra* note 37, at 105-09, 113-16; S. REP. NO. 797, *supra* note 43, at 13.

57. 23 DEP'T ST. BULL. 173 (1950).

The breadth of the Commander-in-Chief power as envisioned by the Truman Administration was described by then Secretary of State Dean Acheson:

Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.⁵⁸

With respect to allocations of constitutional authority, Secretary Acheson admonished that “[w]e are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour.”⁵⁹

These were bold and pivotal assertions by the executive branch. As Senator Robert Taft correctly, but fruitlessly observed, “The President simply usurped authority, in violation of the laws and the Constitution, when he sent troops to Korea to carry out the resolution of the United Nations in an undeclared war.”⁶⁰ Indeed, this was the same unilateral authority that had been repudiated by the Supreme Court in the context of the *Youngstown* case. But congressional inaction in the face of this usurpation politically legitimized the precedent as well as the theory that the Commander-in-Chief power gave the President an independent basis to make war.

Congressional willingness to defer to the executive branch in matters relating to war reached its nadir in 1964 with the passage of the Gulf of Tonkin Resolution. This event and its aftermath must be examined closely since together they provided an important prelude to the adoption of the War Powers Resolution.

V. THE GULF OF TONKIN RESOLUTION

On August 2 and 5 of 1964, the Department of Defense reported attacks by North Vietnamese PT boats upon two United States destroyers thirty miles off the coast of North Vietnam in the Gulf of Tonkin. Based on these incidents, the Administration immediately sought from Congress authorization to engage in direct military action against North Vietnam. The request came in the form of a resolution, now

58. *Assignment of Ground Forces in European Area: Hearings Before the Senate Comm. on Foreign Relations & Armed Services*, 82d Cong., 1st Sess. 92 (1951) (Statement of Dean Acheson, Secretary of State).

59. *Id.* at 93 (testimony of Dean Acheson, Secretary of State).

60. 97 CONG. REC. 57 (1951).

known as the Gulf of Tonkin Resolution, that had been drafted by the Administration some time earlier. It appeared to vest in the President broad, seemingly unchecked, military authority in Southeast Asia.

Specifically, the Gulf of Tonkin Resolution provided:

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

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.⁶¹

Supporters of the Resolution recognized the breadth of the authority being vested in the President, namely, a free hand to make war, but doubted that the President would use it.⁶²

In fact, the Resolution was merely part of an escalating United States involvement in the war, much of it unknown to the American public. For example, beginning in February of 1964, the United States had been engaged in a concerted program of clandestine military operations against North Vietnam designed "to result in substantial destruction, economic loss and harassment."⁶³ These operations, entitled Operation Plan 34A, included spy flights over North Vietnam, kidnappings of North Vietnamese citizens, infiltration of sabotage and psychological-warfare teams into the North, commando raids on rail and highway bridges, and bombing of North Vietnamese coastal installations.⁶⁴ In fact, the PT boat attacks by the North Vietnamese against the United States destroyers may have been in response to specific Plan

61. Gulf of Tonkin Resolution of 1964, Pub. L. No. 88-408, §§ 1-2, 78 Stat. 384 (1964).

62. 110 CONG. REC. 18,403-04, 18,409 (1964) (statement of Sen. Fulbright); *id.* at 18,409-10 (statement of Sen. Cooper); *id.* at 18,418 (statement of Sen. Javits).

63. THE PENTAGON PAPERS 238 (N.Y. Times ed. 1971) [hereinafter cited as THE PENTAGON PAPERS] (quoting Report to the President of the United States from Maj. Gen. Victor H. Krulak of the Marine Corps (Jan. 2, 1964)); *See generally* DEPARTMENT OF DEFENSE, UNITED STATES—VIETNAM RELATIONS 1945-1967 (1971).

64. THE PENTAGON PAPERS, *supra* note 63, at 238.

34A raids that had taken place in that vicinity on July 30, 1964.⁶⁵

The House of Representatives spent approximately eighty minutes considering the Gulf of Tonkin Resolution, both in committee and on the floor of the House, prior to adopting it by a vote of 416 to 0.⁶⁶ There is no record of any member speaking against the Resolution, although one member did express concern for the constitutional implications of its broad grant of authority.⁶⁷ The Senate devoted approximately eight and a half hours to the Resolution and although some Senators did express their constitutional concerns and even opposition, the Resolution passed unscathed by a vote of eighty-eight to two.⁶⁸ Two days after the second reported incident, Congress had completed its work. The President signed the Resolution on August 10, 1964. Considering the breadth of executive authority the Resolution recognized, the haste can only be described as a rush to irresponsibility. In two days, Congress succeeded in setting the Constitution on its head, placing in the President a range of powers wholly at odds with our republican system of government.

Curiously, the administration consistently denied that the Gulf of Tonkin Resolution was a constitutional requisite for the military action it was taking or planning to take. Congressional support was politically expedient, but not constitutionally required.⁶⁹ Undersecretary of State Nicholas deB. Katzenbach did argue later, however, that the Gulf of Tonkin Resolution when coupled with the SEATO Treaty was the "functional equivalent" of a declaration of war.⁷⁰ He was, as a practical matter, correct.⁷¹ And the President used this open ended invitation

65. *Id.* at 259-61.

66. STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., *THE WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE COMMITTEE ON FOREIGN AFFAIRS 4* (Comm. Print 1982) [hereinafter cited as *SPECIAL STUDY*].

67. 110 CONG. REC. 18,553 (1964) (statement of Rep. Alger).

68. *SPECIAL STUDY*, *supra* note 66, at 4-5. Senator Wayne Morse expressed a dissenting view with uncanny prescience,

I believe that history will record that we have made a great mistake by subverting and circumventing the Constitution of the United States . . . by means of this resolution.

As I argued earlier today at some length, we are in effect giving the President . . . warmaking powers in the absence of a declaration of war.

I believe that to be a historic mistake.

110 CONG. REC. 18,470 (1964).

69. The President's News Conference, 3 WEEKLY COMP. PRES. DOC. 1173, 1176-77 (Aug. 18, 1967); Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474, 484, 489 (1966) [hereinafter cited as Meeker]. The Nixon Administration was of the same view. See *SPECIAL STUDY*, *supra* note 66, at 20-21.

70. S. REP. NO. 797, *supra* note 43, at 22.

71. See Meeker, *supra* note 69, at 485-88; Van Alstyne, *Congress, the President and the*

to make war with a vengeance. The rapid escalation of the war by the executive branch in 1965 and thereafter is well documented.⁷² Congress, by failing to act responsibly at the outset, had opened a Pandora's box of unchecked power.

Of course, there is nothing wrong with Congress granting to the President a mandate to exercise his authority as Chief Executive or Commander-in-Chief. When the situation calls for it, Congress has the power and responsibility to do so. This is part of the congressional lawmaking function. But such grants must be accomplished in a manner that is consistent with the constitutional allocations of war making authority.⁷³ Delegations of authority are permitted, but only when accompanied by standards substantially defining and limiting the policy making discretion of the executive branch.⁷⁴

There is something very wrong with Congress handing the President a blanket grant of war making authority to meet unspecified future contingencies—and this is precisely what Congress did when it adopted the Gulf of Tonkin Resolution. Such a grant is not an active exercise of constitutional responsibility. It is, rather, an abdication of the constitutionally mandated duty to fully examine the necessity for armed conflict and, assuming the necessity arises, to articulate the policy to be followed by the executive branch.⁷⁵ That, in any event, was the role imposed upon Congress by the Constitution.⁷⁶ Indeed, the responsibility to make such ultimate policy judgments on war cannot be delegated to the executive branch without completely ignoring the most

Power to Declare War: A Requiem for Vietnam, 121 U. PA. L. REV. 1, 19-28 (1972) [hereinafter cited as Van Alstyne].

72. See *supra* note 62.

73. See *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.")

74. See *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420-30 (1935). This rule would seem to have particular relevance in the war making context since the Constitution imposes upon Congress the ultimate responsibility to define and determine the nation's war making policy. That responsibility cannot be given away without subverting the framework and intent of the Constitution. In short, that responsibility is nondelegable. See Van Alstyne, *supra* note 71, at 13-19.

75. In *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813), the Supreme Court upheld a congressional grant of authority to the President that permitted him to reactivate certain laws regarding this nation's neutrality upon a finding by him that certain specific events had occurred. The authority vested in the President was narrowly drawn to meet a specific contingency and as such could not be said to violate the separation of powers principle. See also *Field v. Clark*, 143 U.S. 649, 682-683 (1892) (discussing *The Aurora* and the narrow scope of its holding).

76. See *supra* notes 17-42 and accompanying text.

basic tenets of our carefully structured system of government.⁷⁷ Such delegations place in the President powers the Framers specifically and carefully withheld from that office.

A report issued by the Senate Foreign Relations Committee aptly described the Gulf of Tonkin Resolution and its implications as follows:

The Gulf of Tonkin resolution represents the extreme point in the process of constitutional erosion that began in the first years of this century. Couched in broad terms, the resolution constitutes an acknowledgement of virtually unlimited Presidential control of the armed forces. It is of more than historical importance that the Congress now ask itself why it was prepared to acquiesce in the transfer to the executive of a power which, beyond any doubt, was intended by the Constitution to be exercised by Congress.⁷⁸

Congress never fully recuperated from its failure to shoulder its constitutionally mandated responsibility during the formative stages of the Vietnam War. Although prior to the adoption of the War Powers Resolution there were several efforts in Congress to address the evident constitutional breakdown, a tone of executive predominance had been set by the Gulf of Tonkin Resolution, and the initiative remained in that branch for the duration of the conflict. Included among the efforts to assert congressional authority were the National Commitments Resolution,⁷⁹ the Cooper-Church Amendment,⁸⁰ the McGovern-Hatfield

77. As Professor Alexander Bickel stated:

The doctrine that delegation without standards is unconstitutional . . . is no mere technical teaching. It is concerned . . . with the sources of policy, with the crucial joinder between power and broadly based democratic responsibility, bestowed and discharged after the fashion of representative government. Delegation without standards short-circuits the lines of responsibility that make the political process meaningful.

Bickel, *supra* note 25, at 137; *see also* Van Alstyne, *supra* note 71, at 13-19.

78. S. REP. NO. 797, *supra* note 43, at 20.

79. Adopted in 1969 by the Senate, the National Commitments Resolution provided:

Whereas accurate definition of the term "national commitment" in recent years has become obscured: Now, therefore, be it

Resolved, That (1) a national commitment for the purpose of this resolution means the use of the armed forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the armed forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.

S. Res. 85, 91st Cong., 1st Sess., 115 CONG. REC. 17,245 (1969).

Resolution,⁸¹ and the repeal of the Gulf of Tonkin Resolution.⁸² None of these measures significantly altered the pattern of presidential predominance. The National Commitments Resolution expressed only the sense of the Senate and, hence, did not have the force of law. It was virtually ignored by the Nixon Administration—the invasion of Cambodia being a prime example.⁸³ Cooper-Church may have had an effect upon the administration's political flexibility,⁸⁴ but even so, Cooper-Church can be fairly characterized as too little and too late.⁸⁵ McGovern-Hatfield failed to pass.⁸⁶ And the repeal of the Gulf of Tonkin Resolution had little practical effect since the Nixon Administration, both before and after the repeal, disavowed any reliance upon the resolution as support for military activities in Southeast Asia.⁸⁷ In short, Congress had been dislodged from a policy making position and placed

80. The Cooper-Church Amendment was a direct response to the invasion of Cambodia. Initial versions of Cooper-Church would have required a pullout of all United States troops from Cambodia by a date certain, as well as a halt to bombing and any future military incursions into Cambodia. Although those measures had substantial support, none were adopted—in part because action taken by the Nixon Administration indicated an early withdrawal from Cambodia. A modified version of the Cooper-Church Amendment was passed by both Houses approximately six months after all United States troops had been withdrawn from Cambodia. The substance of the provision was the result of negotiations between Capitol Hill and the White House. It was signed by the President on January 12, 1971 as an amendment to a supplemental foreign assistance bill that provided substantial military and economic aid to Cambodia. The amendment forbade the President from using any funds appropriated under the Act or otherwise for the reintroduction of ground combat troops to Cambodia. It did not preclude United States bombing missions into Cambodia. In addition, the Administration never conceded that the Amendment would bind the President, if, as Commander-in-Chief, he deemed a second invasion of Cambodia necessary to protect the troops in Vietnam.

81. See 116 CONG. REC. 30,674 (1970).

82. Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (1971).

83. The Nixon Administration did not seek authorization from Congress for the invasion of Cambodia. Nor did it consult with Congress. The Sen. Foreign Relations Committee was completely bypassed. In fact, according to Henry Kissinger's account, the only legislator informed of the plans for the invasion was Senator John Stennis, chairman of the Senate Armed Services Committee and a staunch supporter of the war. H. KISSINGER, WHITE HOUSE YEARS 496 (1979).

84. See *id.* at 513.

85. See *supra* note 80. This comment is not meant to disparage the efforts of those who sponsored Cooper-Church; rather it is a comment on the institutional inability of Congress to extricate itself from its failure to act responsibly at the outset.

86. 116 CONG. REC. 30,683 (1970).

87. SPECIAL STUDY, *supra* note 66, at 37, 41. In the view of the Nixon Administration, the President possessed ample authority as Commander-in-Chief to engage in combat for the protection of troops in the field and for the protection of prisoners of war, regardless of whether the Gulf of Tonkin Resolution had been a constitutional requisite for the initiation of the war. *Id.* Through a bizarre twist of reasoning, the withdrawal of troops, which had begun under President Johnson, became the basis for a continuing authority to make and expand the war. Thus, in one very important sense, the repeal of the Gulf of Tonkin Reso-

in a reactive posture. Recapturing the ability to control the nation's war policy would remain elusive.

At the same time Congress was considering the above measures, the House began hearings on a number of legislative proposals regarding the overall division of war making authority between Congress and the President.⁸⁸ The eventual fruit of those hearings and similar hearings in the Senate⁸⁹ was the War Powers Resolution of 1973.⁹⁰ In part, the War Powers Resolution was a conservative effort to short-circuit the perceived excesses of Cooper-Church and McGovern-Hatfield.⁹¹ In part, it was a bipartisan effort to express legislatively that which the Constitution had so plainly articulated. In any event, as finally adopted—over the veto of President Nixon—the Resolution symbolized for the public a resurgence of congressional willingness to participate in the exercise of the war power.⁹²

VI. THE WAR POWERS RESOLUTION

The War Powers Resolution⁹³ contains three major substantive provisions. Section 3 requires consultation by the President with Congress; section 4 requires a presidential report to Congress on specified deployments of United States Armed Forces; and, section 5 places a sixty to ninety day limitation on the deployment of armed forces into hostile zones in the absence of the express consent of Congress. There

lution was constitutionally dangerous. It permitted the war to continue, while at the same time leaving no congressional authorization whatsoever for that continuance.

88. See *Congress, The President, and the War Powers: Hearings Before the Subcomm. on Nat'l Security Policy & Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. (1970).

89. *War Powers Legislation, 1971: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. (1971).

90. For a legislative history of the War Powers Resolution, see SPECIAL STUDY, *supra* note 66; Statutory Comment, *The War Powers Resolution: Statutory Limitation on the Commander-in-Chief*, 11 HARV. J. ON LEGIS. 181 (1974).

91. SPECIAL STUDY, *supra* note 66, at 66-67, 75-77.

92. Before examining the War Powers Resolution, a final point must be addressed. It has been argued that congressional acquiescence in the practice of executive war making has constitutionally legitimized the model of presidential predominance. See, e.g., Monaghan, *Presidential War-Making*, 50 B.U.L. REV. (Special Issue) 19 (1970). If this theory is correct, then it can only mean that an unconstitutional practice long endured amends the Constitution for we are not here dealing with anything that can be legitimately described as a grey area. The theory is without merit. Article V of the Constitution provides a method of amendment and so long as that method is not used, the Constitution remains unaltered regardless of any pattern of behavior undertaken by the President, the Congress or the Supreme Court. There is no doctrine of amendment by violation. Patterns of unconstitutional behavior call for one response—repudiation.

93. The War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548 (1973).

is nothing inherently wrong with consultation and reporting, and at first glance a limitation on deployments into hostile zones would appear to be a step in the right direction. However, under all of these provisions, the role of Congress remains precisely where it had been placed by the Gulf of Tonkin Resolution—in a reactive posture. It is important to note that the War Powers Resolution is not part of a larger scheme designed to reestablish the predominance of Congress. It is the single congressional response to the pattern of executive predominance exemplified by Vietnam. The sufficiency of the Resolution must be assessed as such.

With respect to consultation, the Resolution provides that the President shall, “in every possible instance,” consult with Congress before introducing United States Armed Forces into hostilities. Neither the key terms, “consult,” and “hostilities,” nor the phrase, “in every possible instance,” are defined, leaving the application of this provision to the vagaries of political circumstance and presidential creativity. The decisions of whether and to what extent consultation is required are to be made by the President. Under some circumstances, this may mean that key members of Congress will be given an opportunity to participate in policy formulation. Under other circumstances, it may mean nothing more than a preview of tomorrow’s news for a selected few. While the former is certainly preferable, neither can substitute for the constitutionally required congressional control over exercises of the war power. Clearly, under this section, the dominant lawmaking role remains in the executive branch. Policy will be formulated there; action will emanate from decisions made there. At best, consultation operates as a moderate check upon presidential excess. This is a far cry from the structural role of Congress as the nation’s primary policy making institution.

Of course, the President as Commander-in-Chief has the constitutional authority to act unilaterally in responding to surprise attacks upon the nation. Under such circumstances, a policy of consultation when possible would be exemplary even if not constitutionally required. But aside from that very limited context, the Constitution demands a much larger role for Congress. Legislative obeisance to the practice of consultation without other incursions into unconstitutional presidential prerogative exalts the limited constitutional authority of the Commander-in-Chief above the pervasive war power authorities vested in Congress by the Constitution. Both in theory and practice the consultation requirement detracts from the congressional role ordered

by the Constitution. It legitimizes a process which places Congress in a position of institutional inferiority.

The reporting requirements have a similar effect.⁹⁴ They recognize an executive authority to order deployments of United States armed forces over a broad spectrum of situations, an authority which goes well beyond the emergency powers of the Commander-in-Chief. Moreover, nothing in the Resolution imposes upon Congress a duty to participate in decisions leading up to these deployments. Yet, the Constitution expressly places on Congress the duty to raise, regulate and govern the armed forces. Surely this grant of authority requires Congress to be actively involved in such basic strategic decisions as the placement of American armed forces throughout the globe.

The President's authority as Commander-in-Chief was not designed to override the primary responsibilities of Congress. Rather that authority was designed so that the will of Congress would be efficiently and effectively prosecuted.⁹⁵ To be sure, some delegation of congressional authority to the President would be appropriate. Congress cannot be expected to supervise day-to-day operations of the armed forces. But presumably any such delegation would be accompanied by defined standards and accomplished through provision of a relatively constant network of congressional oversight.⁹⁶ The War Powers Resolution envisions a framework under which the President has broad discretion to use the United States Armed Forces as tools of his foreign policy subject to a reporting requirement that will permit Congress to

94. Section 4 of the War Powers Resolution provides in part:

(a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

The War Powers Resolution of 1973, § 4(a), 50 U.S.C. § 1543.

95. See *supra* notes 28-37 and accompanying text.

96. See *supra* notes 73-77 and accompanying text.

attempt, when politically feasible, to pour spilled milk back into a bottle.

The deficiencies of the consultation and reporting requirements pale when compared to the constitutional give-away created by section 5. The War Powers Resolution provides that whenever the President introduces United States Armed Forces "into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," he must terminate the use of those forces within sixty days "unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States."⁹⁷ The primary constitutional obstacle to this provision is not, as President Nixon argued in his veto message, that it unconstitutionally limits the power of the Commander-in-Chief.⁹⁸ Rather the key deficiency of section 5(b) is that it gives the President a legislative blank check to deploy United States Armed Forces into combat situations without the specific consent of Congress.

This grant ventures well beyond the constitutional powers of the Commander-in-Chief to repel sudden attacks. It permits invasions of foreign sovereigns whenever deemed by the President to be expedient. The only qualification upon the grant is that the military activity cease within sixty days unless Congress approves a continuation of hostilities beyond that time frame. Again, the War Powers Resolution places Congress in an inferior position. The President initiates hostilities and Congress may either validate the action taken or embark upon an unlikely and largely unworkable effort to extricate the forces from battle. Common experience dictates that in the context of military action such a position is relatively ineffective in light of the vast seductive powers of presidential action in the military sphere. During the entire prosecution of the Vietnam War, Congress was unable to make any substantial inroads into presidential prerogative. Once troops are committed to battle, the die of war is, for all practical purposes, cast. Only in the most rare of situations could Congress successfully challenge the Commander-in-Chief power unleashed. George Mason stated at the Fed-

97. The War Powers Resolution of 1973, § 5(b), 50 U.S.C. § 1544. Section 5(b) also provides a 30 day extension upon certification by the President "that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces." *Id.*

98. Veto of War Powers Resolution, 9 WEEKLY COMP. PRES. DOC. 1285, 1286 (Oct. 24, 1973).

eral Convention that the Constitution should clog war and facilitate peace.⁹⁹ This provision of the War Powers Resolution sets that philosophy on its head. The branch most prone to war is given a battle axe by the branch thought to be most interested in peace.

Section 8(d)(2) of the Resolution may seem to restrict the grant of power when it states that

[n]othing in this joint resolution—. . .

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

However, given the expansive interpretations of the Commander-in-Chief's power by the occupiers of the oval office since President Truman, that admonition can be taken with a grain of salt. The composite message from the War Powers Resolution is that the President has an open ended authorization from Congress to insert United States military forces into hostilities whenever he deems it sound to do so. He should consult; he must report; but in all events the decision to engage in military action is in his hands. Once the President has taken action, if the troops can be withdrawn within sixty days, the War Powers Resolution will be satisfied. If the troops cannot be withdrawn within that time period Congress will either have to sanction further hostilities or force the issue to a confrontation of wills. The latter course has been assiduously avoided.

Section 5(c) of the War Powers Resolution does retain in Congress the power through joint resolution to rescind at any time the sixty day war making authority granted the President.¹⁰⁰ Thus even though United States troops are committed to battle, Congress may order them to withdraw. But even assuming the constitutionality of a legislative veto in the war making context,¹⁰¹ this provision detracts rather than

99. FARRAND, *supra* note 17, at 319.

100. Section 5(c) of the War Powers Resolution provides:

Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

101. In *Immigration and Naturalization Serv. v. Chadha*, — U.S. —, 103 S. Ct. 2764 (1983), the Supreme Court held that a single house veto in the context of the enforcement of the Immigration Act was unconstitutional. There is a strong basis for distinguishing the legislative veto in the War Powers Resolution from the one struck down in *Chadha*. En-

adds to the constitutional responsibility of Congress. In the proper setting—a delegation with precise standards—a legislative veto may be an appropriate tool to ensure the responsible exercise of constitutional authority. But in the context of the broad abdications of the War Powers Resolution and in the absence of affirmative obligations imposed upon Congress,¹⁰² the veto is merely another provision underscoring the secondary nature of congressional authority.

The purpose of the War Powers Resolution is, in its own terms, to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.¹⁰³

Unfortunately, the Resolution provides neither the guidance nor the tools to achieve these very important goals. Instead of defining lines of authority consistent with the constitutional framework, the Resolution implicitly embraces a status quo dominated by presidential prerogative. Instead of imposing procedures that would place Congress in the forefront of policy making, the Resolution codifies a system that presumes continuing presidential initiative and—at best—congressional response. Instead of fulfilling the intent of the framers, the Resolution permits the President and Congress to continue to subvert that intent.

VII. THE RESOLUTION IN ACTION

Several deficiencies of the War Powers Resolution were forcefully brought home by two events in 1983: the surprise invasion of Grenada on October 25, 1983, and the crises that arose over the deployment of the Marine peacekeeping force in Lebanon. In neither situation did the War Powers Resolution curb the unilateral exercise of war power by the executive branch or promote a meaningful participation by Con-

forcement is a clear executive function and the veto struck down in *Chadha* can be argued to have impinged upon that executive function. With respect to the war power, however, the Constitution expresses a strong preference for congressional oversight in that sphere. A legislative veto in this context is a narrow compromise between the need to delegate and the constitutional responsibility imposed on Congress. However, the majority opinion in *Chadha* is a work of mechanical simplicity. Instead of examining the particular veto in a constitutional context, the Court adopted a rigid textual formula that virtually ensures that all legislative vetoes will be struck down in the foreseeable future.

102. See *infra* pp. 74-80, 97-100.

103. The War Powers Resolution of 1973, § 2, 50 U.S.C. § 1541 (1973).

gress in the exercise of that power. In fact, taken together these two events underscore the urgent need for Congress to reassess its largely passive approach to the war power.

A. Grenada

On the evening of October 24, 1983, five congressional leaders—House Speaker Thomas P. O'Neill, Jr., House Majority Leader Jim Wright, House Minority Leader Robert H. Michel, Senate Majority Leader Howard H. Baker, Jr. and Senate Minority Leader Robert C. Byrd—were summoned to the White House for a confidential briefing. At the briefing, the Administration announced that United States armed forces would invade the island of Grenada the following morning. The President had signed the order to proceed with the invasion prior to meeting with these congressional leaders.¹⁰⁴ Thus, both the ultimate decision to invade Grenada and the planning of that invasion were made within the executive branch. The purpose of the October 24 briefing was primarily to provide these influential members of Congress with notice of the impending invasion.

The invasion began as scheduled during the early morning hours of October 25.¹⁰⁵ During the invasion and subsequent clean-up operations, eighteen United States soldiers were killed in action and 116 were wounded; Grenadian casualties were more severe with forty-five dead and 337 wounded.¹⁰⁶ In addition, twenty-four Cubans were killed in action and fifty-nine were wounded.¹⁰⁷ Despite the resistance, the entire island was secured in less than three days.¹⁰⁸ By that time over 5,500 American troops were on Grenada as part of the invasion force. All United States combat troops were withdrawn by December 15, 1983, forty-eight days after the invasion began.¹⁰⁹ As of January 31, 1984, approximately 300 United States military personnel remained on the island, primarily in a military police function.¹¹⁰ The Adminis-

104. *The Situation in Grenada: Hearing before the Senate Comm. on Foreign Relations*, 98th Cong., 1st Sess. 12-13 (1983) (testimony of Kenneth W. Dam, Deputy Secretary of State). Moreover, according to Senator Byrd, the advice of the congressional leaders was not solicited at the briefing. Whittle, *Questions, Praise Follow Grenada Invasion*, 41 CONG. Q. 2221 (1983).

105. THE DEPARTMENT OF STATE AND DEPARTMENT OF DEFENSE, *GRENADA, A PRELIMINARY REPORT 1* (1983) [hereinafter cited as *PRELIMINARY REPORT*].

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Telephone interview with Jean Marie Ward, Public Affairs, Department of Defense (January 31, 1984).

tration has termed the invasion a complete success.¹¹¹

Congress was officially informed of the invasion in an October 25 letter sent by the President to the Speaker of the House and to the President Pro Tempore of the Senate.¹¹² The letter described in summary fashion recent events in Grenada which indicated a complete collapse of governmental institutions on the island. According to the letter, that collapse endangered the lives of approximately 1,000 United States citizens and posed a "threat to the peace and security of the region."¹¹³ The message also explained that the Organization of Eastern Caribbean States (OECS) had organized a security force to restore order on Grenada and, to this end, had requested assistance from the United States. The President explained that he had authorized United States' participation in the security force, including participation in an invasion of Grenada which had begun that morning. The purpose of United States participation in the invasion was "to join the OECS collective security forces in assisting the restoration of conditions of law and order and of governmental institutions to the island of Grenada, and to facilitate the protection and evacuation of United States citizens."¹¹⁴

With respect to the President's constitutional authority to order the invasion, the letter explained that "[t]his deployment of United States Armed Forces is being undertaken pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief of the United States Armed Forces."¹¹⁵ The only allusion to the War Powers Resolution came in a brief paragraph which stated, "[i]n accordance with my desire that the Congress be informed on this matter, and consistent with the War Powers Resolution, I am providing this report on this deployment of the United States Armed Forces."¹¹⁶

Most commentaries on the Grenada invasion have focused on the wisdom, necessity and efficacy of the military action. But these assessments beg the primary question, namely, whether within our carefully structured system of government the President had the constitutional authority to order an invasion of a foreign sovereign. If he acted without such authority, then, regardless of the success or wisdom of the

111. See generally PRELIMINARY REPORT, *supra* note 105.

112. United States Forces in Grenada, 19 WEEKLY COMP. PRES. DOC. 1493 (Oct. 25, 1983).

113. *Id.*

114. *Id.* at 1494.

115. *Id.*

116. *Id.*

mission, the republic has been disserved. Unquestionably the invasion was an act of war and just as plainly the invasion had not been authorized by Congress.¹¹⁷ Nor did the request for assistance from the OECS somehow enhance the President's constitutional power. Hence, here, as in *Youngstown*,¹¹⁸ the sole question is whether the President had an inherent or express constitutional authority for the unilateral action taken.

As indicated above, the Administration specifically relied upon the President's authority to conduct foreign relations and on his position as Commander-in-Chief. The theory behind the reliance was not explained. Constitutional structure, however, is completely subverted by the notion that the inherent authority to conduct foreign relations includes an independent capacity to make war. At best that authority gives the President broad latitude in negotiating treaties and in entering executive agreements on terms otherwise consistent with constitutional structure. Certainly a vague, amorphous power nowhere mentioned in the Constitution cannot be said to nullify express allocations of war making authority. Similarly nothing in the Constitution or its structure imbues the Commander-in-Chief with an independent authority to implement foreign policy through military action. The independent authority of the Commander-in-Chief is limited to a very narrow range of defensive actions.¹¹⁹ It too is not a device through which the basic constitutional structure can be radically reordered. The focus of the inquiry then must be upon the truly independent authority of the Commander-in-Chief. The question is whether the invasion of Grenada can be justified as an application of that authority.

On the facts announced by the Administration, there can be no valid argument that the President's action was designed to repel a sudden attack upon this nation. Even though Grenada, with its Cuban infiltration, may have presented a security risk to the United States, the

117. In fact, the action taken by the President would seem to be inconsistent with 22 U.S.C. § 1732 (1982) which provides:

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

118. See *supra* text accompanying notes 6-16.

119. See *supra* notes 28-37 and accompanying text.

President could not activate the Commander-in-Chief's independent authority without a showing—absent here—that the security risk was of such an imminent and serious nature that it was the equivalent of a sudden attack. Any broader application of this authority would disembowel the constitutional structure. All military action is presumably taken to address some security risk. But aside from the narrow circumstance of a sudden attack or its equivalent, our Constitution contemplates that Congress will determine whether the security risk is sufficiently serious to justify military intervention and its attendant consequences. Apparently the Soviet Union presents a security risk to the United States, one perhaps even more substantial than the threat presented by Grenada. If, based solely upon the security risk presented by Grenada, the President had an independent constitutional authority to invade that nation, he possesses that same authority to invade the Soviet Union—at any time. The mere contemplation of such an expansive presidential prerogative ought to supply its own refutation.

The Administration claimed that the invasion was necessary to protect United States citizens living in Grenada—primarily students attending the St. George medical school.¹²⁰ The claim that the students were endangered may have been well founded. On the other hand, the protection of American lives has been a frequently abused pretext for military incursions of a broader scale. But regardless of the merits of this particular claim of endangerment, expediency does not define a constitutional system of government. The sole question is whether the President had independent constitutional authority to take military action to protect those students.

Arguably, an attack upon United States citizens residing abroad can be analogized to a sudden attack upon the nation. In both situations the Constitution could be read as recognizing the special competence of the executive branch to take decisive military action. But the analogy is strained. The constitutional authority of the Commander-in-Chief to repel sudden attacks is based not only on the efficiency of executive response, but upon the immediacy of the threat to the territorial integrity of the nation and its institutions, coupled with the potential inability of Congress to assemble and deliberate with the speed requisite to ensure survival of the nation. The authority was designed to preserve constitutional structure. Moreover, an exercise of this authority merely recognizes a preexisting state of war calling for immediate response.

120. PRELIMINARY REPORT, *supra* note 105, at 2.

In the context of protecting United States citizens residing abroad, neither the institutions nor the territorial integrity of this nation is in jeopardy. There is no preexisting state of war. Thus although the predicament of the affected citizens may call for prompt and efficient action, that predicament does not, in itself, warrant an alteration or modification of the basic constitutional framework. Moreover, it is of no small import that these citizens have voluntarily placed themselves beyond the jurisdiction of this nation. Finally, an authority to rescue, no matter how often invoked, simply does not enjoy the constitutional pedigree associated with the authority to repel sudden attacks.¹²¹

But the presidency is, after all, an office prone to action. As a matter of practical reality, one should perhaps concede that neither a theory of constitutional structure nor a specific statutory proscription will prevent the occupiers of that office from taking unilateral action to protect American citizens residing abroad. Political circumstances, not constitutional theory, will dictate the extent to which this authority is exercised. In fact, the notion that the President may not take immediate action to rescue American citizens would grate harshly against basic perceptions of most Americans. While the Constitution need not pay obeisance to all of our idiosyncracies, common experience and perceptions must play some part in defining realistic expectations under the Constitution. Thus, despite misgivings one may entertain regarding the constitutional roots of the President's authority to rescue, the question more appropriately addressed is how to assimilate that maverick authority into the basic constitutional framework.

An authority which is at best implied from an otherwise contrary constitutional structure ought to be narrowly confined to its articulated purpose—here, the rescue of United States citizens from emergency situations. Certain guidelines suggest themselves. First, like the authority to repel sudden attacks, the independent authority to rescue arises, if at all, only when Congress as an institution is unable to address an unanticipated emergency. With respect to sudden attacks, there is a textual constitutional presumption that Congress will not be able to do so. Such a general presumption is not applicable to rescue operations. Those operations may involve emerging crises or they may involve relatively static and predictable situations. Once it is conceded in a particular context that there is or has been a substantial opportunity to contemplate action, the authority to decide whether to proceed devolves back to Congress. Congress may then delegate authority to the

121. See *supra* notes 28-37 and accompanying text.

President, but the President is without authority, under such circumstances, to act in the absence of some action by Congress.

Next, the independent authority to rescue should be confined to situations in which the rescue can be accomplished without the risk of precipitating sustained hostilities. The authority to rescue surely does not empower the President to override the responsibility of Congress to determine whether this nation should embark upon a prolonged military involvement within the borders of a foreign nation. Of course, this guideline is not so much a check upon presidential power, as a factor to be considered by the executive prior to ordering a particular rescue operation. But this observation in no way derogates from the constitutional dimensions of the guideline. The executive too has a responsibility to see that constitutional structure is not subverted. Executive flaunting of this factor should be a source of political repudiation in any post-hoc examination of the action taken.¹²²

Finally, the independent authority to rescue can only be as broad as necessary to accomplish the specific mission. Under this authority, the Commander-in-Chief is empowered to take appropriate military action to directly secure the protection of the United States citizens and to effect their evacuation. Nothing more. The discretion to exercise the authority to rescue does not include a collateral right to direct military action toward the accomplishment of goals unrelated to the immediate protection of citizens and their evacuation. The overthrow of the existing political structure regardless of how anarchic it may appear is an undeniable and unconstitutional expansion of the authority to rescue.¹²³ Whatever the merits of the authority to rescue, only Congress can authorize military action designed to establish a new political order in a foreign nation. That is war, plain and simple.

In short, the President's authority to rescue United States citizens voluntarily residing abroad is at best a very limited exception to the constitutional structure. It should be exercised with care and only to the extent necessary to effectuate its underlying purpose.

The invasion of Grenada was a constitutionally irresponsible act. Putting aside for the moment the safety of the students, the security of this nation was not imperiled by anything resembling a sudden at-

122. *See infra* pp. 640-42.

123. There may be situations in which the military must overthrow an existing political structure in order to rescue United States citizens. Such a drastic necessity would seem to call for congressional authorization. Assuming that the President proceeds with such an action without congressional authorization, the President would bear a heavy burden of establishing a direct and necessary relationship between the overthrow and the rescue operation.

tack.¹²⁴ Although vital United States interests may have been endangered by the Cuban and Soviet presence in Grenada, Congress could have been prevailed upon to determine whether to authorize the President to take appropriate military action. Congress, not the President, is vested with the authority to make such basic determinations of national policy.¹²⁵ On this point, there should be no doubt. Next, even assuming the President had the constitutional authority to invade Grenada in order to protect United States citizens, that authority did not give the President the prerogative to extend the military action to "the restoration of conditions of law and order and of governmental institutions to the island of Grenada. . . ."¹²⁶ Nothing in our framework of government sanctions such constitutional bootstrapping. Yet the war in Grenada was plainly and openly conducted toward the end of establishing a political structure compatible with United States interests.¹²⁷ This aspect of the military intervention has no plausible constitutional justification. The President in ordering the military to achieve this goal acted in plain and direct violation of the Constitution he is sworn to uphold.

The invasion did generate a response in Congress. On November 1, the House of Representatives overwhelmingly approved a resolution that invoked sections 4(a)(1) and 5(b) of the War Powers Resolution and defined October 25 as the date upon which United States Armed Forces entered into hostilities, thus triggering the sixty day limitation provided in section 5(b).¹²⁸ The Senate, by a vote of sixty-four to twenty, had adopted identical language on October 28 in a rider to a debt ceiling bill.¹²⁹ Despite the apparent consensus between the House and the Senate, neither measure reached the President's desk. The House Joint Resolution was not acted upon in the Senate and the Senate rider was deleted during Conference Committee negotiations on the debt ceiling. The intensity of the initial response dissipated in part

124. The Administration has made no such claim. *See generally* PRELIMINARY REPORT, *supra* note 105.

125. *See supra* pp. 600-04.

126. United States Forces in Grenada, 19 WEEKLY COMP. PRES. DOC. 1493 (Oct. 25, 1983).

127. *See supra* notes 112-14 and accompanying text. *See generally* PRELIMINARY REPORT, *supra* note 105. Indeed, there is a substantial argument that the rescue of United States citizens was only of secondary importance and that the OECS request was used as a shield for a long awaited opportunity to invade Grenada. *See Britain's Grenada Shut-Out*, THE ECONOMIST, March 10, 1984, at 31-34.

128. H.R.J. Res. 402, 98th Cong., 1st Sess., 129 CONG. REC. H8933-34 (daily ed. Nov. 1, 1983).

129. 129 CONG. REC. S14,876-77 (daily ed. Oct. 28, 1983).

because public reaction to the invasion had been favorable and in part because of guarantees by the Administration that the bulk of the troops would be withdrawn within the sixty day period.¹³⁰ Of course, by October 28, the troops in Grenada were technically no longer in a hostile zone. The island had been pacified. Thus regardless of the conclusion drawn by Congress with respect to hostilities on October 25, the War Powers Resolution may have been tolled by the success of the military action.

Congress could have and should have done more. Every unilateral exercise of war power by the President requires an immediate, searching examination of the constitutional premises for the action taken. If those premises are determined to be sound, a congressional endorsement of constitutionality would be appropriate. If those premises are unsound, the President's action should be clearly and precisely repudiated for its constitutional deficiencies. This is more than an academic exercise. It is an exercise of congressional duty that must be undertaken if Congress is to play any role in curbing expansive notions of presidential prerogative. Such a process of constitutional examination serves to define the relative authorities of each branch and to underscore the need for particular congressional action to remedy perceived imbalances in those authorities.

Congress failed to make such an inquiry into the President's little war in Grenada.¹³¹ It readily accepted the assertion that the students at St. George medical school were in need of a military style evacuation. It did not, as an institution, question the constitutionality of the expansion of the military action beyond the evacuation of those students. This failure to scrupulously examine the President's use of military force signals a willingness to permit the executive branch to exercise freely an independent and unconstitutional authority to make war. It permits the executive branch to define broadly the limits of its own power. The war in Grenada may have been a miniscule affair. The

130. See 41 CONG. Q. 2292-93, 2360-61 (1983).

131. The Senate Foreign Relations Committee held a single hearing on the invasion. *The Situation in Grenada: Hearing Before the Senate Comm. on Foreign Relations*, 98th Cong., 1st Sess. 12-13 (1983) (testimony of Kenneth W. Dam, Deputy Secretary of State). The hearing lasted slightly less than two and one half hours and was attended by only seven members of the committee. Few probing questions were asked and the constitutional issue was left drifting in limbo. At a markup session on H.R.J. Res. 402, Rep. Weiss and Levine did broach the subject of the constitutionality of the President's action. However, Weiss' suggested amendment to the resolution stating that the invasion was in violation of the Constitution was ruled out of order by the chair. *Grenada War Powers: Full Compliance Reporting and Implementation, Markup on H.R.J. Res. 402 Before the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 16-21 (1983).

congressional response to that war was, however, part of a larger pattern of congressional trepidation. If Congress cannot assert its constitutional duty in the context of a Grenada, one can retain little hope for a significant congressional response to larger scale conflicts.

One basic shortcoming of the War Powers Resolution is its implicit and somewhat naive assumption that a legalistic limitation focused on presidential action will effect a modification of presidential attitude and practice. The Resolution had little or no effect upon the President's unilateral decision to invade Grenada. Nor did it generate a substantial congressional response to the invasion. As to the latter, early moves to invoke section 4(a)(1) dissipated as the initial shock of the invasion was assimilated into the hoopla over the success of the mission. A key to restoring constitutional structure to the war power is, however, affirmative and specific congressional action. Ideally, that action arises at a policy making stage. However, faced with an ongoing or completed presidential military initiative, the responsibility of Congress does not magically evaporate. If anything, the need for an affirmative assertion of congressional will is more acute. Only when Congress demonstrates its resolve to shoulder responsibility through specific responses to presidential action, will the executive branch take seriously the otherwise vacuous admonitions of the War Powers Resolution.

The primary focus of the War Powers Resolution should be shifted away from limitations on presidential action and aimed directly upon the affirmative obligations of Congress. This could be accomplished through the adoption of a precise and relatively automatic system for reviewing deployments arising under the War Powers Resolution. The invasion of Grenada and its aftermath suggest two such devices: (1) creation of a trigger device that requires an immediate decision by Congress, through joint resolution, of whether section 4(a)(1) has been activated; and, (2) upon a determination that section 4(a)(1) has been activated, a requirement that Congress immediately convene hearings for a prompt determination on the constitutionality of the presidential action.

Certainly there are several creative methods for triggering an automatic and definitive section 4(a)(1) determination.¹³² One simple approach is to require expedited consideration of any resolution

132. Of course, §§ 4(a)(1), 5(b) are activated by military, not political, events. However, as a practical matter some branch of the government must indicate an assessment that those military events have taken place. This places both branches on notice that the 60 day limitation of § 5(b) has been activated as of a date certain. Since Congress, through the War

indicating the sense of Congress that on a date certain and in a defined location, United States Armed Forces met with hostilities or the imminent threat of hostilities within the meaning of section 4(a)(1). If that approach would lead to abuse, some minimal sponsorship requirement could be a prerequisite to the expedited consideration. In any event, a procedure should be adopted by Congress through which such a resolution could be given full consideration by both Houses within three days of its introduction into either chamber. Since invocation of section 4(a)(1) does not require an automatic pullout of United States troops involved in hostilities, the adoption of such a resolution does not require a policy determination. It merely indicates the sense of Congress that the sixty day limitation of section 5(b) has begun to run.

Assuming a joint resolution invoking section 4(a)(1) is adopted by Congress, hearings, undertaken preferably by a committee composed of members of both Houses, should be automatically activated. The purpose of those hearings would be to undertake a review of the constitutionality of the President's action and to report to Congress and the nation on the conclusions derived from that review.¹³³ A joint committee composed of members of the Senate and House Committees on the Judiciary would seem particularly appropriate since those committees and their staffs have general responsibilities and developed expertise in the realm of constitutional law. Other committee configurations are possible. In any event, the structure and procedures of this committee must be set in advance. And regardless of the particular approach adopted, the focus of the inquiry should be upon the constitutional dimensions of the presidential action, not upon the substantive merits of the military mission. These hearings should be required to commence immediately upon the invocation of section 4(a)(1). A report on those hearings, accompanied by an appropriate resolution, should be delivered to Congress within thirty days of the invocation of section 4(a)(1). Upon submission of that report and resolution to Congress, both Houses should be required to consider the resolution on an expedited basis.

There is nothing sacrosanct about the details of this proposal. The details are less important than the thrust. The point is to require Congress to seriously consider the constitutional ramifications of individual instances of presidential war making. At a minimum, such a self-im-

Powers Resolution, is attempting to protect its constitutionally created sphere of responsibility, the appropriate branch to make that determination is Congress.

133. The role of Congress in determining upon deployment authorizations beyond the 60 day period is discussed *infra* pp. 651-52.

posed requirement would generate a public debate on the constitutional question. This alone would present a significant opportunity to improve the nation's constitutional literacy. Next, assuming the inquiry is undertaken in a sensible and serious fashion, it may activate in Congress a sense of its own constitutional mission. Perhaps Congress would eventually realize that it cannot achieve its constitutional mission without injecting itself into the policy making stage. Finally, an awareness that a probing congressional inquiry would ensue upon the unilateral exercise of war making power may force the executive branch to carefully examine its otherwise expansive and cavalier notions of an inherent power to make war. None of this is guaranteed. Preordained procedures can be circumvented by parliamentary technique. Ultimate conclusions on constitutionality can be suffocated in a web of legalese. But with the focus upon congressional duty, matters would at least be pointed in the proper direction and the public would be better able to assess the adequacy of its representation on Capitol Hill.

A searching examination of the constitutional premises of the decision to invade Grenada would have placed the executive branch on notice that regardless of its ability to skirt or stretch constitutional structure, its actions will be placed under the close scrutiny of Congress and the nation. It may not be possible to prevent the executive branch from proceeding with military actions such as the invasion of Grenada. It is, however, quite possible to create an environment of congressional activism that will at least place a political price tag on the executive proclivity to unsheath the saber. With a serious exercise of congressional oversight, the lines of authority may be stretched from time to time, but they will not be forever broken.

B. Lebanon

In July of 1958, President Eisenhower sent 5,000 Marines into Lebanon to "protect American lives" and to preserve "Lebanon's territorial integrity and independence."¹³⁴ The forces reached a peak level of 15,000, but were withdrawn in October of that same year.¹³⁵ This intervention had been at the request of the Lebanese government, but

134. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 422, 85th Cong., 2d Sess. 1 (1958).

135. 39 DEP'T ST. BULL. 650-51 (1958); 1 CONGRESSIONAL QUARTERLY, INC., CONGRESS AND THE NATION 1945-1964: A REVIEW OF GOVERNMENT AND POLITICS IN THE POSTWAR YEARS 122 (1965).

was accomplished without the prior authorization of Congress.¹³⁶ It represents but one of many minor landmarks in the erosion of congressional responsibility. Twenty-four years later, the Marines returned to Lebanon, again to assist the government of that nation in achieving stability and again the deployment was accomplished without the authorization of Congress. This time, however, Congress was armed with the War Powers Resolution and presumably with a fresh sense of its constitutional responsibility. Yet neither the War Powers Resolution nor the lessons of recent history prevented Congress from avoiding its constitutional duty.

In July of 1982, the executive branch reported to Congress that it had decided in principle to send troops to Lebanon as part of a multinational peacekeeping force.¹³⁷ Several members of Congress argued that any deployment of troops to Lebanon would have to be reported under sections 4(a)(1) and 5(b) of the War Powers Resolution.¹³⁸ Representative Clement Zablocki, Chairman of the House Foreign Affairs Committee, concluded in a letter to the President: "Any common-sense assessment of the situation in Lebanon must conclude that, if the United States agrees to participate in this multinational force, it would be introducing its armed forces into hostilities or into a situation where imminent involvement in hostilities is clearly indicated by the circumstances."¹³⁹ Accordingly, any deployment beyond sixty days would require express congressional authorization. Zablocki was certainly correct, although he might have added that the initial decision of whether to participate in the multinational force was also one for Congress to make. Although participation in a multinational peacekeeping force is not itself an act of war, the deployment of United States troops into a foreign nation is a clear exercise of the war power of the national government and a constitutional exercise of that power requires an initial determination by Congress.¹⁴⁰ As a consequence, the Administration's decision should have been treated, in principle, as a proposal for legislation. Congress was duty-bound to immediately address and resolve whether to approve the proposed deployment. But instead of seizing this ideal opportunity to assert congressional authority at a crucial policy making stage, Zablocki's letter to the President, coupled with other similar congressional responses, implicitly conceded the

136. See *infra* note 137.

137. *Reagan Sends Aid, Troops to Lebanon*, 38 CONG. Q. ALMANAC 167-70 (1983).

138. See, e.g., Letter from Sen. Eagleton to the President of the United States, July 16, 1982, reprinted in 129 CONG. REC. S12,189 (Sept. 14, 1983).

139. 128 CONG. REC. E3183-84 (daily ed. July 13, 1982).

140. See *supra* notes 3-42 and accompanying text.

right of the President to proceed with the planned deployment without the express authorization of Congress. Congressional responsibility would be activated only after the troops were deployed "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."¹⁴¹ The technical requirements of the War Powers Resolution masked the more fundamental responsibilities created by the Constitution.

On August 25, 1982, the decision in principle became a decision in fact. On that date a contingent of approximately 800 Marines was deployed to Beirut to assist in the evacuation of Palestinian guerillas.¹⁴² A report on the deployment was sent to Congress, "[i]n accordance with [the President's] desire that the Congress be fully informed on this matter, and consistent with the War Powers Resolution . . ."¹⁴³ The President, according to the report, had concluded that United States involvement in the evacuation process would improve the prospects for peace in Lebanon and for stability in the region. As a consequence, he ordered the deployment of Marines "pursuant to [his] constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief of the United States Armed Forces."¹⁴⁴ Although the Marines were equipped with infantry weapons, there was no expectation that they would become involved in hostilities.¹⁴⁵ Moreover, the deployment was temporary; the Marines would be withdrawn from Lebanon within thirty days.¹⁴⁶ On September 10, after the evacuation of 14,000 Palestinian guerillas had been completed, the Marines were withdrawn from Lebanon. No casualties had been suffered.

Ten days later, however, the President announced to the nation that the Marines would be returning to Beirut.¹⁴⁷ On September 16, the newly elected President of Lebanon, Bashir Gemayel, was assassinated; between September 16 and 18, there was a brutal massacre of Palestinian civilians in Beirut refugee camps.¹⁴⁸ In general, the ability of the government of Lebanon to maintain the peace was seriously in doubt. Accordingly, the President, on September 20, announced to the nation

141. The War Powers Resolution of 1973, § 4(a)(1), 50 U.S.C. § 1543(a)(1) (1973).

142. Deployment of United States Forces in Beirut Lebanon, 18 WEEKLY COMP. PRES. DOC. 1065-66 (Aug. 24, 1982) [hereinafter cited as Deployment of Forces in Beirut].

143. *Id.*

144. *Id.* at 1066. See *supra* text accompanying notes 115-19.

145. Deployment of Forces in Beirut, *supra* note 142, at 1065, 1066.

146. *Id.* at 1066.

147. Address to the Nation Announcing the Formation of a New Multinational Force, 18 WEEKLY COMP. PRES. DOC. 1182 (Sept. 20, 1982) [hereinafter cited as Address on New Multinational Force].

148. S. REP. NO. 242, 98th Cong., 1st Sess. 2 (1983).

that "[t]he international community has an obligation to assist the government of Lebanon in reasserting authority over all its territory. Foreign forces and armed factions have too long obstructed the legitimate role of the government of Lebanon's security forces. We must pave the way for withdrawal of foreign forces."¹⁴⁹ The multinational force, including a contingent of Marines, would return to Beirut in a peacekeeping function. The overall goal of the multinational force would be restoration of "a strong and stable central government" in Lebanon.¹⁵⁰

On September 29, 1,200 Marines arrived in Beirut. On that same day, the President sent a letter to Congress, "consistent with the War Powers Resolution," reporting this latest deployment.¹⁵¹ The letter described the purpose of the mission as "the restoration of Lebanese Government sovereignty and authority. . . ."¹⁵² In attempting to achieve this goal, the Marines would provide what was characterized as "an interposition force." As in the previous message on Lebanon, the President emphasized that there was no "expectation that U.S. Armed Forces will become involved in hostilities."¹⁵³ Finally, the deployment was ordered pursuant to the President's "constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief of the United States Armed Forces."¹⁵⁴

As with the August 25 deployment, Congress had been given an opportunity to exercise its constitutional responsibility prior to the actual commitment of troops. Again Congress failed to do so. The focus of the congressional response was upon technical requisites of the War Powers Resolution; the authority of the President to order the deployment was implicitly conceded. A number of members did argue, however, as Zablocki had prior to the first deployment, that in order to comply with the War Powers Resolution the President must report this

149. Address on New Multinational Force, *supra* note 147, at 1183.

150. *Id.* The mandate of the multinational force was as follows:

The MNF (multinational force) is to provide an interposition force at agreed locations and thereby provide the MNF presence requested by the Government of Lebanon to assist it and Lebanon's armed forces in the Beirut area. This presence will facilitate the restoration of Lebanese Government sovereignty and authority over the Beirut area and thereby further its efforts to assure the safety of persons in the area and to bring to an end the violence which has tragically recurred.

Statement by the Principal Deputy Press Secretary to the President, 18 WEEKLY COMP. PRES. DOC. 1196 (Sept. 23, 1982).

151. Letter from the President of the United States to the Speaker of the House and the President Pro Tempore of the Senate, 18 WEEKLY COMP. PRES. DOC. 1232 (Sept. 29, 1982).

152. *Id.*

153. *Id.*

154. *Id.*

second deployment under sections 4(a)(1) and 5(b).¹⁵⁵ Any deployment beyond the Resolution's sixty day limitation, set to expire on November 29, 1982, would require express authorization from Congress. However, in both letters to Congress referenced above, the President had carefully avoided invoking section 4(a)(1) of the War Powers Resolution. Indeed, the reports to Congress were not pursuant to the War Powers Resolution, but "consistent" with it, avoiding any suggestion that the President recognized the validity of the Resolution.

The debate over the applicability of section 4(a)(1) soon dissipated and November 29 came and went with the Marines in place and without any substantial effort by Congress to immerse itself responsibly in this exercise of the war power.¹⁵⁶ Up to this point, only one Marine of the peacekeeping force had been killed and his death was the result of an accident with an unexploded bomb. The relatively quiet deployment in Lebanon could be ignored.¹⁵⁷

The ability to ignore Lebanon evaporated in late summer of 1983. On August 29, two Marines were killed and fourteen were wounded in fighting with Muslim rebels.¹⁵⁸ In September, the fighting around Beirut International Airport escalated dramatically.¹⁵⁹ Several Marines were wounded during that month and two more were killed.¹⁶⁰ Navy ships began shelling rebel positions.¹⁶¹ The President ordered 2,000 more Marines stationed off the coast of Lebanon.¹⁶² As a consequence, the insistence by Congress that the Administration invoke section

155. See, e.g., 128 CONG. REC. E4576 (daily ed. Oct. 1, 1982) (statement of Rep. Jim Leach); letter from Sen. Eagleton to the President of the United States (Sept. 23, 1983), reprinted in 129 CONG. REC. S12,189 (daily ed. Sept. 14, 1983).

156. On December 15, 1982, 14 members of the Foreign Relations Committee did send a letter to the President urging him to seek formal congressional authorization for any expansion or long term continuation of the United States military presence in Lebanon. See S. REP. NO. 72, 98th Cong., 1st Sess. 6-7 (1983). The letter went on to observe, "[i]n the longer term, it may be appropriate to consider more general legislation to clarify the respective roles of the President and the Congress in undertaking the commitment of U.S. Armed Forces to such operations." *Id.* However, the letter did not suggest any steps to ensure immediate congressional involvement in the responsibility for the deployment of Marines in Beirut.

157. In March of 1983, Congress adopted the Lebanon Emergency Assistance Act which included a specific limitation upon the size and role of the Marine contingent in the multinational force. See Lebanon Emergency Assistance Act of 1983, Pub. L. No. 98-43, 97 Stat. 214 (1983).

158. 41 CONG. Q. 1876 (1983).

159. *Id.* at 1912.

160. *Id.*

161. *Id.*

162. *Id.*

4(a)(1) was renewed and intensified.¹⁶³ The question was not whether the Marines should remain in Lebanon. There was little support for ordering an immediate withdrawal.¹⁶⁴ Rather the focus was, as it had been in 1982, upon the technical requisites of the War Powers Resolution. A few members did observe, quite correctly, that in order to fulfill its constitutional responsibilities Congress would have to venture beyond a procedural invocation of the War Powers Resolution to a substantive determination of whether to support the continued deployment of the Marines in Lebanon.¹⁶⁵ The importance of this observation seemed to elude Congress as a whole.¹⁶⁶ In any event, despite the mounting casualties and despite the fact that the Marines in Beirut began receiving combat pay in August of 1983,¹⁶⁷ the Administration adamantly refused to acknowledge that section 4(a)(1) of the War Powers Resolution had been activated.¹⁶⁸ The events in Beirut were described

163. 129 CONG. REC. H6694, E4193 (daily ed. Sept. 12, 1983) (statement of Rep. Downey); *id.* at H6696 (statement of Rep. Coats); *id.* at S12,169-73 (daily ed. Sept. 14, 1983) (statement of Sen. Byrd); *id.* at S12,177 (statement of Sen. Riegle); *id.* at S12,177-78 (statement of Sen. Jepsen); *id.* at S12,178 (statement of Sen. Chiles); *id.* at S12,179-80 (statement of Sen. Zorinsky); *id.* at S12,180 (statement of Sen. Bentsen); *id.* at S12,180-81 (statement of Sen. Katsen); *id.* at S12,181-83 (statement of Sen. Exon); *id.* at S12,181-83 (statement of Sen. Bumpers); *id.* at S12,184 (statement of Sen. Sasser); *id.* at S12,184-85 (statement of Sen. Biden); *id.* at S12,185 (statement of Sen. Sarbanes); *id.* at S12,185-87 (statement of Sen. Dodd); *id.* at S12,187 (statement of Sen. DeConcini); *id.* at S12,187-88 (statement of Sen. Eagleton); *id.* at S12,192-93 (statement of Sen. Pell); *id.* at H7119 (statement of Rep. Frost); *id.* at 7123 (statement of Rep. Markey); *id.* at E4393 (statement of Rep. Zablocki); *id.* at E4419 (statement of Rep. Seiberling); *id.* at S12,256-57 (daily ed. Sept. 15, 1983) (statement of Sen. Mitchell); *id.* at H6932 (statement of Rep. Paul); *id.* at S12,395-96 (daily ed. Sept. 19, 1983) (statement of Sen. Dixon); *id.* at H7008-09 (statement of Rep. Sikorsk); *id.* at H7009-10 (statement of Rep. Alexander); *id.* at H7177 (daily ed. Sept. 21, 1983) (statement of Sen. Obey); *id.* at H7181 (statement of Rep. Roemer); *id.* at H7182 (statement of Rep. Downey); *id.* at H7288 (daily ed. Sept. 22, 1983) (statement of Rep. Kaptur); *id.* at H7290 (statement of Rep. Roemer); *id.* at H7557 (daily ed. Sept. 28, 1983) (statement of Rep. Ratchford); *id.* at H7564 (statement of Rep. Zablocki). *See also* Resolution of the Democratic Conference on September 14, 1983, reprinted in 129 CONG. REC. S12,193 (daily ed. Sept. 14, 1983) (unanimous resolution by Senate Democrats invoking §§ 4(a)(1), 5(b) of the War Powers Resolution); Kennedy, *President's Disregard of War Powers Act*, BOSTON GLOBE, Sept. 13, 1983.

164. *Events in Lebanon: Hearing Before the Senate Comm. on Foreign Relations*, 98th Cong., 1st Sess. 16 (1983) (statement of Sen. Tsongas) [hereinafter cited as *Events in Lebanon*].

165. *See, e.g.*, 129 CONG. REC. S12,178 (daily ed. Sept. 14, 1983) (statement of Sen. Chiles); *id.* at S12,180 (statement of Sen. Bentsen); *id.* at S12,185-87 (statement of Sen. Dodd); *id.* at S12,192-93 (statement of Sen. Wallop); *id.* at S12,256 (daily ed. Sept. 15, 1983) (statement of Sen. Mitchell).

166. *See infra* text accompanying notes 180-183.

167. *Events in Lebanon*, *supra* note 164, at 26 (testimony of Gen. Paul X. Kelley, Commandant, United States Marine Corps).

168. *See id.* at 14 (testimony of Gen. Paul X. Kelley, Commandant, United States Marine Corps); *id.* at 9-10, 17-18, 20-24 (testimony of Davis R. Robinson, Legal Advisor, Depart-

with a precision that carefully avoided the term "hostilities." In a letter informing Congress of the August 29 casualties, the President characterized the fighting as "sporadic."¹⁶⁹ Similarly, in a press conference on August 31, Secretary of State Shultz characterized events in Lebanon as "a situation where there is violence. It is a generalized pattern of violence."¹⁷⁰

The rigid and artificial linguistic and legalistic distinctions drawn by the Administration focused the debate on abstract terms. The meaning of the War Powers Resolution, rather than the Administration's policy in Lebanon, became the central concern. In short, a substantive examination of the wisdom and efficacy of the Marine deployment was effectively submerged in a fatuous verbal gunplay between the two branches. The battle came down to this: Congress insisted that the President invoke the War Powers Resolution; the President insisted that the Resolution did not apply. The presumption was that regardless of who prevailed, the troops would remain in Lebanon.

While the debate over the language and applicability of the War Powers Resolution raged on, efforts were underway to achieve a compromise that would preserve the War Powers Resolution and at the same time accommodate the President's wide ranging view of his powers as Commander-in-Chief.¹⁷¹ Senate Joint Resolution 159 was the vehicle for that compromise. Section 3 of Resolution 159 declared the determination of Congress that section 4(a)(1) of the War Powers Resolution had become operative with respect to the Marines stationed in Beirut on August 29, 1983. Sections 4 and 6 of Resolution 159, however, authorized the continued participation by the Marines in the multinational force for an additional eighteen months. The Joint Resolution also incorporated the terms of the Lebanon Emergency Assistance Act of 1983¹⁷² which prohibited the President from expanding substantially the size of the Marine contingent deployed in Lebanon or from altering the role of those forces.¹⁷³ Resolution 159

ment of State); see also *Multinational Force in Lebanon, Hearings Before the Senate Comm. on Foreign Relations*, 98th Cong., 1st Sess. (1983) [hereinafter cited as *Multinational Force*].

169. United States Forces in Lebanon, 19 WEEKLY COMP. PRES. DOC. 1186-87 (Aug. 30, 1983).

170. 41 CONG. Q. 1876 (1983); see also *Multinational Force*, *supra* note 168, at 29 (statement of George Shultz; Secretary of State).

171. See 41 CONG. Q. 1923-25, 1963-65 (1983).

172. Pub. L. No. 98-43, 97 Stat. 214 (1983).

173. The latter limitation assumes that the role of the Marines had been defined with sufficient clarity to permit a conclusion that under certain circumstances that role had been

did not require that the President concur in the invocation of the War Powers Resolution. Nor was its adoption premised upon any demonstration by the Administration of the necessity for the Marine deployment.

Dissenting members of the Committee on Foreign Relations which had favorably reported the bill (Senators Pell, Biden, Glenn, Sarbanes, Zorinsky, Tsongas, Cranston and Dodd dissented from the majority report) described the compromise as follows:

In our judgment, [Senate Joint Resolution 159's] enactment would constitute (1) a dereliction of Congressional responsibility to uphold the principles and procedures of the War Powers Resolution of 1973; (2) a failure to require of the Administration a clearly articulated and persuasive statement of the mission which U.S. Marines have been deployed in Lebanon to implement; and (3) an 18-month 'blank check' under which the Administration could pursue hitherto unspecified military objectives in Lebanon while asserting that it is operating with full Congressional sanction.¹⁷⁴

Those members had suggested that instead of a broad based compromise, Congress simply invoke section 4(a)(1) of the War Powers Resolution.¹⁷⁵

Senate Joint Resolution 159 was adopted in the Senate by a fifty-four to forty-six margin on September 29, after three days of debate.¹⁷⁶ That same day, the House of Representatives, which had been considering a similar measure, approved the Senate Joint Resolution by a 253 to 156 margin.¹⁷⁷ The resolution was signed by the President on October 12. A presidential statement that accompanied the signing specifically disavowed the congressional determination that section 4(a)(1) had been activated by the bloodshed in Beirut and disparaged the constitutionality of both the War Powers Resolution and any implications

expanded. Apropos of this, the Minority Views of the Committee on Foreign Relations stated,

over the period of 1 year, the stated mission of U.S. forces in Lebanon has expanded from a limited role, the feasibility of which Congress could evaluate, to a role too nebulous for Congress to evaluate and too far-reaching for U.S. military forces alone possibly to accomplish. Consequently, the effect of the resolution is to provide Congressional acquiescence in a policy involving American soldiers in a commitment the scope of which has yet to be defined even by its proponents.

S. REP. NO. 242, 98th Cong., 1st Sess. 17 (1983).

174. S. REP. NO. 242, 98th Cong., 1st Sess. 16 (1983).

175. *Id.* at 3.

176. 129 CONG. REC. S13,167 (daily ed. Sept. 29, 1983).

177. *Id.* at H7724.

of Senate Joint Resolution 159 that might suggest a congressional ability to confine the power of the Commander-in-Chief.¹⁷⁸ In fact, prior to the adoption of this Resolution, the Administration had taken the position that regardless of any compromise reached with Congress, the President would not be bound by the measure if, as Commander-in-Chief, he determined that military action beyond that contemplated by the compromise was appropriate.¹⁷⁹

The compromise was a constitutional disaster. Congress, in an effort to avoid a confrontation with the executive branch, failed to undertake a serious examination of the merits of Marine deployment in Lebanon.¹⁸⁰ It delegated a limited authority to exercise the war power based largely on the pressures of the political moment. Although the deficiencies of Senate Joint Resolution 159 pale in comparison to those of the Gulf of Tonkin Resolution, both resolutions share the similar flaw of having been adopted without a prior examination by Congress

178. Statement on Signing S.J. Res. Into Law, 19 WEEKLY COMP. PRES. DOC. 1422-23 (Oct. 12, 1983).

179. *Multinational Force*, *supra* note 168, at 27-28 (dialogue between Secretary of State Shultz and Sen. Sarbanes). The Reagan Administration's view of the Commander-in-Chief's power is quite broad. If one accepts the testimony of Davis R. Robinson, Legal Advisor, Department of State, the President is free to use military forces in any manner he deems fit, so long as Congress' power to declare war remains technically intact. *See Events in Lebanon*, *supra* note 164, at 8, 18-19, 21, 23 (testimony of Davis R. Robinson, Legal Advisor, Department of State). Congress may attempt to prevent such exercises only by risking a constitutional crisis. *Id.* at 21.

180. The Senate Foreign Relations Committee Report that accompanied S.J. Res. 159 discussed American objectives in Lebanon in what can be charitably described as the vaguest of generalities. S. REP. NO. 242, 98th Cong., 1st Sess. 4-5 (1983). This is understandable since testimony taken by the Committee from members of the Administration provided little guidance in defining those objectives. *See Multinational Force*, *supra* note 168, at 6-8 (statement of George Schultz, Secretary of State). The role of the Marines in assisting to achieve those generalities was covered in two brief paragraphs of the Committee Report, neither of which actually describe how the Marines could be expected to achieve any foreign policy objectives whatsoever. Those paragraphs, in their entirety, read as follows:

The role of the marines.—The Multinational Force, which includes a contingent of U.S. Marines, is another vehicle for implementing our broader policy objectives in Lebanon. The Committee agrees with Secretary Shultz's assurances that "it is not the mission of our Marines, or of the MNF as a whole, to maintain the military balance in Lebanon by themselves They are an important deterrent, a symbol of the international backing behind the legitimate Government of Lebanon"

The Committee understands that the role of the Marines is limited. The authorization of the presence of the Marines does not remove previous limitations on their deployment. Marine activities are restricted to the "Beirut area" and the number of Marine combat troops based onshore will remain approximately 1,200. The Resolution specifically states that it does not modify Section 4 of the Lebanese Emergency Assistance Act of 1983 which require congressional authorization for any substantial expansion in the number or role of the U.S. peacekeeping forces.

S. REP. NO. 242, *supra*, at 5-6.

of the wisdom and necessity for authorizing the presidential action contemplated. The War Powers Resolution was also dealt a serious blow. If the War Powers Resolution has any value, it must be in its ability to force Congress to make policy determinations based on a substantive examination of the merits of ongoing presidential exercises of the war power. In avoiding that policy determination, Congress underscored the Resolution's lack of effectiveness.

A more sensible and constitutionally responsible approach was available. Nothing in the War Powers Resolution requires an admission by the executive branch that troops are engaged in hostilities. The automatic triggering device suggested earlier¹⁸¹ would have obviated the bizarre debate with the executive branch over whether Marines receiving enemy fire were confronted with hostilities. Instead, the question should have been immediately placed before Congress and expeditiously resolved. "Then," in the words of Senator Lawton Chiles of Florida, "when the President begins to consult with Congress we can take the time to gather the facts and make an informed judgment on our policy in Lebanon."¹⁸²

In other words, Congress was confronted with two distinct questions. The first, whether to invoke section 4(a)(1) of the War Powers Resolution, involved a straightforward assessment of facts, permitting, under the circumstances, only one conclusion. A compromise was unnecessary. The second, whether to authorize the Marine deployment beyond sixty days, called for a careful and thorough evaluation of policy. Essential to the latter evaluation would have been a persuasive and detailed statement, provided by the administration, of the foreign policy objective to be achieved by the deployment coupled with a convincing explanation of the manner in which the military presence of the Marines would advance that objective.¹⁸³ In the absence of such statement, Congress could not, consistent with its constitutional responsibilities, authorize further deployment. The troops would have to be withdrawn within sixty days.

This framework does require some faith in congressional resolve and presidential compliance. There is no legalistic or magic formula to guarantee either. Resolve can only derive from the insistence by the public that individual members of Congress courageously exercise the constitutional trust imposed upon them. A combination of public

181. *See supra* pp. 640-41.

182. 129 CONG. REC. S12,178 (daily ed. Sept. 14, 1983) (statement of Sen. Chiles).

183. *See* 129 CONG. REC. S12,925-26 (daily ed. Sept. 26, 1983) (dialogue between Sen. Chiles and Sen. Biden).

awareness and political accountability is the key. As to presidential compliance, a direct invocation of section 4(a)(1) would not be politically weightless. Political posturing and maneuvering aside, the most likely response by the executive branch would be a concerted effort to convince Congress of the necessity of the proposed policy. If it appeared that an express authorization was not forthcoming and if it appeared that Congress was resolute, it is by no means certain that the President would risk the inevitable political fallout that a direct and specific repudiation of the War Powers Resolution would engender. Presumably such a risk would be taken under only the most compelling of circumstances. When that occurs, Congress would be in a position to assess the merits of precise measures designed to force a withdrawal of troops or, in light of the President's insistence, to reassess the decision not to authorize continued deployment.¹⁸⁴

Once Congress affirms that section 4(a)(1) has been activated, the hearing procedures with respect to the constitutionality of the presidential action must commence.¹⁸⁵ In addition, Congress will likely be called upon to determine whether to authorize a continuation of the deployment beyond sixty days. The War Powers Resolution (or internal congressional procedures) should be modified to include a requirement, effective upon a congressional invocation of section 4(a)(1), that the President submit a detailed report to the Senate Committee on Foreign Relations and to the House Committee on Foreign Affairs regarding the foreign policy objective of the subject deployment and the manner in which the deployment will effectively achieve the purported objective. In the absence of such a report or a specific showing of exigent circumstances excusing the report, Congress should be precluded from authorizing the subject deployment beyond the sixty day maximum set in section 5(b). This framework would separate consideration of the authorization of a presidential deployment from both the section 4(a)(1) question and the constitutional determination. Although such procedures could not force Congress to act with constitutional responsibility, they would focus attention upon constitutionally relevant factors and make circumvention of constitutional duty less easily submerged in the rush to compromise.

184. Requiring the executive to clearly and convincingly articulate the purpose and efficacy of a particular military mission has the additional important benefit of forcing the executive to carefully examine the wisdom of its own policies.

185. See *supra* pp. 641-42.

VIII. CONCLUSION

Our Constitution creates a structure of government that vests primary responsibility for defining national policy in the most representative branch. That structure is applicable to exercises of all power vested in the national government, including the war power. Such a structure places great faith in the political maturity of the populace. Beginning largely in the twentieth century and accelerating since World War II, however, Congress has become reluctant to assert its constitutional authority with respect to the war power. The President's practical power combined with this congressional reluctance has created a severe threat to our representative system of government. Worse yet, as a nation we have become accustomed to this imbalance, so much so that unilateral exercises of presidential power are often accepted without question as part of the ordained system.

The War Powers Resolution was designed, ostensibly, to redress that imbalance. The Resolution is, however, based upon the faulty premise that Congress can effectively exercise its constitutional responsibility from a reactive posture, leaving initiative in the executive branch. Moreover, even to the extent that the Resolution has the potential to insert Congress into the policy mode as a response to presidential action, its effectiveness can only be as broad as congressional willingness to use the framework imposed by the legislation. So far Congress has been at best timid. If Congress is to accept the burdens imposed upon it by the Constitution, then it must do more than pay symbolic homage to the War Powers Resolution. The direction Congress must take is toward acceptance of primary responsibility over the military apparatus of this nation. This will require that Congress, through its committee system, devise an internal structure that keeps Congress, as a body, current on emerging world events; that Congress begin a long overdue assault upon the citadel of executive privilege; that the appropriations process be tied to a substantive examination of ongoing and future policy determinations; and that Congress effectively respond to unilateral exercises of the war powers in a manner that indicates its institutional independence.

I have suggested a few modifications of the War Powers Resolution (or of procedures in Congress) that would require Congress to at least gaze in the direction of its responsibilities. Obviously, these small measures will not in themselves be sufficient to overhaul a constitutional structure that has been hobbled by years of abuse. It is clear, however, that whatever measures Congress undertakes, those measures must focus affirmatively on Congress, not upon the executive branch.

Of course, the executive branch could contribute greatly to restoring the constitutional balance by abandoning in both word and deed the latitudinarian approach to presidential power in vogue over the last few decades. That this will be accomplished in the absence of affirmative congressional action is, however, the stuff that dreams are made of. The only cure to the current scheme is an intelligently active Congress and a public that is sufficiently concerned with our constitutional system of government to demand as much from its representatives. Unless Congress is willing to shoulder responsibility for the political consequences of exercises of the war power, the executive can be expected to maintain its position of virtually unlimited power.¹⁸⁶

Events are unfolding throughout the globe that implicate security interests of this nation. Those events require congressional scrutiny now—at a point when policy and objectives can be defined in the absence of a crisis flashpoint. A clear example is the United States military build-up in Honduras. Although ostensibly the United States is involved only in tactical maneuvers, the General Accounting Office has apparently concluded that installations being constructed by United States Armed Forces are permanent.¹⁸⁷ If this is correct, a major policy decision with wide ranging ramifications is being solidified without the express authorization of Congress. In addition, on March 12, 1984, the Los Angeles Times reported that United States Army pilots are flying reconnaissance missions for the Salvadoran army from the base of operations in Honduras.¹⁸⁸ This creeping escalation of United States military involvement in Central America presents a clear signal to Congress that the time to define the scope of that involvement is now. Congress may sit back and allow this presidential initiative and secret

186. I have avoided discussing the role of the Supreme Court in this constitutional breakdown. In part, this avoidance is based on a realistic assessment of the Court's reluctance to become involved in such matters, *see, e.g.*, *Goldwater v. Carter*, 444 U.S. 996 (1979); *Mora v. McNamara*, 389 U.S. 934 (1967) (Douglas and Stewart, JJ., dissenting from denial of certiorari), and in part on a recognition that the buck of constitutional responsibility ought to stop in the branch upon which the Constitution so clearly placed the duty. It may be, however, that at some point the Court will have to intervene to set Congress back upon its appointed track.

187. In the summer of 1983, when the Big Pine II operations began in Honduras, Rep. William Alexander sent to the General Accounting Office a set of 27 questions regarding those military exercises. *See* 130 CONG. REC. H813-14, H883-87 (daily ed. Feb. 23, 1984) (statement of Rep. Alexander). The purpose of the questions was to determine the extent to which the Big Pine operation was something other than a routine training exercise. *Id.* In March of 1984, the GAO delivered its report. However, the report has been classified by the Department of Defense. *See also* 130 CONG. REC. S1123 (daily ed. Feb. 8, 1984) (statement of Sen. Sasser).

188. Los Angeles Times, March 12, 1984, at part I, p. 1.

planning to coalesce into a fixed national policy, or it may step in, assess the vital needs of this nation and direct the executive branch toward the accomplishment of specifically defined objectives. In short, the opportunity to shoulder constitutional responsibility presents itself. The question is whether Congress will accept the challenge.

