PRESIDENTIAL WAR POWER: DO THE COURTS OFFER ANY ANSWERS?

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> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as ultimate interpreter of the Constitution.
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> —*Baker v. Carr*[2]

Few government decisions have greater impact on the military than ordering combat operations. A force that is loyal to the Constitution, which empowers the government to make such decisions, is justifiably proud of an untarnished history of obedience to the war power decisions of the civilian government. Interpretations of the constitutional process for making such decisions, however, have varied throughout U.S. history.[3] This article surveys the impact of federal cases on this interpretation. The judicial decisions that either directly or by implication relate to the issue of the constitutional distribution of war powers provide the framework for

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2. 369 U.S. 186, 211 (1962).

3. This issue has also been the subject of intense scholarly debate. *See, e.g.*, Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903 (1994).

analyzing war power controversies and determining the sources and limits of presidential authority to order combat operations.

This framework supports a broad view of executive war power. With the exception of responding to emergencies, however, it is congressional support for war power policies, not the unilateral constitutional power of the President that forms the foundation for this view. While this framework indicates that congressional support for the President is often the sine quo non for a constitutionally valid decision to take the nation to war, judicial decisions also indicate that implied congressional support is constitutionally sufficient. At the other end of the spectrum, these decisions also consistently suggest that explicit congressional non-support marks the outer limits of this broad presidential authority.

The cases analyzed in this article demonstrate three critical points. First, war power issues are justiciable. Second, the federal courts have never concluded that the executive is vested with unilateral constitutional authority to commit United States armed forces to combat. Third, under the right circumstances a war power controversy between the President and Congress may necessitate judicial resolution.[4] While many of the cases that are analyzed herein date from early periods of the nation's history, they form the common foundation for virtually all of the cases decided on this issue in recent history.

A preliminary issue that must be addressed is whether there is value in providing legal analysis for what many regard as an inherently political topic. The answer to this is two-fold. First, issues regarding war powers cannot be absolutely categorized as non-justiciable. As this article illustrates, the fluctuating nature of the doctrines of political question and equitable discretion preclude such a conclusion. Second, even when these issues are resolved on a purely political level, the parties to the negotiations rely on the law. Therefore, a knowledge and understanding of this body of law, and the analysis the courts used when faced with such issues, is essential to a thorough understanding of the arguments asserted by both parties to any future political debate surrounding the use of force.

Part I of this article provides the background justifying resort to judicial decisions to analyze this issue. Part II considers whether such an issue could be justiciable. Part III proposes an analytical framework provided by the courts to resolve a separation of powers issue. Parts IV, V, VI, and

4. *See infra* notes 22-67 and accompanying text.

VII review war related decisions from different periods of our nation's history. Parts VIII and IX analyze how these decisions, and the history of war making decisions they represent, factor into the analysis based on the template provided in Part III. This article concludes by applying the template to the history of warmaking decisions. This supports a broad, but not unilateral view of presidential war power.

I. Background

With only the United States Constitution as a guide to determine which branch of the United States government possessed predominant authority over war power decisions, Congress would logically prevail. While Article II designates the President as the commander in chief of the armed forces,[5] Article I explicitly vests Congress with extensive war-related powers.[6] Proponents of limited presidential war power assert that the vesting of extensive war-related powers in the legislative branch was no accident. Instead, it was a deliberate attempt on the part of the framers of the Constitution to ensure that the nation went to war only after the judgment of the most representative branch of the government determined that such action was appropriate. According to one such proponent:

> [T]he question is whether the grant to Congress of the power to declare war alters or affirms the basic principle of separation of powers . . . it plainly affirms that principle . . . . The power to declare war, when coupled with other authorities vested on 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 the 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.[7]

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5. U.S. CONST. art. II, § 2.

6. *Id*. art. I, § 8. These powers include the power of the purse, the power to provide for the establishment and regulation of land and naval forces, and the power to declare war and grant letters of *marque and reprisal*. *Id.*

7. Allan Ides, *Congress, Constitutional Responsibility and the War Power*, 17 LOY. L.A. L. REV. 599, 611 (1984).

Under such a view, the role of the commander in chief is to execute a conflict once Congress decides to go to war.[8] The record of the debate surrounding war powers at the Constitutional Convention is often cited in support of this conclusion.[9]

Analysis of war making authority, however, only begins with the constitutional text. History illustrates a steadily increasing assertion of presidential war power. This trend is characterized as follows:

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.[10]

The significance of the history of war power decision-making has been asserted to support both expansive[11] and restrictive theories of presidential war power.[12] Regardless of the textual analysis leading to the conclusion,[13] however, the proposition that during the course of history there

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8. This position is expressed by Allan Ides as follows:

> 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 . . . Congress as a deliberative body had proven itself to be an entirely unsatisfactory vehicle for the day-to-day prosecution of war . . . . [T]his power to direct the war effort did not, however, vest the President with the constitutional authority to override the more pervasive authorities of Congress . . . . [T]hus, 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.

Id. at 611-12.

9. *Id.* at 612-14. *See also* JOHN H. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).

10. Ides, *supra* note 7, at 616.

11. *Id.*

has been a shift in predominant authority in this area to the President is well accepted.[14]

It is against this constitutional separation of powers backdrop that the armed forces of the United States operate today. The only combat operation since the Vietnam War that was expressly authorized by Congress was "Operation Desert Storm" in 1991.[15] There is no evidence that the military ever questioned the legality of the numerous other operations that were conducted during this period, and, fortunately, most of these operations were unaffected by war power debate.[16] However, a serious future disagreement between the President and Congress regarding a war power decision could conceivably require military leaders to make very difficult decisions. If Congress were to vote against authorizing a future operation, could the President legally order execution? If the execution order was issued, must it be obeyed? If it were obeyed, could the military leaders who executed the order be subject to any adverse consequences? Finally, is there any role for the judicial branch in the event of such an impasse between the two political branches? This article provides an analytical framework for answering such questions by identifying whether the limits of presidential authority to issue constitutionally valid orders to use force

12. *See generally id.*; Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A. L. REV. 683 (1984); Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715 (1984); Clement J. Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A. L. REV. 579 (1984); Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17 (1995); Brian M. Spaid, *Collective Security v. Constitutional Sovereignty: Can the President Commit U.S. Troops Under the Sanction of the United Nations Security Council Without Congressional Approval?*, 17 U. DAYTON L. REV. 1055 (1992); John W. Rolph, *The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm*, 40 NAVAL L. REV. 85 (1992); Christopher A. Ford, *War Powers As We Live Them: Congressional-Executive Bargaining Under the Shadow of the War Powers Resolution*, 11 J.L. & POL. 609 (1995); Bennett C. Rushkoff, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330 (1984); ELY, *supra* note 9.

13. *See* Turner, *supra* note 3 (providing an excellent discussion of the weaknesses of this view).

14. *See supra* note 10 and accompanying text.

15. Combat operations initiated pursuant to the orders of the President and absent express Congressional authorization include the Mayaguez rescue mission, the Iranian hostage rescue mission, the deployment of U.S. Marines to Lebanon, Operation Urgent Fury, Operation Just Cause, Operation Joint Endeavor, Operation Provide Hope, and Operation Provide Comfort.

can be derived from an analysis of judicial decisions that relate to both war power and separation of powers issues.[17]

Resolving such an issue from judicial authority holds special significance for U.S. military officers. There is no question that there exists an abundance of scholarly analysis of this issue, with advocates for both broad and narrow interpretations of presidential war power. While the importance of such works should not be underestimated, especially in the impact they have on policy development, they do not amount to conclusive enunciations on the subject. In contrast, judicial interpretations of the Constitution, pursuant to the precedent of *Marbury v. Madison*,[18] are ostensibly conclusive. There is no reason to believe that this precedent of judicial authority to interpret the Constitution should not apply to a war power controversy. It is impossible to predict exactly how the political branches (or, for that matter, the military) would respond to a judicial resolution of such an issue. It is fair to presume, however, that such a resolution would be given the respect traditionally accorded such decisions under the U.S. system of government. In fact, when the Supreme Court indicated "that it is *an 'inadmissible suggestion' that action might be taken in disregard of a judicial determination*"[19] it demonstrates that the Court expects

16. One example of an operation that was ostensibly influenced by such debate is the United States participation in Lebanon during 1983. The controversy surrounding this operation led to a debate in Congress as to whether the President was required to comply with the War Powers Resolution. *See* War Powers Resolution, Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C.A. §§ 1541-1548 (West 1998)). The final result was a specific authorization for continuation of the operation with a specific end date that had been negotiated with the administration. *See* Ratner & Cole, *supra* note 12, at 745-49.

Another example, albeit less direct, of political debate surrounding war power authority that impacted on an ongoing military operation was the United States involvement in Operation Provide Hope in Somalia. Although erosion in public support was the prime motivation behind the United States pullout from the operation, Congress scrutinized the President's authority to continue an operation that he had unilaterally initiated. The impact of this is less certain than the response to Lebanon. While the Senate passed a joint resolution to support the operation, the resolution languished in the House of Representatives. The President mooted the issue by withdrawing all U.S. forces from the operation. *See* Sean D. Murphy, *Nation Building: A Look At Somalia*, 3 TUL. J. INT'L. & COMP. L. 19, 39-40 (1995).

17. The constitutional importance of the congressional responses to these operations may be more significant than the impact they had on the respective operations. It appears that the congressional assertion of authority over the decision to continue these operations increased proportionally to the erosion of public support for them. This is an indication that, while Congress may be content to provide support to certain operations by implication, it continues to reserve the power to reject affirmatively war power policy that is initiated by the President. *See infra* notes 313-332 and accompanying text.

18. 5 U.S. (1 Cranch) 137 (1803).

nothing less than full compliance with judicial decisions, even if those decisions relate to a conflict of positions between different branches of the government.

Many scholarly works on this subject dismiss the role of the judiciary in resolving these issues and instead analyze the purported meaning of the Constitution and the debates surrounding its founding. However, members of a profession whose allegiance is owed to the Constitution must give ultimate respect not to academic views, but to interpretations of the Constitution provided by the branch of government that has the duty "to say what the law is."[20] Furthermore, scholarly works that propose contradictory conclusions tend to "yield no net result but only suppl[y] more or less apt quotations from respected sources on each side of any question."[21]

Those who swear to uphold the Constitution cannot ignore judicial decisions that bear on this issue. It is for this reason that this article approaches the issue of determining the constitutional limits of presidential war power from a somewhat unconventional approach–the judicial perspective. The relevance of this perspective, however, is contingent on the conclusion that under the right circumstances a war power controversy could be justiciable.

II. Justiciability

If a constitutional crisis concerning war power developed between the President and the Congress, the judiciary might conceivably be called upon to resolve the crisis. Because military officers swear oaths of allegiance to the Constitution, any such resolution would ostensibly be binding on them.[22] What is far less certain is the position that the judiciary, and

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19. Powell v. McCormack, 395 U.S. 486, 549 n.86 (1969) (quoting McPherson v. Blacker, 146 U.S. 1, 24 (1892)) (emphasis added).

20. *Marbury*, 5 U.S. (1 Cranch) at 177.

21. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

22. *See Powell*, 395 U.S. at 549 n.86. This conclusion is based not only on *Powell v. McCormack*, but also on the text of the oath of a military officer. The oath makes clear that military officers (who will in turn be commanders) swear an oath to support and to defend the Constitution of the United States, and there is no allegiance sworn to either the President or the Congress. It is the judiciary whose historical role has been to interpret the meaning of that Constitution. *See, e.g.*, *Marbury*, 5 U.S. (1 Cranch) at 177; Baker v. Carr, 369 U.S. 186, 211 (1962). Therefore, loyalty to the Constitution would seem to require acceptance of judicial interpretation of the Constitution.

the United States Supreme Court in particular, would take regarding the justiciability of such an issue.[23] While the Supreme Court did adjudicate such issues early in the nation's history,[24] these decisions pre-date modern doctrines of judicial restraint.[25]

These doctrines of judicial restraint, the most relevant of which is the political question doctrine, should not, however, be viewed as conclusively precluding judicial intervention to resolve such issues. In fact, there are examples of relatively contemporary judicial willingness to adjudicate issues involving war powers.[26] A close analysis of the doctrine of judicial restraint supports the reasonableness of the conclusion that war power issues are potentially justiciable.

The leading case in the area of judicial restraint is *Baker v. Carr*.[27] In this case, the Supreme Court established the test for determining when an issue that is presented to the judiciary is so inherently political that it is non-justiciable.[28] Justice Brennan's opinion in *Baker* lists a variety of circumstances under which an issue would qualify as a "political question."

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial desecration; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment

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23. *See* Ratner & Cole, *supra* note 12, at 733-34.

24. *See infra* notes 105-141 and accompanying text (discussing these early Supreme Court decisions).

25. These include the political question doctrine and the doctrine of equitable discretion. *See infra* notes 27-29, 51 and accompanying text.

26. *See, e.g.*, Dacosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

27. 369 U.S. 186 (1962).

28. *See id*. Such an issue is therefore properly left to the political branches of government for resolution. *See* STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 140-42 (1990).

from multifarious pronouncements by various departments on one question.[29]

While many of these circumstances seem to suggest the non-justiciability of a war power issue, this conclusion is undermined by analysis of the precise nature of such an issue. Such an issue presupposes a conflict between the President and the Congress over a proposed combat deployment. This would represent a political loggerhead that would require judicial resolution only as a last resort.[30] Resolution of this loggerhead would require constitutional interpretation, the classic function of the federal judiciary.[31] So framed, the question of which branch of the federal government has the constitutional "final say" on the decision to go to war seems the antithesis of the "textually demonstrable constitutional commitment of the issue to a coordinate political department."[32]

Under constitutional jurisprudence, it is this absence of a textually demonstrable commitment of power that makes judicial resolution of such an issue so essential. Pursuant to Supreme Court precedent, this judicial function is not automatically nullified because such an issue touches on foreign affairs.[33] In fact, even in *Baker*, the Court specifically instructed

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29. *Baker*, 369 U.S. at 217.

30. *See, e.g.*, *Dellums*, 752 F. Supp. at 1141.

31. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that it is "emphatically the province and the duty of the judicial department to say what the law is").

32. *Baker*, 369 U.S. at 217. In *Powell v. McCormack*, the Supreme Court seemed to limit the significance of the concerns that judicial resolution of a controversy involving the political branches would cause embarrassment or show a lack of respect for a coordinate branch. *See* Powell v. McCormack, 395 U.S. 486 (1968). The Court subjugated these concerns to the traditional judicial responsibility of interpreting the Constitution. *See id. See also infra* note 33. Furthermore, the language used by the Court in *Baker* suggests that the enunciated criteria for making a political question determination must be considered in a very discriminating way in light of all of the interests involved in the case. *See Baker*, 369 U.S. at 217. *See also infra* note 33 and accompanying text.

33. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731 (1982); Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Nixon, 418 U.S. 683 (1974). Although *Baker* involved a domestic issue (a reapportionment challenge), Justice Brennan suggested that, while cases touching foreign affairs often may be non-justiciable, such a conclusion should not be automatic. *See Baker*, 369 U.S. at 211-12. Careful analysis of the precise issue is required. *Id.* The Court has also rejected as a per se trigger for the doctrine the potential embarrassment that might result from such a resolution. *See Powell*, 395 U.S. at 548-49 (rejecting the argument that the potential for an embarrassing confrontation between the judicial and legislative branches rendered the case non-justiciable). *See also infra* notes 35-37 and accompanying text.

against assuming that every foreign affairs-related issue amounts to a political question:

> It is error to suppose that every case or controversy that touches on foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.[34]

The potential embarrassing result of such a resolution should not be considered a per se trigger for the doctrine. The Supreme Court made this clear in *Powell v. McCormack*.[35] In that case, the plaintiff was elected to the House of Representatives, but was denied his seat due to allegations of misconduct in his home state.[36] He sought injunctive, mandatory, and declaratory relief against the Speaker of the House and his subordinates. The Supreme Court specifically rejected the argument that the potential for an embarrassing confrontation between the judicial and legislative branches rendered the case non-justiciable.

> Respondent's alternate contention is that the case presents a political question because judicial resolution of petitioners' claim would produce a "potentially embarrassing confrontation between coordinate branches" of the Federal Government. But . . . a determination of petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve a "lack of respect due [a] coordinate [branch] of government," nor does it involve an "initial policy determination of a kind clearly for non-judicial

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34. *Baker*, 369 U.S. at 211-12. In the last portion of this quotation, Justice Brennan suggests consideration of the possible consequences of judicial action. While instinct may trigger consideration of foreign policy embarrassment or failure as such a consequence of judicial resolution of a war power issue, there are other consequences that a court might consider equally important. These could include not only the precedential consequence of a judicial pronouncement of what branch has war power authority, but also the human consequence involved. In short, a court would have to consider that judicial action could conceivably stop or fail to stop a planned military operation, and the lives of the citizen soldiers of this nation would be impacted by any such decision.

35. 395 U.S. 486 (1968).

36. *Id.* at 486.

> discretion." *Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.*[37]

The rationale for this rejection seems equally applicable to a war power dispute between the legislative and executive branches. Both *Baker* and *Powell* involved purely domestic issues. While they seem logically applicable to a war power dispute, the significant foreign relations impact of such a dispute must be considered. While *Baker* did address the significance of such an impact, the most significant political question case involving a pure foreign relations issue was *Goldwater v. Carter*.[38] This case involved a challenge by Senator Goldwater to President Carter's decision to terminate, without the consent of the Senate, a mutual defense treaty with Taiwan.[39] The district court dismissed the challenge for lack of standing, but the circuit court reversed and held that the Constitution authorized the President to withdraw from the treaty in the manner in which he did.[40] The Supreme Court concluded that the issue was non-justiciable, vacated the circuit court decision, and remanded for dismissal.[41] Four of the five Justices who joined in this result concluded that the issue presented a "political question."[42] This conclusion was based on the fact that the case implicated foreign affairs. According to Justice Rehnquist, who wrote for these four Justices:

> I am of the view that the basic question presented by the petitioners in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.[43]

Although this conclusion might at first glance seem to apply to a war power dispute, the justifying rationale leaves room to distinguish a war power controversy. First, Justice Rehnquist concluded that the absence of

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37. *Id.* (citing *Baker*, 369 U.S. at 217) (emphasis added).
38. 444 U.S. 996 (1979).
39. *Id.* at 997-98.
40. Goldwater v. Carter, 617 F.2d 697 (1979) (en banc), 444 U.S. 996 (1979).
41. *Goldwater*, 444 U.S. at 996.
42. *Id.* at 997-1002.
43. *Id.* at 1002 (Rehnquist, J., concurring in judgment).

any constitutionally established Senate role in treaty abrogation rendered the issue "controlled by political standards."[44] This same conclusion does not necessarily apply to war power issues, particularly in light of early cases that indicate a congressional role in authorizing both "perfect" and "imperfect" war.[45] Second, the case was distinguished from *Youngstown Sheet & Tube Co. v. Sawyer*[46] because, unlike *Youngstown*, it involved private litigants and because *Youngstown* involved "an action of profound and demonstrable domestic impact."[47] It is certainly conceivable that a war power challenge could originate with a private litigant. Even assuming that a challenge was initiated by a member of Congress, it is difficult to imagine an action by the President that would have more potential for "profound and demonstrable domestic impact" than the decision to embroil the nation in a war contrary to the express will of Congress. Finally, Justice Rehnquist analogized the case to *United States v. Curtiss-Wright Corp.*[48] because "the effect of this action, as far as we can tell, is 'entirely external to the United States, and [falls] within the category of foreign affairs.'"[49] While the decision to take the nation to war would naturally result in an external effect and have foreign affairs implications, the effect would certainly not be "entirely" external. Ultimately, the cost of conducting a war, measured in both lives and money, falls on the American people. This should certainly qualify as a substantial domestic impact.

In the *Goldwater* plurality opinion, Justice Powell's rejected outright the conclusion that the issue was a political question. His rationale is enlightening. Although he concurred in the judgment of the Court, he based his concurrence on a ripeness analysis.[50] In so doing, he advanced what is perhaps the most persuasive theory for concluding that a war power disagreement between the President and Congress is properly within the realm of judicial resolution.

> This case "touches" foreign relations, but the question presented to us concerns only the constitutional division of power between Congress and the President . . . .
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> Interpretation of the Constitution does not imply lack of respect for a coordinate branch. If the President and the Con-

44. *Id.* at 1003.
45. *See infra* notes 105-113 and accompanying text.
46. 343 U.S. 579 (1952).
47. *Goldwater*, 444 U.S. at 1004.
48. 299 U.S. 304 (1936).
49. *Goldwater*, 444 U.S. at 1005 (quoting *Curtiss-Wright*, 299 U.S. at 315).
50. *Id.* at 999-1001 (Powell, J., concurring).

> gress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and Congress would require this Court to provide a resolution pursuant to our duty "to say what the law is."[51]

In his dissenting opinion, Justice Brennan also rejected the "political question" conclusion, but saw no "ripeness" impediment to justiciability. Ironically, this justice, who wrote the opinion in *Baker*,[52] characterized Justice Rehnquist's application of the political question doctrine as follows: "[I]n stating that this case presents a nonjusticiable 'political question,' MR. JUSTICE REHNQUIST, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations."[53] Brennan then expressed what he considered the proper understanding of the doctrine.

> Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." But the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power. The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.[54]

In spite of the "openings" in the analysis used by Justice Rehnquist to reach the political question conclusion, the inclination to avoid involving the Court in foreign affairs issues is undeniable. Ultimately, whether the Court would follow this inclination in a war power dispute would depend on whether the case is characterized by the Court as an issue of "entirely external" impact and therefore one of foreign policy, or one involving "profound and demonstrable domestic impact." Because of the uncertainty surrounding how the Supreme Court would treat such an issue, the lower court treatment of war power issues is especially significant in analyzing the proper characterization of such an issue.

Several warmaking related decisions demonstrate that such cases are not automatically non-justiciable. Perhaps the most significant of these

decisions involved the Vietnam War. Throughout the years of United

51. *Id.* at 999-1001 (Powell, J., concurring) (citing United States v. Nixon, 418 U.S. 683, 703 (1974) and quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). Although this was only a concurring opinion, the method it established for analyzing a separation of powers dispute—that is, whether the dispute between the two political branches is sufficiently ripe—has used by various courts. "[The test for ripeness is helpful] even though Justice Powell spoke only for himself . . . . Four different views were expressed by the various justices. However, several other courts have adopted Justice Powell's reasoning." Dellums v. Bush, 752 F. Supp. 1141, 1150 n.23 (D.D.C. 1990) (citations omitted). Lower courts have followed this approach in cases that involve war power issues. *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333, 339 (D.D.C. 1987), *aff'd*, No. 87-5426 (D.C. Cir. Oct. 17, 1988); Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam). These cases suggest a distinction between the narrow doctrine of judicial restraint based on "political question" concerns and a much broader and improper application of a theory that any "political issue" is non-justiciable.

One case in particular suggests that the courts will be far more likely to intervene to resolve a fully ripe dispute between the Congress and the President on the issue of war power than they are to issue a ruling that crystallizes such a dispute. In *Crockett v. Reagan*, a federal court was again asked by members of Congress (29) to determine whether the War Powers Resolution was triggered by a relatively minor United States military operation that involved the dispatch of 56 military advisors to El Salvador. 558 F. Supp. 893, *aff'd per curium*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). The court concluded "that the fact-finding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-justiciable." *Id.* at 898. The court held that this issue was more appropriate for congressional, not judicial, investigation and determination. *Id*. The court did, however, distinguish two other situations where it suggested that a similar case would be justiciable. First, it indicated that if asked to determine whether a commitment of forces on a scale similar to that in Vietnam triggered the War Powers Resolution, "it would be absurd for [the court] to decline to find that U.S. forces had been introduced into hostilities after 50,000 American lives had been lost." *Id*. Second, and perhaps more significantly for the proposition that a clear and ripe dispute between the branches would be justiciable, the court stated that:

> If Congress doubts or disagrees with the Executive's determination that U.S. forces in El Salvador have not been introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes . . . . Congress has taken absolutely no action that could be interpreted to have that effect. *Certainly, were Congress to pass a resolution to the effect that a report was required under the [War Powers Resolution], or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented.*

Id. at 899 (citing Goldwater v. Carter, 444 U.S. 996 (1979) (Powell, J., concurring)) (emphasis added).

52. 369 U.S. 186 (1962).

States military involvement in Vietnam, federal courts were presented with "a slew of judicial challenges [to the constitutionality of the war] by citizens, taxpayers, members of Congress, and draftees."[55] After several refusals to adjudicate this issue based on the political question doctrine,[56] federal courts refined their analysis to focus on whether there was a textual commitment of war power to a specific political branch, and not to the political branches in general.[57] This refinement led to the conclusion that these issues were justiciable.[58]

The cases that reached the merits of the challenges to the war shared one fundamental proposition. They all presented the justiciable issue of whether a decision by the President to send United States armed forces into a combat environment was constitutionally valid. Since the issue was justiciable, the standards to make the determination of whether the President's action was constitutionally valid fall within the purview of judicial analysis and resolution.[59] Ultimately, however, the cooperation between the

53. *Goldwater*, 444 U.S. at 1000 (Brennan, J., dissenting).

54. *Id.* (citing Powell v. McCormack, 395 U.S. 486, 519-21 (1969)).

55. Ratner & Cole, *supra* note 12, at 727. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 1974); Dacosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Dacosta v. Laird, 448 F.2d 1368 (2d Cir. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom.*, Atlee v. Richardson, 411 U.S. 811 (1973); Mottola v. Nixon, 318 F. Supp. 538, (N.D. Cal. 1970), *rev'd. on other grounds*, 464 F.2d 178 (9th Cir. 1972).

56. Although initial challenges that were brought during the early phases of the war were dismissed based on the political question doctrine, the analysis that the courts applied to reach the political question conclusion seemed flawed. While these courts focused on the "textually committed" prong of the *Baker v. Carr* analysis, they based dismissals on the conclusion that the issue of war power was committed to the political branches generally, as opposed to analyzing whether there was a textual commitment of war power to a specific political branch. This resulted in the conclusion that although the exact situs of war power within the government may be uncertain, the certainty that such power was vested in either the executive or legislative branch, or somewhere in between, made the issue a political question. *See* Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.) (per curium), *cert. denied*, 387 U.S. 945 (1967); United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968); Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968), *aff'd. sub nom.*, Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). *See also* Ratner & Cole, *supra* note 12, at 762 n.212.

57. *See supra* note 55.

58. *See id.*

59. *See* Ratner & Cole, *supra* note 12, at 733-34.

President and Congress in supporting the war led to the conclusion that each challenge lacked merit.

It was not until 1990 that a court confronted a real likelihood of conflict between the President and the Congress concerning a decision to wage war. In *Dellums v. Bush*,[60] fifty three-members of the U.S. House of Representatives and one member of the U.S. Senate sought an injunction to prohibit President Bush from initiating any offensive military operation in the Persian Gulf without first obtaining congressional authorization.[61] At the time of the lawsuit, United States forces that would eventually conduct Operation Desert Storm were in Saudi Arabia, and the President, pursuant to a United Nations resolution, made it clear that the United States intended to conduct such offensive operations. At the same time, there was an ongoing debate in Congress on whether to pass a joint resolution to authorize such operations.[62]

Judge Harold Green held that the issue was not sufficiently ripe because Congress had not yet expressed its position.[63] Judge Green made clear, however, that if the President were to ignore a congressional vote to deny authorization to conduct the operation, not only would an injunction be appropriate, but also it would be the proper role of the courts to resolve the deadlock:

> While the Constitution itself speaks only of the congressional power to declare war, it is silent on the issue of the effect of a congressional vote that war not be initiated. However, if the War Clause is to have its normal meaning, it excludes from the power to declare war all branches other than the Congress. It also follows that if the Congress decides that United States forces should not be employed in foreign hostilities, and if the Executive does not of its own volition abandon participation in such hostilities, action by the courts would appear to be the only available means to break the deadlock in favor of the constitutional provision.[64]

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60. 752 F. Supp. 1141 (D.D.C. 1990). Several of the constitutional scholars whose works are cited in this article participated in this case either as counsel (Michael Ratner, Jules Lobel) or on amicus curai (John Ely, Louis Henkin, Harold Hongju Koh, Michael Glennon).

61. *Id.* at 1141-42.

62. *Id.*

63. *Id.* at 1149.

64. *Id.* at 1144 n.5.

Taken collectively, these decisions from both the Vietnam and Persian Gulf wars illustrate the potential justiciability of a war power controversy between the two political branches. Each is consistent with the standards enunciated by the Supreme Court in both *Baker v. Carr*[65] and *Goldwater v. Carter*.[66] This consistency further supports the conclusion that a truly ripe war power dispute between the President and Congress would be justiciable and would not automatically be barred by the political question doctrine.[67]

III. Analytical Framework

65. *See supra* notes 27-32 and accompanying text.

66. *See supra* notes 35-39 and accompanying text.

67. This is not to suggest that the judiciary would be willing to take on such an issue simply to appease disgruntled legislators. In fact, another doctrine of judicial restraint, know as "equitable discretion," prohibits just such action. In *Crockett v. Reagan*, twenty-nine members of Congress asked a federal court to determine whether the War Powers Resolution was triggered by a relatively minor United States military operation that involved dispatching 56 military advisors to El Salvador. *See* Crockett v. Reagan, 558 F. Supp. 893, *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984). *See also* War Powers Resolution, Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1988). In his opinion, Judge Green (the same judge who, in *Dellums v. Bush*, suggested a judicial role for resolving a policy conflict between the President and Congress regarding the Persian Gulf War) wrote:

> When a member of Congress is a plaintiff in a lawsuit, concern about separation of powers counsels judicial restraint even where a private plaintiff may be entitled to relief. Where the plaintiff's dispute appears to be primarily with his fellow legislators, [j]udges are presented not with a chance to mediate between two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the process of democratic decisionmaking.

Crockett, 558 F. Supp. at 902 (citing Riegle v. Federal Open Mkt. Comm., 656 F.2d 873 (D.C. Cir. 1981)).

This case once again illustrates that the jurisdictional pre-requisite is that the two political branches of government be at a true impasse with regard to a war power issue, and not that the case be void of such an issue. The inference drawn from this opinion is that, when the conduct of the President contradicts the express will of Congress on a war power issue, it is the proper role of the judiciary to "mediate between the two political branches." *Id.*

As the foregoing justiciability discussion suggests, the resolution of a war power issue between the political branches would turn on a separation of powers analysis. Determining the likely parameters of such analysis requires an understanding of the locus of war power in the government. That a decision based on "constitutional war powers" implicates foreign affairs considerations requires no explanation. As a result, *United States v. Curtiss-Wright Export Corp.*,[68] is often proposed as authority for analyzing war power issues.[69] This case, in which the Supreme Court characterized the President as the "sole organ of the federal government in the field of international relations,"[70] is relied on to support broad presidential authority over any matter that involves foreign affairs.[71]

Contrary to those who profer *Curtiss-Wright* as a decision template, the usefulness of this precedent as a template for analyzing a war power dispute is questionable. First, despite the "sole organ" language that is often used to support the conclusion that the President is vested with exclusive authority in the foreign affairs arena, this case did not involve a unilateral executive action. In *Curtiss-Wright*, the President acted in accordance with the will of Congress, not contrary to that will.[72] While this case certainly does indicate that the President is the primary actor in the realm of foreign relations, it seems to provide little support for the constitutionality of presidential action contrary to the stated will of Congress

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68. 299 U.S. 304 (1936).

69. *See* Michael J. Glennon, *The War Powers Resolution: Sad Record, Dismal Promise*, 17 LOY. L.A. L. REV. 657, 661-63 (1984). *See also* Harold Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255.

70. *Curtiss-Wright*, 299 U.S. at 319. This was the precise conclusion of the congressional review of the Iran-Contra affair. In response to assertions that the Boland Amendments ran afoul of the *Curtiss-Wright* precedent and were therefore unconstitutional restrictions of Presidential authority, the majority report stated:

> One does not have to be a proponent of an imperial Congress to see that this language has little application to the situation presented here. We are not confronted with a situation where the President is claiming inherent constitutional authority in the absence of an Act of Congress. Instead, to succeed on this argument the Administration must claim it retains authority to proceed in derogation of an Act of Congress . . . .

Report of the Congressional Committees Investigating the Iran-Contra Affair (Iran-Contra Report), S. REP. NO. 216, H.R. REP. NO. 433, at 406-407 (1987).

simply because the action involves foreign affairs. This was expressed emphatically in a subsequent Supreme Court decision:

> It is in this class of cases that we find the broadest recent statements of presidential power, including those relied on here. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, involved not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress . . . .
>
> That case . . . recognized internal and external affairs as being in separate categories, and held that the strict limitations upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs. It was intimated that the President might act in external affairs without congressional authority, *but not that he might act contrary to an Act of Congress . . . .*[73]

The second reason to question the applicability of *Curtiss-Wright* is that it requires the conclusion that war power issues fall exclusively within the realm of foreign affairs, and are therefore controlled by this precedent. This ignores the reality that the decision to wage war has many potentially

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71. *See, e.g.*, Report of the Congressional Committees Investigating the Iran-Contra Affair (Iran-Contra Report), S. REP. NO. 216, H.R. REP. NO. 433 (1987). This report contains the review of the legality of the "Iran-Contra Affair" and specifically addresses the issue of presidential authority to direct "arms for hostages" transactions. The majority report recognized that many proponents of presidential power relied on the "sole organ" language from *Curtiss-Wright* to conclude that the Boland Amendments (which prohibited support for the Nicaraguan Contra Rebels) were unconstitutional.

> The analysis must begin, of course, with an appropriate statement of what is, and what is not, the issue. Some have attempted, for example, to cast the Boland Amendments as violative of the Supreme Court's famous dictum in *United States v. Curtiss-Wright Export Corp.*, referring to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ."

Id. at 406-07. The report ultimately rejected this conclusion. *Id.* (citing *Curtiss-Wright*, 299 U.S. 304).

72. *Curtiss-Wright*, 299 U.S. at 312.

73. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.2 (1952) (emphasis added).

profound domestic consequences.[74] The third reason is that *Curtiss-Wright* represents a "static" theory of powers between the executive and legislature. The history of military operations subsequent to World War II indicates that such a static model of constitutional authority provides minimal utility in analyzing the constitutionality of war power decisions. This history demonstrates that congressional response to decisions that the President makes in the capacity of commander in chief may range from virtually no action[75] to intense debate followed by legislative action either supporting or opposing the planned or ongoing operation.[76] Therefore, while *Curtiss-Wright* certainly provides support for proponents of extensive unilateral executive war powers, its efficacy is arguably transcended by constitutional jurisprudence that reflects a less static and more functional approach to analyzing separation of powers issues.

This "counter-force" in the jurisprudence of separation of powers emerged in *Youngstown Sheet & Tube Co. v. Sawyer*.[77] In this case, the Supreme Court nullified President Truman's seizure of domestic steel production facilities during the Korean War.[78] In so doing, six justices rejected the government argument that, in the context of the Korean War, the President's independent constitutional powers justified the seizure. While the direct issue of property seizure was one of "profound and demonstrable domestic impact,"[79] resolution of the issue required a separation of powers analysis within the context of a major armed conflict.[80] Of the six concurring opinions in the result,[81] the two most significant in terms of laying out a model for analyzing separation of powers issues belonged to Justice Frankfurter and Justice Jackson.

Although Justice Frankfurter acknowledged the clearly defined nature of some constitutional authorities, he specifically rejected a "static" model of constitutional analysis:[82] "[T]o be sure, the content of the three branches of government is not to be derived from an abstract analysis. The

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74. *See supra* note 42 and accompanying text.

75. *See* Ratner & Cole, *supra* note 12, at 740-50 (discussing the range of congressional responses to military operations subsequent to the Vietnam War, such as Grenada and the Mayaguez rescue).

76. *See infra* notes 267-283 and accompanying text.

77. 343 U.S. 579 (1952).

78. *Id.*

79. Goldwater v. Carter, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in judgment).

80. *Youngstown*, 343 U.S. 579 (1952).

81. *Id.*

areas are partly interacting, not wholly disjointed. *The Constitution is a framework for government*."[83] This directly contradicts the *Curtiss-Wright* model.

In his concurring opinion, Justice Jackson echoed Justice Frankfurter's view on the need to employ a flexible versus static approach to separation of powers analysis. In so doing, he expressed the extreme difficulty of discerning the true meaning of the Constitution when analyzing the constitutionality of presidential power in the modern world.

> A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.[84]

Justice Jackson went on to articulate a "fluctuating" concept of presidential power and to suggest the commonly cited three-tier framework for analyzing issues related to this power:

> *Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.* We may well begin by a somewhat oversimplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
>
> 1. *When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maxi-*

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82. *Id*. at 603-04 (Frankfurter, J., concurring).

> Absence of authority in the President to deal with a crisis does not imply want of power in the government. Conversely the fact that power exists in the government does not vest it in the President. The need for new legislation does not enact it. Nor does it repeal or amend existing law . . . .

Id.

83. *Id.* at 610 (Frankfurter, J., concurring) (emphasis added).

84. *Id*. at 634-35 (Jackson, J., concurring).

> *mum*, for it includes all that he possesses in his own right plus all that Congress can delegate . . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which its distribution is uncertain. Therefore, *congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility . . . .*
>
> 3. *When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb*, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. *Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.*[85]

The true efficacy of this self-proclaimed "somewhat over-simplified grouping"[86] three-tier analytical template is the focus on the level of concurrence between the two political branches concerning issues of nebulous constitutional authority. Although it emerged from a case that involved a domestic "taking," this analytical template is ideally suited to resolving challenges to presidential war power decisions. It recognizes and accounts for the reality that the language of the Constitution is insufficient to resolve every challenge to the authority of the President. It validates the efficacy of cooperative decisionmaking between the political branches, while sug-

85. *Id.* at 635-38 (Jackson, J., concurring) (emphasis added).
86. *Id.*

gesting that the courts should closely scrutinize presidential actions that have the effect of nullifying the constitutional role of Congress.[87]

Even assuming that Justice Jackson's analytical framework is applicable only to issues that involve domestic constitutional implications, the conclusion that it is wholly inapplicable to a war power controversy. It is reasonable to conclude that the decision to take the nation to war impacts not only international affairs, but also domestic interests.[88] If anything, it seems that the scope of the conflict generating the controversy, and not the "war power" nature of the controversy, could decide whether a war power decision would be considered to be "an action of profound and demonstrable domestic impact."[89]

The *Youngstown* framework arguably assumed full precedential value[90] in *Dames & Moore v. Reagan*.[91] *Dames & Moore* involved a challenge to an executive order[92] that terminated all claims against Iran that were pending in American courts.[93] The executive order was issued pur-

87. A number of war power cases decided during the Vietnam War illustrate the utility of such a functional approach to analyzing war power authority. These cases sustained the constitutionality of presidential prosecution of the war in Vietnam based on the cooperative policy of both political branches. *See infra* notes 170-262 and accompanying text. While these cases did not explicitly invoke the *Youngstown* template, they still validate the utility of focusing on the level of cooperation between the President and Congress when analyzing the constitutionality of a decision that involves a nebulous or "shared" constitutional authority.

88. *See supra* note 42 and accompanying text.

89. Goldwater v. Carter, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in judgment).

90. While this model may be extremely useful when analyzing a war power dispute, and may be relied on by a court that faces such an issue, it is important to note that while *Dames & Moore* turned on a separation of powers analysis, the Court carefully limited the holding to the specific issue presented: "[W]e attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." *Dames & Moore v. Reagan*, 453 U.S. 654, 661 (1981). This caveat seemed to be motivated by the Court's concern that it adjudicate such separation of powers disputes only when absolutely necessary. *Id.*

In addition, the value of this framework for resolving a war power controversy may, as a practical matter, be diminished by the fact that it remains a concurring opinion, regardless of the endorsement that *Dames & Moore* seemed to give it. Furthermore, characterization by a court of a war power dispute as a "foreign affairs" issue may also diminish the value of this framework, which, as the majority indicated in *Goldwater v. Carter*, involved resolution of a domestic "taking" by the government. *See supra* note 42 and accompanying text.

91. 453 U.S. at 654.

92. Exec. Order No. 12,170, 3 C.F.R. 457 (1980).

suant to an agreement that related to the release of the U.S. hostages who were being held in Iran. Because of an absence of specific statutory authority for such an action, the issue before the Court was the constitutionality of the "sole" executive order.[94]

In analyzing this issue, the Court expressed the importance of following the essence of Justice Jackson's tiered approach, particularly in cases involving international crises:

> Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping," and it is doubtless the case that executive action in any particular instance falls, not neatly in one of the three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate with any detail.[95]

Applying this analytical template, the Court upheld the legality of the executive order based on related legislation and legislative history that evinced congressional approval of the practice of presidential settlement of foreign claims.[96] According to the Court, such closely related legislation as the International Emergency Economic Powers Act[97] and the Hostage Act[98] was "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as

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93. *Dames & Moore*, 453 U.S. at 660.

94. *Id. See generally* Hugh C. Keenan, *Executive Orders: A Brief History of Their Use and the President's Power to Issue Them*, *in* Senate Special Committee on National. Emergencies and Delegated Emergency Powers, 93d Cong., 2d Sess., Executive Orders in Times of War and National Emergency 20 (Comm. Print 1974). *See also* PETER M. SHANE AND HAROLD H. BRUFF, THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS (1988).

95. *Dames & Moore*, 453 U.S. at 669 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)).

96. *Id*. at 655.

97. 50 U.S.C. §§ 1701-1706 (1976 ed., Supp. III).

98. 22 U.S.C. § 1732 (1994).

those presented in this case," especially in light of the history of claims settlement. [99] The Court stated:

> [W]e cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress . . . . Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive . . . . On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case that evinces legislative intent to accord the President broad discretion may be considered to "invite measures of independent responsibility" . . . . *At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President*.[100]

This refinement of the *Youngstown* framework for analyzing separation of powers issues provides an effective model for resolving war power disputes. In *Dames & Moore*, it explicitly applied to foreign affairs and national security issues, even where the legislature could not anticipate such issues and where rapid executive action is required.[101]

While this approach appears more flexible than Justice Jackson's model,[102] the Court made it clear that when a case involves an issue of uncertain constitutional authority, implied or express congressional approval of presidential conduct remains the critical element to finding such conduct constitutional.[103] Most importantly, the Court reaffirmed Justice Jackson's position that the President's constitutional authority is at its lowest point where the action is contrary to the express or implied will of Congress. As the Court noted, "[j]ust as importantly, Congress has not

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99. *Dames & Moore*, 453 U.S. at 677.

100. *Id.* at 678 (citing Haig v. Agee, 453 U.S. 280 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)) (emphasis added)).

101. *Id.*

102. *See supra* note 85 and accompanying text.

103. *Dames & Moore*, 453 U.S. at 680. "Crucial to our decision today is that Congress has implicitly approved the practice of claim settlement by executive agreement." *Id.*

disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement."[104] A review of cases that specifically involve war power issues illustrates that, from the earliest days of the nation's history, courts analyzed these issues by relying on a virtually identical approach to analyzing separation of powers issues.

IV. The Early Cases

The *Youngstown* and *Dames & Moore* "shared power" framework for analyzing war power issues is premised on the assumption that the authority to make war power decisions is shared between the two political branches of government. A predicate issue, however, is what constitutes "war" for purposes of this analysis. Are war powers "shared" only in the case of a declared war? In the alternative, is undeclared conflict nonetheless a "war" for constitutional war power purposes? These questions were answered in one of the first cases in the nation's history to deal with a war power issue, *Bas v. Tingy*.[105] That case established the concept of "perfect" versus "imperfect" war,[106] supporting the conclusion that any conflict between the United States and a foreign nation constitutes war, regardless of whether there is a formal declaration.

In *Bas*, Captain Tingy, the captain of the U.S.S. Ganges, sought compensation pursuant to an act of Congress, for the recapture from the French of a U.S. merchant ship belonging to Bas.[107] The issue was whether Tingy was entitled to compensation based on a 1798 act of Congress governing recapture of ships from the "French" or the higher amount of compensation based on a 1799 act of Congress governing the recapture of ships from the "enemy."[108] This required judicial resolution of whether, absent a declaration of war, the state of hostilities existing at the time between the United States and France amounted to a "war" for the purposes of labeling France "the enemy," thereby triggering the latter statute.[109] Each justice of the Court, writing separately, concluded that although undeclared, a state of war did nonetheless exist between the United States and France.[110] Jus-

104. *Id.* at 687.
105. 4 U.S. (4 Dall.) 37 (1800).
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 39.

tice Washington articulated the distinction between "perfect" versus "imperfect" war:

> It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but also public war. If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation . . . .
>
> But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn . . . [s]till, however, it is *public war*, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers. It is a war between the two nations . . . .[111]

Justice Washington then proffered a pragmatic explanation of why relations between France and the United States fell into the category of "war," thereby entitling Captain Tingy to the higher amount of compensation.

> Here then, let me ask, what were the technical characters of an American and French armed vessel, combating on the high seas, with a view the one to subdue the other, and make prize of his property? They certainly were not friends, because there was a contention of force; nor were they private enemies, because the contention was external, and authorised by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.[112]

Justices Chase and Patterson also concluded that war existed absent any declaration to that effect. According to Justice Chase:

> Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law

110. *Id.*
111. *Id.* at 40.
112. *Id.* at 43-46.

> of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.
>
> What, then, is the nature of the contest subsisting between America and France? In my judgment, it is a limited, partial, war. Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases. *There is no authority given to commit hostilities on land; to capture unarmed French vessels; nor even to capture French armed vessels lying in a French port* . . . . So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates.[113]

Not long after *Bas*, the Court addressed the issue of constitutional power to authorize military operations short of a formally declared war. In *Talbot v. Seeman*,[114] the Supreme Court again addressed the undeclared conflict with France and reaffirmed the significance of congressional participation to authorize even an undeclared "imperfect" war. In this case, the captain of the U.S.S. Constitution captured the plaintiff's merchant ship while it was flying a French flag. The owner of the ship subsequently sued the captain in libel for the value of the ship.[115] The captain seized the

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113. *Id.* at 43 (emphasis added). According to Justice Patterson:

> The United States and the French republic are in a qualified state of hostility. An imperfect war. *As so far as Congress tolerated and authorised the war on our part, so far may we proceed in hostile operations*. It is therefore a public war between the two nations, qualified, on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add, that the term "enemy" applies . . . .

Id. at 45-46 (emphasis added). This language, particularly that emphasized, certainly suggests that it is for Congress alone to decide when and in which type of military hostilities the United States will engage. Although beyond the scope of this article, it even suggests that Congress can limit the type of operations employed to achieve an authorized objective. If the limited authority Congress granted to conduct naval operations against France precluded "hostilities on land," could Congress have constitutionally limited Operation Desert Storm to a naval blockade and air war? If they had authorized only the use of naval and air power to achieve the United Nations objectives, would an order to conduct the ground war have been constitutional? Fortunately, such a conflict between the Congress and the President seems even less likely today than even a direct dispute over whether to conduct an operation in general.

114. 5 U.S. (1 Cranch) 1 (1801).

ship in response to orders that had been issued by President Jefferson.[116] The district court ordered the captain to return the ship to its owners, but the circuit court reversed this decision.[117] The Supreme Court concluded that the seizure had been legal and ruled in favor of the captain.[118] The sole basis for this conclusion, however, was not the orders of the President[119] but the congressional authorization to conduct such seizures. According to the Court:

> In order to decide on the right of Captain Talbot it becomes necessary to examine the relative situation of the United States and France at the date of the re-capture.
>
> The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities . . . or partial hostilities.[120]

This language strongly suggests that early in the nation's history, those who were charged with interpreting the Constitution had little difficulty determining that the power to authorize war, whether declared (perfect) or undeclared (imperfect), was vested in Congress.[121] This was particularly so when, as in this case, Congress had already acted on the subject of whether or not the nation should engage in hostilities. The Court's focus on the authority granted by Congress, and not the orders of the President, suggests that once Congress occupied the field, it had the exclusive authority to determine the scope of hostilities.[122]

A more direct enunciation of this principle occurred in 1804, when the undeclared war with France provided the backdrop for the only Supreme Court decision in U.S. history that suggests that the President lacked constitutional authority to order a military operation. In *Little v.*

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115. *Id.* at 1-2.
116. *Id.* at 3.
117. *Id.* at 3-4.
118. *Id.* at 36.
119. *Id.* at 28.
120. *Id.*
121. Justice Marshall's citation to this quotation in his opinion in *Holtzman v. Schlesinger* highlights the continued significance of this constitutional interpretation to modern analysis of war powers. *See* Holtzman v. Schlesinger, 414 U.S. 1304, 1312 (1973). According to Justice Marshall: "In my judgment, nothing in the 172 years since those words were written alters that fundamental constitutional postulate." *Id.*
122. *Talbot*, 5 U.S. (1 Cranch) 1.

Barreme,[123] the Prussian owner of a Danish merchant ship sued a U.S. Navy captain for seizing the ship.[124] The seizure had been conducted in accordance with orders issued by the President.[125] In the words of the Court, the orders "given by the executive under the construction of the act of Congress made by the department to which its execution was assigned, enjoin the seizure of *American* vessels sailing from a *French* port."[126] Those orders, however, exceeded the scope of the statutory authority granted by Congress for conducting such seizures, which "allowed for seizure of American ships sailing to, and not from, French ports."[127] The captain asserted that his conduct was legal because he acted in accordance with the President's orders.[128] Thus, the specific issue before the Court was whether the President possessed constitutional authority to order combat operations that exceeded a limited congressional authorization.

The Court held the captain liable.[129] Chief Justice Marshall indicated that once Congress set the parameters of military operations, the President could not constitutionally authorize transcending those parameters, and an order to that effect could therefore not serve to immunize a military leader from personal liability:

> These orders, given by the executive under the construction of the act of congress made by the department to which its execution was assigned, enjoin the seizure of American vessels sailing from a French port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, *or will his orders excuse him*? . . . .
>
> I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages . . . . That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in

123. 6 U.S. (2 Cranch) 170 (1804).
124. *Id.* at 172.
125. *Id.* at 175.
126. *Id.* at 178.
127. *Id.*
128. *Id.* at 172-73.
129. *Id.* at 179.

> general requires that he should obey them . . . . But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass . . . .
>
> Captain Little then must be answerable in damages to the owner of this neutral vessel.[130]

The notion of holding a military officer personally liable in a libel action may seem a legal anachronism. However, the conclusion that Congress is vested with the authority to set limitations on the conduct of military operations during an undeclared war, limits not even the President may transgress, is undeniably significant.[131] This conclusion is bolstered by the fact that Chief Justice Marshall actually acknowledged a broad scope of inherent presidential power to order military conduct absent any congressional authorization, but obviously felt that this authority ended when Congress spoke.

> It is by no means clear that the president of the *United States* whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the *United States*, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the *United States*, to seize and send into port for adjudication, *American* vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first

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130. *Id.* at 178-79 (emphasis added).

131. In fact, approximately 150 years later, this holding compelled Justice Clark to rule against President Truman in *Youngstown Sheet & Tube*.

> In my view—taught me not only by the decision of Mr. Chief Justice Marshall in *Little v. Barreme*, but also by a score of other pronouncements of distinguished members of this bench—the Constitution does grant to the President extensive authority in times of grave and imperative national emergency . . . . I cannot sustain the seizure in question because here, as in *Little v. Barreme*, Congress had prescribed methods to be followed by the President in meeting the emergency at hand.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 662 (1952) (Clark, J., concurring).

> section of the "act, which declares that such vessels may be seized . . ." obviously contemplates a seizure within the *United States*; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to *French* ports, the legislature seem to have prescribed that manner in which this law shall be carried into execution, was to exclude seizure of any vessel not bound *to a French* port. [132]

The fact that Chief Justice Marshall authored the opinion only adds to this significance.[133]

Another example of a judicial review of an assertion of orders from the President as a defense to a charge of illegal military activity is *United States v. Smith.*[134] This case, from the same period, involved a defendant charged with violating the Neutrality Act of 1794 by conducting a military expedition against Spanish territory.[135] Although not a member of the U.S. military, Smith asserted that the President had personally instructed him to conduct the operation.[136] The issue in the case, which was decided by Supreme Court Justice Patterson sitting as a circuit justice, was whether it was necessary to subpoena the secretary of state to establish the veracity of the defense assertion.[137]

Justice Patterson concluded that, even if the testimony of the secretary proved that the President did direct the operation, it would not provide a defense, because the President lacked authority to approve such an operation.[138] According to his opinion, only Congress possessed the constitutional authority to direct acts of hostility against a nation that was at peace with the United States.[139] Written by a Justice of the Supreme Court, who had also served as a member of the Constitutional Convention, the conclusion that Congress alone could authorize acts of hostilities against foreign

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132. *Little*, 6 U.S. (2 Cranch) at 177-78.

133. This seems particularly true considering that it was Chief Justice Marshall who first coined the phrase that the President was the "sole organ of the nation in its external relations, and its sole representative with foreign nations." *See* United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936) (quoting Congressman John Marshall).

134. 27 F. Cas. 1192 (C.C.S.D.N.Y. 1806) (No. 16,342).

135. *Id.* at 1196-97.

136. *Id.*

137. *Id.* at 1192-94.

138. *Id.* at 1228-31.

nations is another indication that the Constitution provides for a significant congressional role in such decisions.

These three cases all suggest the same two-prong conclusion: (1) that the express will of Congress on the question of authorizing acts of hostility against another nation serves as a powerful limitation on presidential war power and (2) that presidential orders that are contrary to this express will do not necessarily carry the force of law.[140] Furthermore, based on these cases, it is reasonable to infer that express congressional action that prohibits the use of force (as opposed to granting a limited authorization for such use), can bind the President.

These decisions are therefore not only consistent with Justice Jackson's view that executive power is at its lowest point when it contradicts the express will of Congress,[141] but also establish the principle that the President's constitutional powers do not permit transgressing congressionally imposed limitations on the use of the armed forces. However, each of these decisions also suggests that the President does possess some inherent authority to employ military force, albeit insufficient to authorize such employment against the express will of Congress. Instead, the cases suggest that this inherent authority extends to responding to emergency situations, such as suppression of rebellion or repelling a sudden attack or invasion.[142] This "emergency" authority, which is traceable back to the Constitutional Convention,[143] received explicit recognition by the Supreme Court during the Civil War.

In 1861, during congressional recess, President Lincoln ordered a blockade of Southern ports in response to the rebellion of the Southern states.[144] Ships captured while attempting to violate the blockade were

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139. *Id*. at 1230-31.

> There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war . . . the organ intrusted with the power to declare war should first decide whether it is expedient to go to war . . . and until such a decision be made, no individual ought to assume an hostile attitude; and to pronounce, contrary to the constitutional will, that the nation is at war, and that he will shape his conduct an act according to such a state of things.

Id.

sold as prize. In 1862, a consolidated case that challenged the constitutionality of the blockade and the subsequent prize actions reached the Supreme Court as the *Prize Cases.*[145]

The Supreme Court first addressed the nature of the conflict and concluded that the rebellion by the Southern states amounted to a war.[146] The Court then held that the Constitution vested the President with authority to

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140. *See* 7 J. MOORE, DIGEST OF INT'L LAW 123 (1906) (quoting 7 JEFFERSON'S WORKS 628.

> [T]he framers gave Congress virtually exclusive power to initiate war, whether declared or undeclared, perfect or imperfect.
>
> "The power to 'grant letters of marque and reprisal' refers to the authority to initiate an imperfect kind of limited war, or those acts of hostility which sovereigns exercise against each other, or, with their consent, the subjects of foreign commonwealth, that refuseth to do justice . . . ." The framers gave Congress this power in order to remove any remaining doubt about the authority of Congress, as opposed to the President, to authorize undeclared hostilities. Those war-making powers not within the "declare war" provision were residual in the "grant letters of marque and reprisal" provision . . . .
>
> Jefferson recognized the importance of granting Congress authority to grant letters of marque and reprisal:
>
> The making of a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought precede; and when reprisal follows, it is considered an act of war . . . . [I]f the case were important and ripe for that step, Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not the Executive.

Id. (quoting 2 J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITICAL LAW 258 (3d ed. 1784). S*ee* Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 692-700 (1972)); Ratner & Cole, *supra* note 12, at 721-22.

141. *See supra* note 85 and accompanying text.

142. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 177 (1804); United States v. Smith, 27 F. Cas. 1192, 1229-31 (C.C.S.D.N.Y. 1806) (No. 16,342).

143. "The one alteration noted in the constitutional grant of congressional war powers is the substitution of 'declare' for 'make.' The well-established reason for this change was, according to Madison, to leave to the Executive 'the power to repel sudden attacks.'" Ratner & Cole, *supra* note 12, at 722 n.25 (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, at 318-19 (M. Farrand rev. ed. 1966)). *See* Lofgren, *supra* note 140.

144. Prize Cases, 67 U.S. (2 Black) 635, 640-43 (1862).

145. *Id.* at 636-37.

146. *Id.* at 652. "War is simply the exercise of force by bodies politic, or bodies assuming to be bodies politic, against each other, for the purpose of coercion." *Id.*

respond to a military challenge with force and that this authority was not contingent on congressional authorization.[147]

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force, by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or states organized in rebellion, it is none the less a war, although the declaration of it be unilateral. [148]

According to the Court, while Congress alone had the constitutional power to initiate war,[149] in the case of war being "thrust" upon the nation, the President alone decides how to meet the challenge.[150]

Based on the recognition of an inherent executive authority to repel an attack that is "thrust upon" the nation, [151] the *Prize Cases* support the

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147. *Id*. at 668.

148. *Id*.

149. "[The question] is as to the power of the President before Congress shall have acted, in case of a war actually existing. It is not as to the right *to initiate a war, as a voluntary act of sovereignty. That power is vested only in Congress*." *Id.* at 660 (emphasis added).

150. *Id*. at 669. While the Court noted that there had been congressional ratification of the President's actions after Congress came into session, it made clear that this was not regarded as a prerequisite to the constitutionality of the President's actions, but served only to rebut any assertion that the orders were illegal. "[W]ithout admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress . . . this ratification has operated to perfectly cure the defect." *Id.* at 671.

This caveat that congressional action was not a prerequisite to the authority of the President to respond to war being "thrust" on the nation distinguishes the holding from the first case to address the power of the President to respond to attack on the nation, *Martin v. Mott*. *See* Martin v. Mott, 25 U.S. 19 (1813). In that case, the Supreme Court discussed the authority of the President to repel an invasion within the context of the War of 1812. The Court concluded that the President alone must judge whether the nation must use military force to react to an invasion. *Id*. at 29-30. However, this authority was exercised pursuant to a statutory delegation that authorized the President to call forth the militia "as he may judge necessary to repel such invasion." *Id*. at 31-32. Based on this delegation, the Court concluded that the discretion exercised by the President was one of exercising the delegation, and not one of independent constitutional authority. *Id*.

151. This accords with the position of virtually all of the scholars who have addressed this issue. *See*, *e.g.*, Lofgren, *supra* note 140; Glennon, *supra* note 69; Ratner & Cole, *supra* note 12; Christopher J. Pace, *The Art of War Under the Constitution*, 95 DICK. L. REV. 557 (1991).

conclusion that the blockade order would have survived the constitutional challenge, even if it contradicted the express will of Congress. Unlike the cases generated by the undeclared war with France, the President derived the authority to issue the blockade orders exclusively from Article II. Therefore, unlike the "undeclared war" cases, had Congress attempted to limit this authority, the limit would have been an unconstitutional intrusion on the authority of the President. The Court made it clear, however, that the President's authority did not extend to initiating war, regardless of whether such a war is declared. "[The President] has no power to *initiate or declare* a war either against a foreign nation or a domestic state."[152]

This result is not inconsistent with the *Youngstown* template.[153] President Lincoln acted in the face of congressional silence; therefore, his action fell within Justice Jackson's "twilight zone,"[154] where the President "and Congress may have concurrent authority, or in which its distribution is uncertain."[155] If President Lincoln's action had been "incompatible with the expressed or implied will of Congress,"[156] only the President's own constitutional power could serve as a valid constitutional basis for the order. By holding that the constitutionality of the President's actions was not contingent upon any legislation, the Supreme Court recognized just such an independent source of authority.[157] With this decision, the Supreme Court demonstrated the critical aspect of determining the specific nature of a conflict when analyzing the constitutionality of executive war power decisions, a factor which may be determinative in any future executive and legislative dispute.

VI. Steel Seizure: The Substance

Nearly one hundred years passed between the *Prize Cases* and the next significant war power decision. During the Korean War, the Supreme Court again addressed the extent of the President's inherent war power. While *Youngstown Sheet & Tube*[158] profoundly impacted the jurisprudence of separation of powers issues, the case centered on the power of the President to maintain military production in the context of a major war.[159] The

152. *Prize Cases*, 67 U.S. (2 Black) at 668 (emphasis added).
153. *See supra* note 85 and accompanying text.
154. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).
155. *Id*.
156. *Id.*
157. *See supra* notes 144-150 and accompanying text.
158. *Youngstown Sheet & Tube Co*., 343 U.S. at 579.

specific issue of the case was "whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills."[160] Although this issue involved a domestic "taking," the case is also a valuable enunciation of certain aspects of the commander in chief power.[161]

To justify the seizure of domestic steel production, the government argued that the "action was necessary to avert a national catastrophe . . . 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."[162] In response, six members of the Court, each writing separately, joined to strike down the seizure as unconstitutional.[163] Each of them rejected the argument that the commander in chief power justified the seizure.[164] All the opinions suggested that the commander in chief clause of the Constitution does not vest the President with unlimited war power and that the risk of detriment to national security does not justify judicial affirmation of an expansion of the limited authority derived from that provision.[165] In

159. *Id.* at 582-84.

160. *Id.* at 582.

161. This was not the first time the Supreme Court specifically addressed the scope of the commander in chief power. In *Flemming v. Page*, the Court analyzed whether the presidentially ordered occupation of an enemy port, during the congressionally declared war with Mexico, resulted in annexation of the territory. Flemming v. Page, 50 U.S. (9 How.) 602 (1851). The Court unanimously concluded that the occupation could not convert the territory to a possession of the United States and that, as commander in chief, the President's role was to execute the authority granted by law. *Id*. at 614-15.

> [The President's] duty and power are purely military. As commander in chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits assigned to them by the legislative power.

Id.

162. *Youngstown*, 343 U.S. at 582.

163. *Id*. at 580-82.

164. *Id*. at 587.

165. *Id*.

rejecting the argument that necessity to respond to a national crisis justified the seizure and that national security concerns necessitated support for the President, Justice Frankfurter wrote:

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safe-guards which these restrictions afford . . . .[166]

Justice Jackson's articulation of this limited scope of the commander in chief power validates the need to determine whether the President can point to congressional support to constitutionally justify decisions to use military force.

> There are indications that the Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also as Commander in Chief of the country . . . . [H]e has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army and navy to command . . . .
>
> While broad claims under this rubric often have been made, advice to the President in specific matters usually has carried overtones that powers, even under this head, are measured by command functions usual to the topmost officer of the army and navy. *Even then, heed has been taken of any efforts of Congress to negative this authority.*[167]

Even a narrow interpretation of this case suggests that executive war power is not a license to transgress the constitutional scheme of government.[168] In the context of other cases that hold that the constitution does not envision unilateral executive war power authority, this supports the conclusion that short of imminent attack or invasion, "national security" never justifies executive disregard of express congressional will. A review

166. *Id*. at 633-34, (Frankfurter, J., concurring).

of a number of federal court decisions involving war power issues during the Vietnam War validates this conclusion. These cases confirm that the Constitution mandates a significant, albeit amorphous, role for Congress in this constitutional process for authorizing military hostilities beyond the category of responding to "war being thrust upon the nation."[169]

VII. The Vietnam Decisions

No conflict in United States history generated more war power controversy than the Vietnam War.[170] This controversy often manifested itself in judicial challenges to the constitutionality of the war. The resolution of these challenges provide both an example of application of the political question doctrine to war powers[171] and an indication of the type of coop-

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167. *Id.* at 643-45 (Jackson, J., concurring) (emphasis added). Justice Douglas also rejected the argument that necessity mandated support for the President:

> Stalemates may occur when emergencies mount and the nation suffers for lack of harmonious, reciprocal action between the White House and Capitol Hill. That is a risk inherent in our system of separation of powers . . . .
>
> We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many.

Id. at 633-34 (Douglas, J., concurring).

168. The precedential value of this case to a war power dispute is debatable. Characterization of such a dispute as either a purely foreign affairs issue or one involving domestic concerns seems to be a condition precedent to determining whether the holding of this case is applicable. This was highlighted by the plurality in *Goldwater v. Carter* when they rejected the applicability of the *Youngstown* holding to a pure foreign affairs issue. *See* Goldwater v. Carter, 444 U.S. 996 (1979); *supra* note 42 and accompanying text. *See also* JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 773 (1990). As indicated previously, however, many of the factors used to determine whether a case involves a domestic issue, which, according to the Court, were absent in *Goldwater*, seem to be implicated by a war power controversy. *See supra* note 42 and accompanying text.

Assuming, *arguendo*, that the analysis of *Youngstown* might be applied to a war power controversy, some of the language used by the Court seems particularly compelling, and in fact seems directed more towards national security than any other concern.

169. *See supra* note 149 and accompanying text.

170. *See* Ratner & Cole, *supra* note 12, at 730.

171. *See supra* note 56 and accompanying text.

eration between the President and Congress that is essential to the constitutionality of a future war power decision.

When litigants first began to challenge the constitutionality of orders sending them to Vietnam, requiring judicial resolution of whether the war had been legally authorized, the judicial response was application of the political question doctrine to the general issue of what was a lawful war.[172] This resulted in dismissal of these early challenges.[173] These cases were dismissed as political questions on the grounds that the decision to go to war was committed to the coordinate branches of government.

Later decisions reflected a more careful application of the doctrine. Instead of concluding that the decision to wage war was committed to the coordinate branches, and was therefore non-justiciable, the fact that the decision was committed to *both* coordinate branches meant that ascertaining whether each had played a role in the decision was *not* a political question. Only after determining that Congress supported the war, and thereby played its constitutional role, did the courts apply the political question doctrine—not to the question of whether Congress had a role to play in the decision to wage war, but in the narrower question of whether the evidence demonstrated that the level of support was constitutionally sufficient. Thus, although these later cases also ran afoul of the political question doctrine, this more discriminating analysis of what amounts to a political question led once again to a validation of the need for congressional support for presidential war power decisions.

The first example of this, *Berk v. Laird*,[174] involved an Army enlistee's challenge to orders sending him to Vietnam.[175] The district court denied his request for a preliminary injunction against the Secretary of Defense and those subordinate officers who signed his orders.[176] The circuit court affirmed and specifically addressed the issue of constitutional

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172. *See* Ratner & Cole, *supra* note 12, at 727 (citations omitted).

173. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Dacosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Dacosta v. Laird, 448 F.2d 1368 (2d Cir. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom.*, Atlee v. Richardson, 411 U.S. 811 (1973); Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd. on other grounds*, 464 F.2d 178 (9th Cir. 1972). *See also* Ratner & Cole, *supra* note 12, at 727.

174. 429 F.2d 302 (2d Cir. 1970).

175. *Id.* at 304.

176. *Id.* at 302.

distribution of war power.[177] In analyzing whether the challenge presented a political question, the court distinguished the separation of powers issue from the issue of whether the war was authorized in accordance with the Constitution.

With regard to the initial issue, the court indicated that the case did not call for judicial "second guess[ing]" of a presidential decision "to commit armed forces to action."[178] Instead, it raised the issue of whether the courts "have the power to make the particular kind of constitutional decision involving the division of powers between legislative and executive branches."[179] It then rejected the government assertion that, absent a declaration of war, the scope of the President's power as commander in chief is as broad and unitary as his power over foreign affairs in general.[180] The court indicated that the government argument would essentially nullify the authority granted to Congress by the declaration clause of the Constitution.[181] The court apparently recognized that the government position would nullify any congressional role in war power decision-making whenever the President decided to involve the nation in hostilities without a declaration of war.[182] Concluding that the historical significance of granting Congress the power to declare war was designed to preclude unilateral executive decision-making on that subject, the court held that the executive and legislative branches shared the constitutional authority to commit the United States to war[183] and that the Constitution required participation by both of these branches in any such decision.

Having rejected the conclusion that the political question doctrine applied per se to any war power issue, the court then analyzed the subsequent issue of the constitutionality of the Vietnam conflict.[184] Finding that the Tonkin Gulf Resolution[185] and other implied congressional authorizations[186] provided sufficient evidence of congressional participation in the

177. *Id.*

178. *Id.* at 304.

179. *Id.*

180. *Id.* (citing United Sates v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)).

181. *Id*. at 304.

182. *See supra* note 229 (discussing the inferred negative power created by the declaration clause).

183. *Berk*, 429 F.2d at 304.

184. *Id.*

185. Pub. L. No. 88-408, 78 Stat. 384 (1964).

186. "From 1964 to 1969, Congress proceeded to pass no less than twenty-four public laws supporting presidential action in Vietnam." Ratner & Cole, *supra* note 12, at 729 (citing E. KEYNES, UNDECLARED WAR 114 (1982)).

decision to wage war, the court concluded that the constitutional requirement of legislative support for the President was satisfied.[187] It then held that the narrower question of whether this support was constitutionally sufficient involved a "lack of judicially discoverable and manageable standards" and was therefore a political question.[188] However, the decision also indicated that presidential military decisions might fail to pass constitutional scrutiny in the absence of such a significant congressional role.[189] Thus, while the question of what constitutes sufficient congressional participation in the decision to wage war was considered to be a political question, ascertaining whether Congress participated at all was not.

In *Orlando v. Laird*,[190] two Army enlistees appealed district court denials of requests for injunctions against enforcement of orders that required them to deploy to Vietnam.[191] On appeal, they asserted that the Constitution required "an express and explicit congressional authorization of the Vietnam hostilities," the absence of which rendered their orders unconstitutional.[192] To support this argument, they asserted that "because military appropriations lacked an explicit authorization for particular hostilities, they could not, as a matter of law, be considered sufficient."[193]

The United States Court of Appeals for the Second Circuit denied the appeal.[194] Relying on *Berk*,[195] the court once again held that determining whether Congress had exercised its constitutional role in deciding to wage war was a justiciable issue; however, second guessing how Congress exercised that role was not.[196] The court then concluded that the evidence showed a significant level of joint action to "prosecute and support" military operations in Vietnam, making the orders constitutionally valid.[197]

> The Congress and the Executive have taken mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations. The

187. *Berk*, 429 F.2d at 305.
188. *Id*. at 304 (quoting Baker v. Carr, 369 U.S. 186 (1962)).
189. *Id.*
190. 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).
191. *Id.*
192. *Id.* at 1041.
193. *Id.* at 1042.
194. *Id.* at 1043.
195. 429 F.2d 302 (2d Cir. 1970).
196. *Orlando*, 443 F.2d at 1043-44.
197. *Id.* at 1042 (citing H.R. REP. NO. 90-267, at 38 (1967)).

> Tonkin Gulf Resolution, enacted August 10, 1964 (repealed December 31, 1970) was passed at the request of President Johnson and, though occasioned by specific naval incidents in the Gulf of Tonkin, was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military actions taken by the President at that time in Southeast Asia, and as might be required in the future "to prevent further aggression." Congress has ratified the executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia and by extending the Military Selective Service Act with full knowledge that persons conscripted under that Act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conscripted manpower to fill "the substantial induction calls necessitated by the current Vietnam buildup."[198]

The court then accepted the government contention that "decisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy, and military strategy inappropriate to judicial inquiry."[199] Again, however, the court concluded that the Constitution did mandate some verifiable form of congressional authorization for military operations amounting to war as a prerequisite for the legality of the President's prosecution of the war.

In *Massachusetts v. Laird*,[200] the State of Massachusetts sought to enjoin the Secretary of Defense from ordering its inhabitants to military duty in Southeast Asia.[201] Like the Second Circuit, the First Circuit also concluded that the challenge presented a political question.[202] Unlike the Second Circuit, however, the First Circuit focused on the "textually committed to a coordinate branch" prong of the *Baker* political question test.[203] The First Circuit also focused on the requirement for some verifiable form of congressional concurrence or authorization for prosecution of the war.

> As to the power to conduct undeclared hostilities beyond emergency defense, then, we are inclined to believe that the Con-

198. *Orlando*, 443 F.2d at 1043-44.
199. *Id.* at 1043.
200. 451 F.2d 26 (1st Cir. 1971).
201. *Id.* at 28.
202. *See supra* notes 170-262 and accompanying text.
203. *See supra* note 32 and accompanying text.

> stitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation . . . . In arriving at this conclusion we are aware that while we have addressed the problem of justiciability in the light of textual commitment criterion, we have also addressed the merits of the constitutional issue.[204]

The court emphasized this critical congressional role with the caveat that its holding applied only to situations that involved "prolonged but undeclared hostilities, where the executive continues to act *not only in the absence of any conflicting Congressional claim of authority, but with steady Congressional support*."[205] In response to the argument that congressional support short of a declaration of war was insufficient to authorize presidential execution of the war, the court noted that the Declaration Clause of the Constitution was not written to negate other possibilities and that Congress was also granted the power to grant letters of marque and reprisal. [206] Therefore, the court rejected the argument "that Congress has no power to support a state of belligerency beyond repelling attack and short of a declared war" and concluded that the Constitution did not prohibit congressional support for an undeclared war.[207]

In *Dacosta v. Laird*,[208] the Second Circuit again faced a constitutional challenge to the war when a draftee sought to prevent enforcement of deployment orders to Vietnam.[209] By the time of this challenge, Congress had repealed the Tonkin Gulf Resolution.[210] Emphasizing the Second Circuit's prior holding in *Orlando* that the Tonkin Gulf Resolution served as

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204. *Massachusetts v. Laird*, 451 F.2d at 33.

205. *Id.* at 34 (emphasis added).

206. *Id.* at 33.

207. *Id.*

208. 448 F.2d 1368 (2d Cir. 1971).

209. *Id.* at 1368-69.

210. *See* Pub. L. No. 91-672, § 12, 84 Stat. 2055 (1971). *See also* DYCUS ET AL., *supra* note 28, at 140-42. "At the end of 1970, spurred by public dissent and frustrated by President Nixon's decision to invade Cambodia, Congress voted to repeal the Gulf of Tonkin Resolution by a single sentence amending an unrelated measure." *Id.* at 211-12.

substantial evidence of congressional authorization for the war, the plaintiff argued that the requisite support no longer existed.[211]

In response to this argument, the court refused to treat the repeal of the Tonkin Gulf Resolution as sufficient evidence that Congress no longer supported the war.[212] Instead, it found requisite evidence of support in defense appropriations and selective service authorizations.[213] Characterizing the repeal of the Tonkin Gulf Resolution as a means of "winding down" the war, the court held that how the President and Congress chose to bring a conflict to an end was as much a political question as how they chose to prosecute it.[214] Based on this asserted continued cooperative policy of the two political branches, the court dismissed the challenge.[215] The court indicated, however, that "[i]f the executive were now escalating the prolonged struggle instead of decreasing it, additional supporting action by the legislative branch over what is presently afforded, might well be required."[216]

This "winding down" response to the plaintiff's assertion that the *Orlando* precedent[217] required the court to conclude that Congress no longer supported the war soon presented an even more difficult dilemma for the court.[218] On 8 May 1972, President Nixon announced his decision to mine the ports of North Vietnam and to step up the bombing campaign. Responding to the breakdown of peace negotiations, he indicated that denying the enemy the capability to continue to wage war necessitated his decision.[219] Subsequent to this announcement, Dacosta once again sought an injunction to halt the war in Southeast Asia.[220] Armed with these new facts, and relying on the "now escalating"[221] language from the denial of his first challenge to the war, he asserted that the President unilaterally and unconstitutionally decided to escalate the war and that military leaders were therefore not authorized to carry out the President's orders.[222]

The Second Circuit once again dismissed the action as a political question.[223] Unlike prior decisions, the court did not regard the case as an

211. *See supra* notes 189-199 and accompanying text.
212. *Dacosta*, 448 F.2d at 1369.
213. *Id.* at 1369-70.
214. *Id.* at 1370.
215. *Id.* at 1368.
216. *Id*. at 1370.
217. *See supra* notes 189-199 and accompanying text.

attack on the constitutionality of the war. Instead, it framed the issue in the following terms:

> We are called upon to decide the very specific question whether the Secretary of Defense, the Secretaries of the Army, Navy, and Air Force, and the Commander of American military forces in Vietnam, may implement the directive of the President of the United States, announced on May 8, 1972, ordering the mining of the ports and harbors of North Vietnam and the continuation of air and naval strikes against military targets located in that battle-scarred land. The appellant seeks a declaratory judgment that the military operations undertaken pursuant to that directive are unlawful in the absence of explicit Congressional authorization, and asks for what he terms "appropriate equitable relief."[224]

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218. At least two critics have asserted that the cases decided during the Vietnam conflict were the product of a judiciary consistently attempting to avoid reaching deciding the issue of the war's legality without appearing totally ineffective as a branch of government. *See* Ratner & Cole, *supra* note 12, at 716.

> Since 1950, we have witnessed a reversal in the constitutional scheme. The war powers, clearly vested in Congress by the Framers, have come under de facto presidential control. While scholars differ as to the sources, causes, and historical details of this constitutional alteration, very few deny that the constitutional scheme has been radically frustrated.
>
> The judiciary has neither attempted to redress nor even recognized this problem. By dismissing in the name of "judicial restraint" challenges to presidential usurpation of the war powers, courts have ignored *their* institutional role.

Id.

219. *See* DYCUS ET AL., *supra* note 28, at 215.

220. *See* Dacosta v. Laird, 471 F.2d 1146 (2d Cir., 1973).

221. *See Dacosta*, 448 F.2d at 1370.

222. *Dacosta*, 471 F.2d at 1146. This case highlighted the difficulty in trying to draw a line between the commander in chief, as the "top general," properly directing the execution of a constitutionally authorized war, and the President unconstitutionally altering the very nature of a previously authorized commitment. There is little debate over the authority of the President to direct the execution of a constitutionally authorized war. *See supra* note 12 and accompanying text. The court appears to have determined that the second half of this issue is too complex to adjudicate. *See infra* note 223 and accompanying text.

223. *Dacosta*, 471 F.2d at 1146.

Thus framed, the court focused on whether "the President's conduct has so altered the course of hostilities in Vietnam as to make the war as it is currently pursued different from the war which we held in *Orlando* and *Dacosta* to have been constitutionally ratified and authorized."[225] It then clarified the meaning of the "now escalating" language, upon which the appellant relied. According to the court, this language "implied, of course, that litigants raising such a claim had a responsibility to present to the court a manageable standard which would allow for proper judicial resolution of the issue."[226] Failure to do so resulted in dismissal based on the political question doctrine, because the judiciary lacks the ability to resolve such an issue absent such standards. According to the court:

> The difficulty we face in attempting to decide this case is compounded by a lack of discoverable and manageable judicial standards. Judge Dooling [who decided the case for the District Court] believed that the case could be resolved by simply inquiring whether the actions taken by the President were a foreseeable part of the continued prosecution of the war. That test, it seems to us, is superficially appealing but overly simplistic. Judges, deficient in military knowledge, lacking vital information upon which to asses the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an "escalation" of the war or is merely a new tactical approach within a continuing strategic plan.[227]

Although it dismissed Dacosta's second challenge, the court refused to abandon the proposition that a large scale escalation of the war could require additional congressional support. Rather, it chose to place the burden on the litigant to provide standards by which a court could determine whether the action was in fact an unauthorized escalation. The court also

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224. *Id.* With the issue framed this narrowly, the court held that the "lack of judicially manageable standards" prong of the political question doctrine mandated dismissal. *Id.* at 1155.

225. *Id.* at 1154.

226. *Id.* at 1156.

227. *Id.* at 1155-56.

re-emphasized the significance of what it concluded was continued congressional support for the war.[228]

> Having previously determined, in accordance with our duty, that the Vietnamese war has been constitutionally authorized by the mutual participation of Congress and the President, we must recognize that those two coordinate branches of government—the Executive by military action and the Congress, by not cutting off the appropriations that are the wherewithal for such action—have taken a position that it is not within our power, even if it were our wish, to alter by judicial decree.[229]

In 1973, the bombing of Cambodia by U.S. forces led to the final judicial challenge to the war in Southeast Asia. In *Holtzman v. Schlesinger*,[230] a congresswoman and several U.S. Air Force officers who were assigned to Southeast Asia sought declaratory and injunctive relief to halt these air operations.[231] After the President exercised his veto to terminate an effort to cut off funding for air operations over Cambodia, Congress appropriated funding in support of such operations until 15 August 1973.[232] The plaintiffs argued that Congress had, in effect, been forced to fund these operations and that this compromise funding process inverted the constitutional war power scheme. [233] In short, the President needed the support of only

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228. *Id.* at 1157.

229. *Id.* This language certainly suggests that the court in fact did resolve the ultimate issue in the case and concluded that Congress had authorized, at least by implication, the escalation ordered by the President. It reached this conclusion by focusing primarily on appropriations that supported continued hostilities.

The War Powers Resolution places into question whether such a conclusion would be valid today. *See infra* note 262. Furthermore, such an analysis can potentially be perceived as posing a danger of inverting the constitutional war power process. If Congress is vested with the power to authorize a conflict, the logical conclusion is that failure to reach a majority in favor of conflict results in non-authorization. This ostensibly requires that a bare majority of only one house of Congress be opposed to a conflict. Even a resolution to withdraw authorization for a conflict would require only a simple majority of both houses. In neither case would there be a necessity to muster a super-majority to override a veto. However, the simple majority would be insufficient to override a virtually certain presidential veto of a bill that terminates appropriations for a conflict. Therefore, while this focus on appropriations seems legitimate in the face of no other indication of congressional will (assuming that the War Powers Resolution does not impact this analysis), a resolution that opposes a conflict or a refusal to authorize it in the first place should trump such a consideration.

230. 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

231. Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y. 1973).

232. *Id.*

one-third plus one member of the House of Representatives to avoid an appropriations cutoff, instead of the majority of both houses that would have been needed to authorize the war from the outset.[234]

The district court accepted the plaintiffs' theory, granted a motion for summary judgment, and enjoined further operations based on an absence of congressional support for military operations over Cambodia.[235] The Second Circuit then granted the government's request for a stay of the injunction pending resolution of an appeal.[236] The plaintiffs sought to dissolve the stay from Justice Marshall in his capacity as a circuit justice.[237] Adopting the analysis used by circuit courts that previously adjudicated challenges to the war, Justice Marshall concluded that the political question doctrine did not bar a challenge to the constitutionality of the President's orders.[238]

Justice Marshall did not, however, dissolve the stay.[239] He focused on the procedural issue of whether dissolution of the stay was justified.[240] Because a plausible interpretation of the facts might show continued congressional support for operations in Cambodia, which would allow the government to prevail on appeal, he concluded that dissolution was inappropriate.[241] Justice Marshall also highlighted, however, the critical need for some congressional role in the decision to wage war: "As a matter of substantive constitutional law, it seems likely that the President may not wage war without some form of congressional approval—except, perhaps

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233. *Holtzman*, 484 F.2d at 1313.

234. *Id*. at 1313-14. Phrased alternatively, an authorization to go to war, which requires a simple majority of both houses under the Constitution, requires a super-majority of both houses not to authorize once the President unilaterally commits U.S. forces to combat operations.

235. *Holtzman*, 361 F. Supp. at 553.

236. *Holtzman*, 484 F.2d at 1308.

237. Holtzman v. Schlesinger, 414 U.S. 1304 (1973).

238. *Id*. at 1311. Justice Marshall wrote: "[T]here is a respectable and growing body of lower court opinion holding that Art. I, § 8, cl. 11, imposes some judicially manageable standards as to congressional authorization for war making, and that these standards are sufficient to make controversies concerning them justiciable." *Id*.

239. *Id*. at 1315. Another major consideration applied by Justice Marshall to reach the conclusion that dissolution of the stay was inappropriate was the accelerated hearing already ordered by the Second Circuit. *Id*.

240. "With the case in this posture, however, it is not for me to resolve definitively the validity of the applicants' legal claims. Rather, the only issue now ripe for decision is whether the stay ordered . . . should be vacated." *Id.* at 1308.

241. *Id.* at 1314.

in the case of pressing emergency or when the President is in the process of extricating himself from a war which Congress once authorized."[242]

The plaintiffs then applied to Justice Douglas, in his capacity as a circuit justice, for the same relief that had been denied by Justice Marshall.[243] Justice Douglas ordered dissolution.[244] He noted the unusual nature of the procedure and the prior denial of the requested relief by Justice Marshall; however, he concluded that Justice Marshall's opinion did not bind him. [245] He justified his re-imposition of the injunction by focusing on the potential loss of life facing the servicemen, equating the case to a capital case because of the possible deprivation of life without due process which might result from obeying an unconstitutional presidential order.[246] Justice Douglas also noted that the issue was justiciable and that the President did not possess unilateral constitutional authority to make war.

> The question of justiciability does not seem to be substantial. In the *Prize Cases*, decided in 1863, the Court entertained a complaint involving the constitutionality of the Civil War. In my time we held that President Truman in the undeclared Korean War had no power to seize the steel mills in order to increase war production. The *Prize Cases* and the *Youngstown* case involved the seizure of property. But the Government conceded on oral argument that property is no more important than life under our Constitution . . . . Property is important, but if President Truman could not seize it in violation of the Constitution, I do not see how any President can take "life" in violation of the Constitution.[247]

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242. *Id.* at 1311-12.
243. Holtzman v. Schlesinger, 414 U.S. 1316 (1973).
244. *Id.*
245. *Id.*
246. *Id.* at 1319.
247. *Id.* at 1317.

For Justice Douglas, the constitutional grant of war declaration authority to Congress,[248] coupled with doubtful congressional support for the bombing of Cambodia, mandated his decision.[249]

The government returned to Justice Marshall the following day with a request to re-impose the stay.[250] Justice Marshall, noting that the Second Circuit had scheduled hearing on the appeal in four days, granted the government request.[251] The Second Circuit issued a decision on the government appeal on 8 August 1973.[252] Relying on the appropriations statute that authorized military operations in Southeast Asia through 15 August 1973 as unambiguous evidence of congressional support for the President's orders, the court ruled in favor of the government.[253] The court rejected the plaintiffs' argument that an appropriation that resulted from a veto-inspired compromise should not be considered as such evidence.[254]

The court once again held that some tangible evidence of congressional participation in the decision to wage the war satisfied the justiciable question of whether the President's orders were constitutional. Again, however, it treated the question of the constitutional propriety of the method used by Congress to support the conflict as a political question.[255]

Although the government prevailed in every case that challenged the constitutionality of the Vietnam War, it did so based on tangible evidence that Congress played a role in deciding to conduct the war. These cases also held that the method chosen by Congress to play this role was not an appropriate subject of judicial review.

These decisions can certainly be viewed as a judicial maneuver to avoid the difficult decision of the ultimate issue.[256] However, while it is

248. "It has become popular to think the President has that power to declare war. But there is not a word in the Constitution that grants that power to him. It runs only to Congress." *Id.* at 1318.

249. *Id.* at 1317-18.

250. Holtzman v. Schlesinger, 414 U.S. 1321 (1973).

251. *Id.* at 1322. In support of his decision, he indicated that he had contacted the other members of the Court, who, with the exception of Justice Douglas, agreed with his decision. Justice Douglas dissented and challenged the procedure Justice Marshall used to determine the views of other Court members. *Id.* at 1322-23.

252. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973).

253. *Id.*

254. *Id.* at 1313-14.

255. *Id.*

true that they do suggest a hesitancy on the part of the judiciary to entertain challenges to war-making decisions, they also indicate a judicial willingness to make an initial determination of what is required by the Constitution to render such decisions lawful. Taken collectively, these holdings are consistent with other cases involving war power issues[257] and the *Youngstown* separation of powers analytical template.[258] They illustrate the judicial view that the Constitution vests war-making power in *both* political branches, even for an undeclared war. This requires some level of congressional support for presidential prosecution of a conflict for such prosecution to be constitutionally authorized. In short, as long as the President is acting in the "twilight zone" of Justice Jackson's analytical framework,[259] constitutional jurisprudence supports his decisions to wage war. However, if such a decision contradicts the express will of Congress and therefore falls within Justice Jackson's third tier,[260] this same constitutional jurisprudence supports only decisions that are based on response to "emergency."[261]

Based on this analysis, the risk of judicial injunction of a presidential order to execute a military operation becomes significant if an impasse exists between the President and Congress over contradictory war power positions. It is the existence of such an impasse that would remove the dispute from the "some cooperation" political question precedents.[262] During the buildup for the Persian Gulf War, one federal district court adjudicated a case involving the potential for such an impasse. The decision in that case provides an explicit indication of the potential resolution of such a war power impasse.

VIII. The Persian Gulf War

The war power situation that the Vietnam era cases suggested would fail to meet the constitutional standard for a lawful presidential order—a presidential order to commit United States armed forces into a major conflict absent any evidence of congressional authorization—became a realistic possibility in the Autumn of 1990. During this period, the United States deployed several hundred thousand troops to the Persian Gulf in response

256. *See supra* note 218 accompanying text.
257. *See supra* notes 105-141 and accompanying text.
258. *See supra* notes 86-87 and accompanying text.
259. *See supra* note 85 and accompanying text.
260. *Id.*
261. *See supra* note 189 and accompanying text.

262. The War Powers Resolution significantly altered the issue of what constitutes sufficient congressional support for the President. *See* War Powers Resolution, Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)). In what seems to be an effort to prevent non-explicit congressional authorization to be interpreted as support for a President, as the courts consistently did through the Vietnam War era, the War Powers Resolution included two provisions to require explicit indications of congressional support for the President. Section 1541, Purposes and Policy, subsection (c) states that:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) *specific statutory authorization*, or (3) a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces.

Id. § 1541(c) (emphasis added). This language indicates that, except for the President's authority to "repel sudden attack," only a declaration of war or its functional legislative equivalent may be treated as war-making authorization from Congress. This requirement for an express authorization appears again in § 1541, Congressional Action. In subsection (b), it allows an unauthorized deployment to continue beyond 60 days only when authorized by a declaration of war or specific statutory authorization. *Id*. § 1541(b).

Finally, in § 1547, Interpretation of Joint Resolution, the following language appears:

> (a) Authority to introduce United States Armed Forces into hostilities or situations wherein involvement in hostilities is clearly indicated by the circumstances *shall not be inferred—*
>
> *(1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any Appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter.*

Id. § 1547(a)(1) (emphasis added).

If these provisions are constitutional, which is an issue *vel non*, courts would have the "manageable standard" by which to judge congressional participation in war-making decisions. Courts would then be unable to dismiss as political questions those cases that involve issues that are similar to those of the Vietnam era once "some" congressional participation has been identified. In the context of those decisions, these provisions certainly appear to be an effort to prevent just such results. However, because the constitutionality of the War Powers Resolution is far from certain, and because there is no evidence that the courts will treat these provisions as binding in future cases, this article assumes that the War Powers Resolution is not applicable.

to the Iraqi invasion of Kuwait. Labeled Operation "Desert Shield," defense of Saudi Arabia was the initial mission of this force. This defensive mission received substantial implied and express support from Congress.[263] On 29 November 1990, however, the United Nations Security Council approved Resolution 678, which authorized "Member States cooperating with the Government of Kuwait . . . to use all necessary means to uphold and implement" former resolutions that demanded Iraq to withdraw from Kuwait.[264] Then, on 8 November 1990, President Bush "announced the need for 'an adequate offensive military option' and doubled the size of the United States forces in the Gulf."[265] This move led Congress to "ask from what source the chief executive drew this extraordinary authority to place the nation at war without legislative approval."[266] The initial strong support for the administration policy of defending Saudi Arabia began to erode, and, by January 1991, Congress was debating whether to grant the President authority to conduct offensive military operations to achieve the objectives of United Nations Resolution 678.[267]

President Bush set the stage for a constitutional showdown of the magnitude necessary to run afoul of the Vietnam era precedents when, during a press conference on 9 January 1991, he was asked if he would go to war if Congress failed to authorize offensive operations. In response to this question, he stated: "I don't think I need it . . . . Secretary Cheney expressed it very well the other day. There are a lot of differences of opinion on either side. But Saddam Hussein should be under no illusions. *I believe I have the constitutional authority—many attorneys having so*

263. Spaid, *supra* note 12, at 1082-83. Although Congress overwhelmingly passed a joint resolution supporting the President's actions, it cautioned the President that future military decisions must be based on United States "constitutional and statutory processes." *Id.* at 1082 (quoting Susan F. Rasky, *House Democrats Caution Bush on War*, N.Y. TIMES, Dec. 5, 1990, at A-22).

264. *See* S.C. Res. 678, U.N. SCOR, 45th Sess., U.N. Doc. S/INF/46 (1990).

265. Spaid, *supra* note 12, at 1083. Up until this date, the President had asserted that the mission of the U.S. forces deployed to the Persian Gulf was defensive—to protect Saudi Arabia from further aggression by Iraq. Both houses of Congress explicitly supported this policy. However, the resolution that expressed support also indicated that "future decisions about military action would be tied to 'United States constitutional and statutory processes.'" *Id.* at 1081 (quoting Rasky, *supra* note 263, at A22).

266. Michael J. Glennon, *The Gulf War and the Constitution*, 70 FOREIGN AFF. 84, 86 (1991).

267. *See* Spaid, *supra* note 12, at 1084. The debates over the question of whether the President should be granted authority to conduct offensive military operations in the Persian Gulf were described by one scholar as follows: "The debates preceding the votes in both houses, though truncated by the eleventh-hour nature of the President's request, were among the most responsible within memory." ELY, *supra* note 9, at 50.

advised me."[268] According to then Under Secretary of State Richard Haas, the President clearly informed his closest advisors that he intended to order United States forces to eject Iraqi forces from Kuwait, whether or not Congress authorized the use of force, even if it meant being impeached.[269]

President Bush never faced the clash with Congress that he was ostensibly willing to risk. On 14 January 1991, Congress voted to grant what it characterized as "specific statutory authorization" for offensive operations. [270] As a result, the exact source of the President's purported unilateral authority was never revealed. One argument, however, was that the authority flowed from the United States obligation to support the United Nations.[271] Whether status as a member of the United Nations vests the President with additional authority to commit U.S. forces into combat has never been litigated. However, there is legislation directly on point, in the form of the United Nations Participation Act (UNPA).[272] The impact of this law was summarized by one scholar as follows:

> In passing the UNPA, Congress made certain that the use of United States military forces in any collective security system was conditioned on the establishment of Article 43 agreements "in accordance with . . . respective constitutional processes". . . . Since this is the only congressional act allowing for the specific use of United States military forces without congressional approval, the negative implication of the UNPA is that the President cannot use military force at all without congressional approval.[273]

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268. Glennon, *supra* note 12, at 22 (quoting *Excerpts: The Great Debate on War Powers*, NAT'L L.J., Jan. 21, 1991, at 26 [hereinafter *Excerpts*]) (emphasis added).

269. *Frontline: The Gulf War* (PBS television broadcast, Jan. 28, 1997) [hereinafter *Frontline*].

270. *See* Authorization for the Use of Military Force Against Iraq, Pub. L. No. 102-1, § 2(c)(1)(C)(2), 105 Stat. 3, 4 (1991).

271. The Department of Defense analysis in support of the legality of U.S. military participation in Operation Restore Hope in Somalia is a subsequent example of reliance on the United Nations Participation Act and the United States obligation to support the United Nations as such a grant of authority. *See* Memorandum, General Counsel, Department of Defense, to Secretary of Defense, subject: Legal Authority for Somalia Relief Operations (Dec. 5, 1992).

272. Pub. L. No. 79-264, ch. 583, 59 Stat. 619 (1945) (codified at 22 U.S.C. §§ 287-287(e) (1994)).

273. Spaid, *supra* note 12, at 1074-75 (quoting U.N. CHARTER art. 43).

Professor Turner, a prominent proponent of expansive executive war power, proffers a contrary interpretation of the UNPA. He asserts that it supports the authority of the President to act pursuant to a United Nations resolution without congressional support:

> On the issue of whether the Congress should reserve a "veto" over decisions to use U.S. armed forces to carry out decisions of the Security Council, the House report quoted this language from the Senate Foreign Relations Committee's report on the United Nations Charter issued six months earlier: "[T]he committee is convinced that any reservation to the Charter, or any subsequent congressional limitation . . . designed to provide, for example, that employment of the armed forces of the United States to be made available to the Security Council under special agreements referred to in article 43 could be authorized only after the Congress had passed on each individual case, would clearly violate the spirit of one of the most important provisions of the Charter . . . .
>
> . . . .
>
> The committee feels that a reservation or other congressional action such as that referred to above *would also violate the spirit of the United States Constitution under which the President has well-established powers and obligations to use our armed forces without specific approval of Congress.*"[274]

In a footnote, however, Professor Turner acknowledges that this quote applies specifically to Article 43 agreements and is extended to other United Nations operations by analogy only.[275] From a perspective of analyzing whether Congress supports a military operation that is conducted pursuant to a United Nations resolution, the distinction seems substantial. Under an Article 43 agreement, Congress would have already given explicit support for the operation by approving the Article 43 agreement to place forces under the control of the Security Council. There would be no

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274. Turner, *supra* note 3, at 959 (quoting H.R. REP. NO. 79-1383, at 4-5 (1945) (emphasis added).

275. *Id.* at 5 n.198.

such explicit evidence of support under the ad hoc hypothetical suggested by Turner.[276]

In the example of the Persian Gulf War, the buildup of forces by the President to prepare for offensive military operations, without first seeking congressional authorization, although pursuant to a United Nations resolution resulted in a judicial challenge by members of Congress. The resulting decision concluded that the challenge was not yet ripe. However, the court went on to suggest the probable outcome of a subsequent challenge if Congress denied authorization for offensive operations, thus satisfying the ripeness requirement.[277]

The case that presented this issue, *Dellums v. Bush*,[278] involved a challenge by fifty-four members of Congress to the President's plan to use an "offensive" option to eject Iraqi forces from Kuwait.[279] These members asked the U.S. District Court for the District of Columbia to enjoin the President from initiating offensive operations in the Persian Gulf without first obtaining congressional authorization.[280] Because Congress had yet to take an express position on the issue, Judge Harold Green dismissed the challenge as not yet ripe.[281] With the following language, however, he rejected all other government theories of non-justiciability: "[W]hile the Constitution grants to the political branches, and in particular to the Executive, responsibility for conducting the nation's foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs."[282]

In his opinion, Judge Green indicated that a deadlock between the two political branches would not only justify, but also require, judicial resolution.[283] Furthermore, he fired the proverbial "shot across the executive bow" when he indicated that he would probably enjoin the President from ordering execution of offensive military operations should Congress vote to deny authorization.[284]

Although the court rejected the political question doctrine as grounds for dismissal, this decision by Judge Green can still be reconciled with those from the Vietnam era.[285] The Vietnam courts abstained from adjudicating a challenge to an exercise of war power by the President based on cooperation between two coordinate branches; Judge Green abstained from adjudicating the issue based on a lack of policy conflict between the two political branches. Under either abstention rationale, a war power policy impasse between these two branches is subject to the same response—judicial resolution. Furthermore, all of these cases either explicitly assert

or implicitly suggest that Congress has the final say in the event of such an

276. History has certainly called into question the significance of this statute, particularly since the United States has never entered into an Article 43 agreement. *Id.* at 1066 (citing Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 S. ILL. U. L.J. 453, 466 (1991)). Whether this indicates that the use of U.S. forces to implement United Nations resolutions under Article 42, such as in Korea and Haiti, should be regarded as evidence of a source of unilateral presidential authority is questionable. Even if these operations were not conducted pursuant to specific statutory authorization, it does not follow that the authority of the President to commit U.S. forces flowed from the U.S. obligation to the United Nations. (It should be noted that, in *Dellums v. Bush*, the argument put forth by the government on behalf of the President's unilateral authority to conduct offensive operations in the Persian Gulf was not based on United Nations treaty obligations, but on the "President's sole power to determine when military activity constitutes 'war' for constitutional purposes," an argument rejected by the court. *See* Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990). *See also* Glennon, *supra* note 12, at 22). Instead, these uses of force can be viewed as being consistent with the holdings of those cases that look to the absence of a contrary congressional position to conclude that the President and Congress have cooperated in the war power decision to such an extent as to render the decision constitutionally valid. There is no example in United States history of an operation that was conducted under the auspices of a United Nations resolution where the President acted contrary to the express will of Congress. There is also no precedent for the conclusion that because an employment of force is not in violation of international law it is automatically constitutionally valid. According to Glennon:

> [A] hortatory resolution of the Council, or one authorizing use of force but not requiring it, can have no effect on the U.S. domestic system of reallocating constitutionally assigned power; that a right exists under international law to take certain action says nothing about whether a power exists under domestic law to exercise that right. The allocation of domestic power is directed by the Constitution, not by international law. For this reason, Article 51 cannot be read to confer a power on the President to use force without congressional consent when he is asked to do so in collective self-defense by a state subject to armed attack.

Glennon, *The Constitution and Chapter VII of the United Nations Charter in Agora: The Gulf Crisis in International and Foreign Relations Law*, 85 AM. J. INT'L L. 74, 81 (1991).

This view was expressed by Schlesinger specifically regarding the Korean conflict: "[A]s for the United Nations resolutions, while they justified American military action under international law, they could not serve as a substitute for the congressional authorization required in national law by the Constitution." ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 133-34 (1973). *See* Jane E. Stromseth, *Authority to Initiate Hostilities: Collective Force and Constitutional Responsibility: War Powers in the Post Cold-War Era*, 50 U. MIAMI L. REV. 145 (1995).

As to this question, the steel seizure decision also seems significant for the total lack of analysis of whether the actions of the President were constitutionally justified because he was executing a military operation pursuant to a unilateral authority he derived from the United States obligation to the United Nations. *See supra* notes 158-169 and accompanying text.

impasse.[286] Only an exercise of exclusive power vested in the President by Article II of the Constitution could justify a different conclusion.

Critical to this analysis, therefore, is whether Article II serves as a sufficient source of constitutional authority to render a different outcome than that suggested by the courts.[287] Although the plain language of Article II does not support such a broad interpretation of executive war power,[288] the precise nature of historic presidential assertions of war power authority must be factored into this analysis. The Supreme Court has established that when determining the locus of constitutional authority, a potentially determining factor is the historical exercise of war power authority. Determining the extent of unilateral executive war power requires, in the language of the Supreme Court, analysis of whether history has "painted a gloss"[289] over the Constitution that would support such authority.

IX. Is there a "Historical Gloss" of Unilateral Executive War Power?

As the prior section illustrates, many judicial decisions throughout the nation's history suggest that (with the exception of certain very limited

277. The debate over whether to grant the authorization requested was intense, and the vote in the Senate resulted in 52 in favor of the authorization and 47 against. *Frontline*, *supra* note 269.

278. 752 F. Supp. 1141 (D.D.C. 1990).

279. *Id.*

280. *Id*. The lawsuit was initiated after the buildup of U.S. forces to provide an offensive capability, but before the vote in Congress regarding granting authorization to the President to use force as he planned. *Id.*

281. *Id.* at 1144.

282. *Id.* at 1146.

283. *Id*. at 1141-42.

284. *See id.* at 1144 n.5.

285. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 1974); Dacosta v. Laird, 471 F.2d 1146 (2d Cir. 1973); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Dacosta v. Laird, 448 F.2d 1368 (2d Cir. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970).

286. This position is consistent with the analytical framework of *Youngstown* and *Dames & Moore*. *See supra* notes 68-104 and accompanying text.

287. This position is asserted by at least one prominent scholar. *See* Turner, *supra* note 3, at 920.

288. *See* U.S. CONST. art. II. *See also* Ides, *supra* note 7, at 7; ELY, *supra* note 9.

289. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). *See also infra* note 294 and accompanying text.

emergency situations) Congress must play some role in authorizing war-making decisions and may even be empowered to control the decision to wage war. The base premise of these decisions is the theory that the constitutional distribution of war powers has remained fundamentally in tact since the nation's founding. Certainly, there has been no effort to amend the Constitution to vest enhanced authority over war-making decisions in the executive branch. However, constitutional jurisprudence also indicates how the exercise of military decision-making might clarify the nebulous textual constitutional distribution of war powers.

This history may have resulted in the establishment of a "historical gloss" over the plain language of the Constitution that favors expansive presidential war-making authority. The history that leads to this argument has been described as follows:

> 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. 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 . . . notwithstanding sporadic examples of presidential war making during these formative years, as the nation entered the twentieth century, the constitutional model was basically intact, albeit somewhat bruised . . . .
>
> The turn of the century marked a clear shift in presidential attitude . . . .
>
> None of these [early twentieth century] 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 . . . .

> Presidential war making authority was pushed a step further and elevated to a constitutional principle during the Administration of President Truman through his 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." Congress was seemingly out of the picture . . . .
>
> 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.[290]

The "historical gloss" hypothesis is premised on the conclusion that a history of unilateral presidential war-making decisions demonstrates that the Constitution should be interpreted to support executive authority to make such unilateral decisions in the future. History is used to enlighten contemporary decision makers on the proper allocation of war power under the Constitution. Therefore, this is not an "adverse possession" type theory, whereby presidential conduct has divested the legislative branch of a power it once possessed. Instead, it is a theory of constitutional interpretation, derived from the *Youngstown* template, applicable when the situs of a governmental power is textually uncertain, as in the case of war power.

Use of history for this purpose was originally articulated by Justice Frankfurter in *Youngstown*.

> To be sure, the content of the three authorities of Government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for Government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting the government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissible narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pur-

290. Ides, *supra* note 7, at 616-20 (citing S. REP. NO. 90-797, at 9-12 (1967); U.S. DEP'T OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (3d rev. ed. 1933); 23 DEP'T. ST. BULL. 173 (1950)).

> sued to the knowledge of Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our Government, may be treated as a gloss on "executive power" vested in the President.[291]

This theory of constitutional interpretation is applicable to war powers because of the consistent judicial conclusion that, under the Constitution, the power to decide to wage war is shared between the President and the Congress.[292] Whether use of such an interpretive theory is legitimate is a subject of scholarly debate.[293] Regardless of scholarly opposition to its application, however, this mechanism for analyzing the impact of his-

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291. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

292. This conclusion has also been expressed in the academic community.

> By repeated exercise without successful opposition, the Presidents have established their authority to send troops abroad probably beyond effective challenge, at least where Congress is silent, but the constitutional foundations and the constitutional limits of that authority remain in dispute. *Such authority no doubt resides somewhere in the government of a sovereign nation; constitutional Scripture does not explicitly grant it to Congress or deny it to the President, and it provides some text in support of his initiatives.*

LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 53 (1972) (emphasis added).

293. *See* Ides, *supra* note 7, at 626.

> It has been argued that congressional acquiescence in the practice of executive war making has constitutionally legitimized the model of presidential predominance . . . . 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 gray 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.

Id. (citation omitted).

tory on the constitutional distribution of war power enjoys judicial endorsement.[294]

Some scholars attack the use of historical practice to guide constitutional interpretation. They assert such practice is irrelevant on the theory that unconstitutional acts practiced over time do not validate future unconstitutional acts.[295] It is the interpretive value of this history, however, that rebuts this criticism, a point articulated by Professor Turner:

> One might argue, particularly given the extent of the constitutional practice and the long history of congressional acquiescence, that this approach begs the question and perhaps the practice is evidence that the actions were not viewed as contrary to the constitutional scheme. Dismissing the importance of constitutional practice in the interpretative process rings of the most extreme form of "original intent" jurisprudence . . . .[296]

It seems that the "acquiescence" to which Professor Turner refers is analogous to the implied consent evidence relied on by the Vietnam era courts to conclude that the President was constitutionally authorized to execute the war. It is critical, however, for the purposes of analyzing the limits on presidential war power, that these two terms be distinguished. If a history of acquiescence is defined as a total abdication by Congress of any role in war power decisions, it supports a conclusion that the President is constitutionally vested with war-making authority that would survive even express congressional opposition. If, however, acquiescence is defined as the type of "implied consent" by Congress to presidential war making decisions, it supports a conclusion that Congress has not interpreted the Constitution as providing it with no role in war-making decisions, but instead as allowing Congress to choose the means that it determines are most appropriate to support presidential decisions. This later conception is exactly the conclusion reached by the Vietnam era courts. Professor Turner seems to endorse this latter view by citing in the same article the extensive evidence of congressional support for President

294. *See supra* notes 7-16 and accompanying text.

295. *See, e.g.*, ELY, *supra* note 9.

296. Turner, *supra* note 3, at 920-21.

Truman's execution of the Korean War and by praising Professor Ely for his acknowledgment that Congress fully supported the Vietnam War.[297]

Dames & Moore[298] represents the most striking example of how history can dictate a "locus of power" determination. The Supreme Court held that the President derived constitutional authority to suspend the claims of U.S. citizens against foreign governments from just such a "historical gloss."[299] In reaching this conclusion, the Court focused on two factors. First, there was a history of congressional acquiescence to such presidential claims settlements.[300] Second, Congress enacted "legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion [and therefore] may be considered to 'invite measures of independent presidential responsibility.'"[301] Such "closely related" legislation was, according to the Court, significant more for what it did not say than what it did say: "[a]t least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President."[302] Thus, the legislation indicated that the President did not act contrary to the express will of Congress; therefore, the history of acquiescence was determinative. Only after identifying a long history of such congressional acquiescence did the Court hold that the President acted pursuant to his "inherent" constitutional authority.[303]

Following the *Youngstown* and *Dames & Moore* approach is instructive on the issue of war power. The history of war power decisions made by Presidents relates to only that part of this "gloss" analysis that goes to identifying a "systematic, unbroken executive practice, long pursued to the knowledge of Congress."[304] *Dames & Moore*, however, demonstrates that to fully satisfy the test for creating such a "gloss," the practice must also have been "never before questioned" by Congress.[305] In short, there must

297. *See id.* at 952-65.

298. 453 U.S. 654 (1981). *See supra* notes 61-64 and accompanying text (discussing the facts of the case). *See also* Stromseth, *supra* note 276, at 159 n.66.

299. *Dames & Moore*, 453 U.S. at 686-88.

300. *Id.*

301. *Id.* at 678 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

302. *Id*.

303. *Id.* at 686-88.

304. *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

305. *Id.*

be substantial evidence of congressional acquiescence in the exercise of war power authority by the President before a history of such presidential actions amounts to sufficient evidence to support the "unilateral" Presidential power conclusion.

Application of this two-part test, focusing on both the historical exercise of power by the President *and* congressional acquiescence, leads to the conclusion that there *is no* "historical gloss" of *unilateral* executive authority to initiate war.[306] No President ever initiated and waged war contrary to the express or implied will of Congress, as interpreted by the courts. Even during the height of the Vietnam War, some form of congressional support for the war always existed.[307] There has been no "systematic, unbroken, executive practice long pursued to the knowledge of Congress"[308] of purely unilateral war-making.

Several compilations of war-making incidents throughout history bear this out.[309] The analysis of this data is not undermined by post-1986 military operations. All of these operations can be classified as being based on the inherent authority of the President to protect U.S. citizens (Grenada and Panama), implicitly supported by Congress (Somalia, Haiti, and Bosnia), or explicitly authorized by Congress (the Persian Gulf and Lebanon, after Congress deemed that the operation was within the scope of the War Powers Resolution). No operation has been conducted in the face of specific congressional opposition.[310]

An example of the need to analyze the facts related to military operations carefully is provided by Professor Turner. Rejecting the position that President Truman conducted the Korean War without providing a role for Congress in the decision-making process, he notes:

> [P]owerful evidence exists in the form of declassified top secret State Department documents, supported by the *Congressional Record* and the autobiographies of key congressional leaders, that President Truman placed very high priority on keeping Congress fully informed about Korea. *Furthermore, he was prepared to go before a joint session of Congress to seek a joint resolution of approval until dissuaded from involving Congress*

306. Once again, this does not refer to the narrow exceptions based on the inherent power of the President to "repel sudden attack." *See supra* notes 110-120 and accompanying text.

307. *See supra* notes 170-262 and accompanying text.

308. *See Dames & Moore*, 453 U.S. at 686.

more directly in the process by the advice of congressional leaders.

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309. This distinction, and the analytically flawed conclusion that results from analogizing implied congressional support to no congressional role whatsoever, was pointed out by Wormuth & Firmage:

1. Actions for which congressional authorization was claimed	7
2. Naval self-defense	1
3. Enforcement of law against piracy, no trespass	1
4. Enforcement of law against piracy, technical trespass	7
5. Landings to protect citizens before 1862	13
6. Landings to protect citizens, 1865-1967	56
7. Invasion of foreign or disputed territory, no combat	10
8. Invasion of foreign or disputed territory, combat	10
9. Other reprisals not authorized by statute	4
10. Minatory demonstrations without combat	6
11. Intervention in Panama	1
12. Protracted occupation of Caribbean states	6
13. Actions anticipating World War II	1
14. Bombing of Laos	1
15. Korean and Vietnam Wars	2
16. Miscellaneous	2
Total	*137*

. . . .

One cannot be sure, but the number of cases in which Presidents have personally made the decision, unconstitutionally, to engage in war or in acts of war probably lies between one and two dozen. And in all those cases the Presidents have made false claims of authorization, either by statute or by treaty or by international law. They have not relied on their powers as commander in chief or as chief executive.

In the case of executive wars, none of the conditions for the establishment of constitutional power by usage is present. The Constitution is not ambiguous. No contemporaneous congressional interpretation attributes a power of initiating war to the President. The early Presidents, and indeed everyone in the country until the year 1950, denied that the President possessed such power. There is no sustained body of usage to support such a claim. It can only be audacity or desperation that leads the champions of recent presidential usurpations to state that "history had legitimated the practice of presidential war-making."

FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 143-44, 147, 149 (1986), *reprinted in* DYCUS ET AL., *supra* note 28, at 241-43. *See* Monaghan, *Presidential War-Making*, 50 B.U. L. REV. (Special Issue) 19, 25-31 (1970).

310. *See* Spaid, *supra* note 12; Ratner & Cole, *supra* note 12, at 723-26. *See also* Turner, *supra* note 3.

. . . .

> Thus, the historical record appears to refute the conventional wisdom that President Truman unilaterally, or simply following the advice of Secretary Acheson, elected to ignore the Congress on Korea. On the contrary, keeping Congress informed was a priority objective from the start . . . .[311]

In reaching this conclusion, it is critical to distinguish between an absence of specific congressional authorization and congressional opposition to a presidential war power decision. Federal courts have recognized the significance of this distinction on numerous occasions. This significance is that it does not indicate a long-standing practice of unilateral war-making by Presidents; to the contrary, *it indicates a long-standing practice of cooperative war-making decisions that were initiated by the President but supported by the express or implied concurrence of Congress*.[312]

Analysis of congressional efforts to play an active role in war power decisions provides evidence to support this conclusion. These efforts fall into three primary categories: (1) legislative efforts to limit presidential war power discretion; (2) specific authorizations of certain military operations; and (3) fiscal controls related to military operations.

In the category of efforts to limit the President's discretion, the most significant action by Congress was the passage of the War Powers Resolution[313] The significance of the War Powers Resolution for the purposes of a separation of powers analysis is independent from its efficacy, or even its

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311. Turner, *supra* note 3, at 950, 956 (citing ELY, *supra* note 9, at 50, 53, 151) (emphasis added). The vote to extend the draft immediately after President Truman informed key congressional leaders of his decision to support South Korea provides even more compelling support for the conclusion that the actions of Congress demonstrated, in accordance with the analysis applied in the Vietnam era cases, sufficient evidence of implicit support for the war. *Id.* at 952 n.179.

312. *See supra* note 308 and accompanying text. The significance of this conclusion transcends the rejection of unilateral presidential war power. It creates, in the opinion of this author, the most significant constitutional impediment to the validity of the War Powers Resolution. *See infra* note 340 and accompanying text. This conclusion is supported by analysis of the congressional role related to recent military operations, such as Operation Restore Hope in Somalia, Operation Uphold Democracy in Haiti, and Operation Joint Endeavor in Bosnia. In all three cases, although the President took the initiative by involving the United States in the operation, Congress debated the propriety of United States involvement and ultimately provided both fiscal and joint resolution support. *See* Stromseth, *supra* note 276.

313. Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)).

constitutionality.[314] Whether the War Powers Resolution has worked, or is even constitutional, in no way diminishes its immense value for such analysis, for it serves as an express indication that Congress specifically rejected what it viewed as a dangerous exercise of unilateral executive war power.

Recent legislative attempts to limit presidential authority to commit U.S. armed forces to international collective security operations further support the conclusion that Congress opposes an interpretation of the Constitution that eliminates its role in war power decisions. These efforts began in 1994 and share the common goal of limiting the authority of the President to place U.S. armed forces under the command of foreign officers during United Nations operations. They include the Nickles-Cochran amendments to the Department of Defense Appropriations Act of 1994,[315] the Peace Powers Act of 1994,[316] the Peace Powers Act of 1995,[317] the

314. From the very time of the passage of the War Powers Resolution, these issues have spawned tremendous debate. *See* Richard Nixon, *Veto of the War Powers Resolution*, 5 PUB. PAPERS 893 (1973). *See also* Turner, *supra* note 12; Ratner & Cole, *supra* note 12; Zablocki, *supra* note 12; Ides, *supra* note 7; Glennon, *supra* note 12; Spaid, *supra* note 12; Rolph, *supra* note 12; Ford, *supra* note 12; Rushkoff, *supra* note 12. Future success of recent efforts to repeal the War Powers Resolution may moot these questions. *See* The Peace Powers Act of 1995, S. 5, 104th Cong. (1995) (including a provision specifically repealing the War Powers Resolution, but mandating new consultation and reporting requirements).

315. H.R. 3116, 103d Cong. § 8137A (1993) (prohibiting the use of U.S. funds to support U.S. combat forces when such forces were under "the command, operational control, or tactical control of foreign officers").

316. 140 CONG. REC. S182-83 (1994) (imposing barriers to providing U.S. armed forces as participants in United Nations peacekeeping operations).

317. S.5, 104th Cong. (1995) (repealing the War Powers Resolution but re-imposing equivalent consultation and reporting requirements, limiting the ability of the President to place U.S. armed forces under foreign command during peacekeeping operations, imposing a requirement on the President to submit a memorandum to the Congress addressing the constitutionality of any peacekeeping operation).

National Security Revitalization Act,[318] and the United States Armed Forces Protection Act of 1996.[319]

While none of these provisions became law, primarily because of opposition from the President (and, in several instances, presidential veto), they all serve as significant evidence that Congress clearly rejects any interpretation of the Constitution that eviscerates its role in war power decisions. What is especially significant about the trend reflected by these efforts is the concern over the changing nature of military operations. Unlike the period following the Vietnam war, Congress is no longer concerned with preserving its role only regarding "hostilities." These legislative initiatives indicate that in the view of Congress, even "operations other than war" are the subject of shared, not unilateral, power. This only reinforces the conclusion that Congress views itself as a key constitutional player in any war power decision that involves the potential for actual combat operations.

The second category of congressional efforts to limit unilateral presidential war power are specific authorizations of certain military operations. The most significant of these are the Gulf of Tonkin Resolution[320] and the authorization to use force in the Persian Gulf.[321] Again, for purposes of this analysis, whether the Presidents who prosecuted the hostilities authorized by these congressional actions would have done so without authorization is not significant.[322] Instead, the significance is that they reflect the congressional view of how the constitutional war power process

318. H.R. 7, 104th Cong. (1995) (imposing restrictions on the President's authority to place U.S. armed forces under foreign command during United Nations peacekeeping missions and imposing a requirement on the President to submit a memorandum to the Congress addressing the constitutionality of any peacekeeping operation).

319. H.R. 3308, 104th Cong. (1996) (imposing a requirement that the President report to Congress the placing of U.S. armed forces under foreign command during peacekeeping operations). *See* Major Richard Watson, Recent Congressional Attempts to Limit the Placement of United States Forces from Serving Under Foreign Command (Dec. 1996) (unpublished manuscript, copy on file with author).

320. Pub. L. No. 91-672, § 12, 84 Stat. 2055 (1971).

321. Authorization for the Use of Military Force Against Iraq, Pub. L. No. 102-1, § 2(c)(1)(C)(2), 105 Stat. 3, 4 (1991).

322. Both President Johnson and President Bush specifically indicated that they believed that these authorizations were not constitutionally required to justify their prosecuting the respective conflicts. *See* Glennon, *supra* note 12, at 22 (quoting *Excerpts*, *supra* note 268, at 26); Ratner & Cole, *supra* note 12, at 729.

works. In both cases, Congress reacted to a perceived constitutional necessity to authorize hostilities.

The Persian Gulf authorization process has been characterized as being "among the most responsible within memory."[323] By its own language, the authorization invoked the concept of congressional constitutional war power responsibility as established by the War Powers Resolution.[324] This authorization and the process leading to it, is compelling evidence of a lack of congressional acquiescence to unilateral presidential war power, even under the United Nations collective security system.

Other examples of congressional efforts to assert control over war power policies initiated by the President include Lebanon and Somalia.[325] These two examples support the conclusion that, although Congress may be content to support by implication presidential war power decisions that are relatively popular, such support should not be equated to an abdication of the prerogative to reject unpopular policies affirmatively.

The third category of congressional efforts to limit presidential war power takes the form of fiscal controls. The process of fiscal authorization often involves specific limitations on the use of appropriated funds by the Department of Defense. The Purpose Statute[326] establishes prohibitions on the use of appropriated funds for anything other than the congressionally authorized purpose. Since World War II, Congress has resorted to this mechanism as a means of limiting presidential foreign policy decisions at an increasing rate.[327] The two most significant efforts by Congress to use appropriations to control presidential war power policy were the appropriation limitations that were designed to bring an end to the Vietnam War[328] and the Boland Amendments, which were intended to prohibit United States involvement in Central America in the early 1980's due to a fear that such involvement would draw the nation into a conflict.[329] More recent examples involve the attempted use of appropriations to impose strict lim-

323. ELY, supra note 9, at 50.
324. *See* Pub. L. No. 102-1, § 2(c)(1)(C)(2), 105 Stat. 3, 4 (1991).
325. *See supra* note 16.
326. 31 U.S.C. § 1301(a) (1994).
327. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).
328. *See supra* notes 170-262 and accompanying text.
329. *Id*.

itations on the nature of the command structure and personnel commitments in support of United Nations operations.[330]

These efforts further demonstrate that Congress considers its role in war power decisions to be constitutionally significant. Even assuming that there has been a "systematic, unbroken executive practice, long pursued to the knowledge of Congress,"[331] these efforts to ensure participation in war power decisions contradict the idea that Congress has "never before questioned"[332] assertions of unilateral executive war power. Therefore, based on the *Dames & Moore*[333] model, the conclusion that a "gloss of history" exists to support broad unilateral presidential war power is unjustified.

This conclusion, therefore, compels the conclusion that the President's Article II powers do not enable him constitutionally to ignore the express congressional opposition to a decision to wage war. War power jurisprudence suggests that the President is not vested with constitutional authority to support an action contrary to the express will of Congress. Based on this same jurisprudence (especially the *Youngstown* analytical model), however, as long as some plausible evidence of congressional support for the President exists, thereby placing the decision in the "twilight zone" of the *Youngstown*[334] template, presidential war power decisions should be considered to be constitutional.

For purposes of this analysis, it seems to matter little what type of operation is involved, as long as it cannot be considered routine training or maneuvers or within the President's inherent power to respond to emergency threats to national security. This is because the critical factor in determining the constitutionality of the presidential directive is not what type of operation is involved, or even the size of such an operation, but how Congress reacts to the operation. Explicit congressional opposition seems no less devastating to a claim of presidential authority for a small scale operation than for a large scale operation. Nor does the enabling effect of congressional support of an operation seem to depend on the scale of that operation. This view was expressed by Ratner and Cole as follows: "[P]resumably, the President, under his Commander-in-Chief powers can direct the armed forces in any manner he wishes as long as the use is 'short

330. *See supra* notes 313-329 and accompanying text.

331. *Id.*

332. Youngstown Sheet & Tube Co., 343 U.S. 579, 610-11 (1952).

333. 453 U.S. 654 (1981). For a discussion of the facts of this case, see *supra* notes 61-64 and accompanying text.

334. *Youngstown*, 343 U.S. 579.

of war.'"[335] They go on, however, to acknowledge the difficulty in defining the term "short of war."[336] Professor Moore, a distinguished national security scholar, suggests that the constitutional role of Congress should be triggered "in all cases where regular combat units are committed to sustained hostilities."[337] Recent congressional efforts to assert a role in decision-making involving United Nations peace operations suggest that Congress does not accept such a "sustained hostility" formula and is once again more concerned with the "likelihood of hostilities" approach that is reflected in the War Powers Resolution.[338] None of these interpretations, however, make the size of the committed force the key factor for congressional authorization or opposition to an operation.

IX. What the Does History Support?

The conclusion that results from analyzing this body of law is twofold. First, with the exception of actions based on emergency power or the formal process of declaring war, war powers under the United States Constitution are vested exclusively in neither the executive nor legislative branch; these powers are shared between these branches. The significance of embracing the shared nature of war power is articulated by Professor Turner as follows:

> To begin with, each branch should recognize that the other has a fully legitimate role to play and that no policy will succeed in the long run without the support of both branches. This is certainly true when the policy in question might involve a commitment of armed forces to hostilities. Taylor Revely was certainly right when, in his recent book, *War Powers of the President and Congress*, he observed that "*the Constitution does impose one iron demand on the President and Congress: that they cooperate if any sustained venture for war or peace is to succeed*." It hardly needs to be observed that, as a practical matter, Congress—despite its powers to declare war (subject to a presidential veto)—cannot effectively engage United States military

335. Ratner & Cole, *supra* note 12, at 773.

336. *Id.*

337. *Congress, the President, and the War Powers: Hearings Before the Subcomm. on Nat'l. Security & Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong. 124, 126-27 (1970) (statement of John Norton Moore, Professor of Law, University of Virginia School of Law).

338. *See* Stromseth, *supra* note 276.

> forces in hostilities without the cooperation of the Commander-in-Chief . . . . Given the Vietnam experience, it should be even less necessary to emphasize the necessity of congressional cooperation in formulating policies involving the use of military force . . . .
>
> The proper congressional role in national security matters should be that of a full partner in the formulation of general principles and policies, rather than that of a micro-manager or second-guesser of the President's execution of those policies. Certainly the initiation of significant offensive hostilities is such a policy decision, which under our constitutional system of government should not be made without the approval of Congress. But more detailed questions of how many and which forces to use, and how best to employ them, are beyond both the expertise and the constitutional jurisdiction of the legislative branch. [339]

Second, the history of war-making decisions in the United States demonstrates that, so long as the actions of Congress reasonably suggest support for the President, the President may treat such support, even if implied, as authority to execute such decisions. This practice of relying on "implied consent," which was so significnat for the Vietnam era decisions, is consistent with a broad view of executive war powers; yet, it plants the foundation for such power not in a theory of unilateral presidential war power, but in the combined authority of both political branches, as executed by the President.

Ironically, it is this practice of presidential reliance on the implicit support of the Congress and not unilateral presidential war making, that is so "long standing" that it may be considered to represent the proper constitutional process for making war power decisions. It appears reasonable to conclude that this practice of executive reliance on the implied support of the legislature comes much closer to satisfying the "historical gloss" test than the theory that the executive is now vested with broad unilateral constitutional authority to wage war.

This distinction is constitutionally critical. In the first instance, the power of the executive to commit the nation to war is derived not from a unilateral source of constitutional authority, but from the joint power of both political branches. This necessarily implies that Congress retains the discretion not to support any given executive war power decision and that

339. Turner, *supra* note 12, at 691-96 (emphasis added).

Congress can bind the executive with that non-support. In the second instance, Congress is divested of any role in war power decisions, because the President derives authority exclusively from Article II. This necessarily infers that Congress has no discretion to "veto" a war power decision, which contradicts every judicial decision analyzed in this article.

If this "implied consent" process of war power decision-making meets the standard of "historical gloss," it represents the most significant constitutional impediment to the validity of the War Powers Resolution.[340] As demonstrated, and as held by federal courts, the nation's history of war power decisions may have established a "gloss" on the Constitution. This "gloss" supports the interpretation that the Constitution vests the President with authority to commit U.S. armed forces to combat operations based on the implied support of Congress. If this is so, § 1547(a) of the War Powers Resolution is in direct conflict with this constitutional process. According to this section:

> (a) Authority to introduce United States Armed Forces into hostilities or situations wherein involvement in hostilities is clearly indicated by the circumstances *shall not be inferred—*
>
> *(1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any Appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter . . . .*[341]

This section of the War Powers Resolution specifically prohibits the President from treating other congressional actions as implicit support for a proposed or ongoing military operation. If the *Dames & Moore* standard for establishing a "historical gloss" on the Constitution is satisfied with regard to the theory that the constitutionally mandated role for Congress in war power decisions need not amount to explicit authorization, the President and his subordinate officers should be entitled to rely on such implicit support to conclude that a proposed or ongoing operation is lawful. While Congress may choose to impose more stringent requirements on itself, such requirements seem invalid if they contradict, to the detriment of the

340. Pub. L. No. 93-248, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)).

341. *Id.* (emphasis added).

executive branch, the constitutional scheme that has emerged through history.

X. Conclusion:

The courts have shown that whether the President may lawfully send United States armed forces into combat is a justiciable question of constitutional interpretation. Although unusual in its nature, such a question may, under the proper circumstances, obligate the courts to ensure that the basic constitutional process of taking the nation to war is not transgressed in the name of national security.[342] The importance of ensuring that such a subversion never occurs was best stated by the Supreme Court:

> Implicit in the term "national defense" is the notion of defending those values and ideals which set this nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in our Constitution . . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties which make the defense of the nation worthwhile.[343]

The role of the courts in resolving such a conflict is highlighted by a careful analysis of the limitations on the remedies that are available to Congress to respond to such a crisis. The experience of the Persian Gulf War exemplifies the risks involved when the two political branches stake out differing positions with regard to a war power issue.[344] Judicial reso-

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342. The narrow majority in the Senate in favor of war authorization for the Persian Gulf War demonstrates the reality of congressional rejection of a presidential war policy. The comments of President Bush to the effect that he intended to take action regardless of whether Congress supported that action demonstrates the reality that a President might act contrary to the explicit will of Congress. *See supra* note 217 and accompanying text. In such a crisis, only the courts possess the power to impose a remedy that is consistent with the constitutional scheme of war power distribution. While it is true that Congress retains the power to take other extraordinary measures in response to presidential disregard of a refusal to authorize war—specifically a cut-off of funding or even impeachment—presuming the constitutionality of a presidential action until such a remedy is imposed contradicts the balance of war power established by the Constitution. In the case of a funding cut-off, the President would certainly exercise his veto power, thereby requiring a two-thirds majority of both houses for an override. Impeachment would require the same two-thirds majority in the House of Representatives. This means that a super majority would be needed to implement the rejection of a war authorization, which requires a simple majority of only one house of Congress. In short, if a simple majority of both houses is required to authorize war, why should a super majority be needed to refuse to authorize a war?

343. United States v. Robel, 389 U.S. 258, 264 (1968).

lution of the issue would preserve the constitutional scheme of authority. If the court determined that the will of Congress prevailed, an injunction would obviate the need for any extraordinary remedy by Congress, with the accompanying super majority. If, however, the court determined that the President's authority trumped the will of Congress, only a super majority vote by Congress to restrain the President should be permitted to prevail. That only the courts possess the ability to impose a remedy that is consistent with the Constitution seemed apparent to Judge Green when, in *Dellums v. Bush*, he wrote:

> While the Constitution itself speaks only of the congressional power to declare war, it is silent on the issue of the effect of a congressional vote that war not be initiated. However, if the War Clause is to have its normal meaning, it excludes from the power to declare war all branches other than the Congress. *It also follows that if the Congress decides that United States forces should not be employed in foreign hostilities, and if the Executive does not of its own volition abandon participation in such hostilities, action by the courts would appear to be the only available means to break the deadlock in favor of the constitutional provision.*[345]

Whether a war power controversy between the President and Congress ever requires judicial resolution is unlikely. The decisions analyzed in this article suggest how the judicial branch might resolve such a case. These decisions, however, and most importantly the analytical model they establish and validate, hold greater significance for those who execute war power decisions. The decisions provide a solid legal foundation for the powerful presumption of legality traditionally accorded presidential orders. They also, however, validate the tradition of fidelity to constitutional authority by making the source of this presumption not the unilateral power of the President, but the cumulative power of our national government derived from the cooperative decisions of both the President and Congress.

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344. S*ee supra* notes 227-238 and accompanying text.

345. Dellums v. Bush, 752 F. Supp. 1141, 1144 n.5 (D.D.C. 1990).