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Edward Keyes' Undeclared War: Twilight Zone of Constitutional Power

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War Powers

UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER By Edward Keynes. University Park, Pennsylvania: The Pennsylvania State University Press, 1982. Pp. ix, 236. $17.95.

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> Interpreting the constitutional separation of the congressional war powers from the presidential office of commander in chief is a difficult art that requires the skills of a historian, constitutional lawyer, political scientist, social psychologist, and the Oracle of Apollo at Delphi. (P. 31)

Dr. Keynes captures the essence nicely. For nearly two centuries the war powers have bedeviled a host of Presidents, congressmen, and those few judges willing to deal with them in court. The constitutional division of the war powers between the executive and legislative branches remains unclear today. Many hold beliefs nurtured by events since 1789—those of the Cold War in particular—that the Constitution vests in the President a broad prerogative over American war and peace. For many others, like Keynes, the Indochina conflict reawakened belief in a dominant congressional role, well rooted in the constitutional text and in the debates of its Framers and Ratifiers. As a result, interested Americans have disagreed vigorously in recent years about the constitutionality of various presidential and congressional approaches to the use of force.

Since government began under the Constitution, struggles over the war powers have erupted constantly between the President and Congress. By 1815 the United States had fought an array of Indians (in effect, foreign enemies); the two greatest powers of the day, France and Britain; and the Barbary States. In addition, the Republic had skirted hostilities with Spain while pressing to relieve her of Florida. Thus, the respective constitutional prerogatives of the President and Congress over war and peace were of great concern to Americans while Washington, John Adams, and Madison held office. And there have been few administrations in which the nature of these prerogatives has not been heatedly debated.

Nonetheless, the search for a satisfactory theory of the war powers has been more intense and fruitful since the United States entered the Indochina

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conflict than at any prior time.[1] Given the experience of the past generation with American involvement abroad and prior experience with isolation and nonintervention, we do seem closer now than ever before to a mature understanding of how to divide authority between the President and Congress over war and peace. Keynes's book joins this quest.[2]

I. The Elements of a Satisfactory Theory of the War Powers

A satisfactory theory of the war powers must successfully unite (1) the text of the Constitution's war-power provisions, (2) the purposes of those who wrote and ratified the text in 1787–1788, (3) the evolving beliefs of Americans since 1789 about what the Constitution requires, and (4) the various allocations of control over the war powers that have existed in fact between the President and Congress during the past two centuries. Text and purpose are reasonably straightforward guides for constitutional interpretation. The evolving beliefs about the requirements of the Constitution and actual allocations of power are more convoluted; together they make up what is generally termed "practice," or "usage."[3] Practice has been shaped not only by the

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1. Keynes characterized Vietnam as the first modern undeclared conflict to test the President's warmaking powers. He suggests that the President's use of troops in the Korean War was pursuant to the United Nations Charter, which has the force of law in the United States. Furthermore, notes Keynes, World War II did not technically terminate until April 1952 so that the initial deployment of troops was valid under war-time statutes (p. 111).

While Indochina far more than Korea did provide an occasion for constitutional testing, Keynes's explanation for this phenomenon is not compelling. Given the Tonkin Gulf Resolution of 1964, a strong case can be made that American involvement in Indochina, unlike Korea, was expressly authorized by Congress until the resolution's repeal in 1971. The reason that Indochina but not Korea provoked such constitutional testing, accordingly, is not immediately obvious. Perhaps the main reason lies in the respeetive lengths of the two conflicts. Had the Indochina War ended as quickly as the Korean War (say, by 1968), it too would not have been the object of such constitutional uproar. Further, unlike Korea, Indochina arose when, as a result of the civil rights movement, the country had become accustomed to constitutional confrontations. That movemcnt rose in force only after Korea ended and peaked just as Indochina was getting well underway, releasing much of its energy to matters of war and peace.

2. The Indoehina conflict unleashed a flood of opinion, scholarship and action on the war powers—in law reviews, books, and the media; in proposed and actual legislation of many sorts, as well as voluminous congressional hearings; in publications of the executive branch; in the verbal positions taken by Presidents and Congressmen on pertinent issues; and, in judicial decisions. Among the ensuing books were T. Eagleton, War and Presidential Power: A Chronicle of Congressional Surrender (1974); L. Henkin, Foreign Affairs and the Constitution (1972); J. Javits, Who Makes War: The President Versus Congress (1973); W. Reveley, War Powers of the President and Congress: Who Holds the Arrows and Olive Branch? (1981); A. Schlesinger, Jr., The Imperial Presidency (1973); A. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins (1976); L. Velvel, Undeclared War and Civil Disobedience: The American System in Crisis (1970). The books unleashed by Indochina continue to emerge. See, e.g., J. Sullivan, The War Powers Resolution: A Special Study of the Committee on Foreign Affairs (1982); A. Thomas & A. Thomas, Jr., The War-Making Powers of the President (1982).

3. Constitutional fundamentalists, of course, say that practice has no legitimate role in constitutional interpretation. It is certainly true that the actual language of the Constitution and, to a lesser extent, the evidence of the Framers' and Ratifiers' purposes for adopting particular provisions, are the primary determinants of what the Constitution means. The actual language of the document has unique standing. Its words alone have been formally drafted and ratified as constitutional law—a status not shared by the Framers' and Ratifiers' comments or by any aspect of subsequent practice, Supreme Court decisions included. It follows that when the war-power provisions of the document do explicitly allocate control between the two branches, the allocation

constitutional text and debates, but also by three additional factors: the hazard, pace, and complexity of America's international relations at any particular time; the respective institutional capabilities of the President and Congress to cope with these changing relations; and the shifting balance of political strength between the two branches.

All of these factors have contributed to the allocation of the war powers between the President and Congress. More important, they will all continue to contribute, barring a radical change in American habits. This does not doom us to wander amid constitutional confusion, obtaining firm direction only from the prevailing political winds. It does suggest that successful constitutional answers must take into account all of the factors: the historical and political, as well as the purely legal.

To what extent does *Undeclared War* further the quest for a satisfactory theory of the war powers? Keynes discusses only in passing the text of many of the Constitution's war-power provisions and the implications that may be drawn from them. He sketches more fully the purposes of the Framers—if not the Ratifiers—by usefully setting out the "philosophical milieu" that shaped the conclusions of the Framers in 1787. The focus of Keynes's book, however, is on one aspect of post-1789 practice: the role of the courts in defining—or declining to define—the respective war powers of the President and Congress. Keynes's treatment of pertinent judicial decisions, especially those spawned by the Indochina conflict, is among the most complete now available.

The nonjudicial aspects of war-power practice, including the history of relations between Congress and the Executive Branch, are largely ignored in *Undeclared War*. Their disregard is serious because, as Keynes laments, judges have been loathe to take cases involving the war powers. Thus, these powers have largely been shaped over the past two centuries by the beliefs and

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must be honored. Accordingly, none doubt that Congress must vote to declare war if America is to declare it. But in most cases, the demands of the Constitution must be interpreted from sources other than the words themselves. We must look beyond the text to decide, for example, which if any hostilities require a declaration of war.

Evidence of the Framers' and Ratifiers' purposes has the first claim to shape whatever meaning is given to uncertainties in the Constitution's provisions. But while the deliberations of 1787–1788 are entitled to deference, they should not mesmerize us. As the Framers of the Constitution were aware, much of their debate reflected problems peculiar to America at that time. See infra notes 12–13. They and others of their generation tend to interpret the Constitution by reading its text in light of experience and the document's underlying principles rather than in terms of the minutiae of their deliberations.

Moreover, the constitutional text has successfully been interpreted in ways contrary to the apparent intentions of its Framers and Ratifiers, even during its early years. For example, a strikingly greater diplomatic role for the Senate was assumed in the 1787–1790 conventions than actually developed during the first generation under the Constitution. It is inescapable that beliefs about what the Constitution's war-power provisions require, as well as the nature of actual allocations of control, have evolved over the past two centuries. It is not true that their evolution has simply been a descent into unconstitutionality. Rather, since 1789 the country has struggled to give concrete meaning to the Constitution's abstract terms, mark the bounds of its competing grants of authority, and fill in its gaps. Along the way we have frequently replaced old expectations about the law and old divisions of raw power with new understandings and arrangements more responsive to the changing circumstances of the country. In short, practice since 1789 does have a role in constitutional interpretation. See generally W. Reveley, supra note 2, at 170–75.

actions of Presidents, members of Congress, Secretaries of State and War (or Defense), other bureaucrats, military and diplomatic officers, and commentators.

The most serious consequence of Keynes's limited, judicial focus is his failure to discuss the only statute purporting to allocate the war powers between the President and Congress: the War Powers Resolution of 1973.[4] The Resolution resulted from a decade of constitutional dispute between the legislative and executive branches, spurred by an explosion in war-power debate and scholarship. As noted below, the Resolution will very likely prove to be the most significant single influence on the development of the war powers since the adoption of the Constitution itself.

II. KEYNES'S ARGUMENT

There are three basic elements to Keynes's argument in *Undeclared War*. First, he suggests that, while the text of the Constitution and its Framers' purposes require prior congressional approval for any *offensive* use of American arms, leaving *defensive* uses to the President's discretion, in modern times the offensive/defensive dichotomy no longer provides a realistic basis for dividing the war powers between the President and Congress. Second, to the extent courts have been willing to do anything at all about the growing executive hegemony over the war powers, judges have usually made the situation worse by creating a "twilight zone of concurrent power" (p. 166).[5] In cases falling within this zone, courts have read imprecise congressional acts—often passed in the wake of executive faits accomplis—as having approved offensive as well as defensive use of force by the President. Third, while courts may be expected to play a limited role in restraining offensive use of force by Presidents—perhaps a greater role after Indochina than before—it remains for Congress to limit executive war-making by insisting on a prior consensus between the executive and the legislative branches about American use of force abroad. Each of these elements bears scrutiny.

A. *The Offensive/Defensive Dichotomy*

As to the first element, Keynes concludes that the Framers gave the commander-in-chief power to the President on the assumption that the President and Congress will perform two separate functions with regard to military activities. Congress can change the nation's condition from peace to war. The President, on the other hand, can repel sudden attacks—be they on U.S. territory or on armed forces abroad—in his capacity as civilian commander in chief. The President may also use the armed forces to protect the lives and property of United States citizens abroad (p. 34). Keynes suggests that by

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4. 50 U.S.C. §§ 1541–1548 (1976 & Supp. V 1981).

5. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("there is a zone of twilight in which [the President] and Congress may have concurrent authority").

giving "defensive" powers to the President, it was intended that his authority in this domain be exclusive. "While Congress has broad power to curb presidential warmaking, the legislature cannot constitutionally limit the President's defensive power" (p. 165).

In all likelihood, however, Keynes has overstated the discretion that the Framers and Ratifiers intended for the President. The "fundamental distinction between offensive and defensive war and hostilities" (p. 34), on which Keynes relies is largely a construct of post-1789 practice, not of the original understanding. Far more than the Framers and Ratifiers, it is post-1789 usage that suggests the President "has the exclusive constitutional authority to defend U.S. citizens, territory, troops, and property against sudden attack or when the threat of attack is imminent" (p. 88). Neither the 1787–1788 debates nor the text of the Constitution itself reveals such sweeping executive prerogative.

The debates do indicate that the Framers envisaged the use of armed force without a formal declaration of war, but not, unless the nation were suddenly attacked, without prior authorization by majority vote of the House and Senate. The Framers and Ratifiers understood the distinction between limited use of armed force in discrete contexts and unrestricted general hostilities, and intended to provide for both contingencies in the Constitution. They were aware that most eighteenth-century conflicts had not been formally declared and that political theorists distinguished between general and limited conflict, with marque and reprisal explicitly recognized as a means of waging the latter. Defensive or retaliatory uses of force, the sorts expected for America in 1787–1788, tended in that era to be limited, undeclared engagements. In addition, the word "declare" was loosely employed by the Framers in ways equating it with "begin" or "authorize." Use of the term suggests that the Framers expected a more active role for Congress than Keynes recognizes. The Framers' grant of authority to Congress to declare war and issue letters of marque and reprisal almost certainly was intended to convey control over all involvement of American forces in combat whether for defensive or offensive purposes, except in response to sudden attack.[6]

Even then, the text of the Constitution suggests that the Framers expected the states to bear the major burden of defense against sudden attack until Congress could act.[7] The only evidence of equivalent authority for the President must be gleaned from a brief, confused Philadelphia debate—less than two pages in Madison's notes—which ended with the substitution of "declare" for "make" in the clause delineating Congress's war power.[8] The discussion meandered and the nature of crucial votes remains obscure; but it is

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6. See generally W. Reveley, supra note 2, at 51–115.

7. Although the states may engage "without the Consent of Congress . . . in War . . . [if] actually invaded, or in such imminent Danger as will not admit of delay," U.S. Const. art. 1, § 10, cl.3, there is no equivalent constitutional provision authorizing presidential response to either ongoing or imminent attack.

8. See 2 Records of the Federal Convention of 1787, at 318 (M. Farrand ed. 1911); see also W. Reveley, supra note 2, at 64, 81–85, 101–02.

not likely that the substitution signaled much gain in executive prerogative in the minds of the Framers. George Mason voted for the substitution despite his phobia about presidential power, and the change later was ratified without objection by any of the most virulent foes of executive power.

The substitution may have been designed simply to prevent Congress from asserting control over the conduct, as well as the initiation, of conflict. Even if, as seems more probable, the change was intended to authorize emergency military action by the President, no mention was made of any power on his part to defend the nation against imminent as opposed to ongoing attack, much less of power to defend anything abroad—such as U.S. citizens and property in other countries. Thus, in the light most favorable to presidential prerogative, the Framers' substitution of "declare" for "make" permits executive response to ongoing physical attack on American territory and may also allow preemptive strikes by the President against impending attack, until Congress can decide whether to pursue the hostilities.

The commander-in-chief clause, in turn, received little attention from the Framers and Ratifiers.[9] It was viewed as a modest grant of authority. Hamilton's limited "first general and admiral" interpretation reflected the consensus.[10] During hostilities the President would set strategy and tactics, and his authority would inevitably grow during a military crisis. But he would not commit America to hostilities except by signing authorizing legislation, and he would not make peace except as a participant with the Senate in the treaty process. Those who fought the commander-in-chief clause did so out of fear that the President would turn the army to treason at home. The Federalists responded by citing the need for a single commander during war (a lesson learned from the Revolution) and the danger of placing it in an ambitious general rather than a civil officer with a fixed tenure. They said that only the rare President would personally command the troops, and that there would be no armies, navies, or militia for him to lead unless Congress so provided. No one suggested that the President would have an unlimited prerogative to use force so long as it was used for defensive ends. The declare-war and commander-in-chief clauses passed with little debate because they left Congress with authority over whether the American military would be used. Other than the President's participation in legislating military policy, his only role was to execute it.

Having found an offensive/defensive dichotomy in the original understanding, Keynes then argues that the twentieth century has undone it. Changes in the technology of warfare, he notes, have eliminated any coherent distinction between the "offensive" and "defensive" use of military force. He cites as examples the deployment of U.S. intermediate range missiles in Turkey and the stationing of Soviet combat troops in Cuba. Should these be considered offensive or defensive measures? For that matter, he asks, is a preemptive nuclear first strike a defensive or an offensive act (p. 3)?[11]

9. See W. Reveley, supra note 2, at 64-65, 75, 77, 80, 82-84, 88-90, 97, 100, 102-06.

10. The Federalist No. 69, at 418 (A. Hamilton) (C. Rossiter ed. 1961).

11. See also pp. 40, 88-89.

But for reasons already noted, the distinction between offensive and defensive uses of force did not figure heavily in how the Framers and Ratifiers anticipated the war powers would be divided between Congress and the President. The source of the constitutional tension between the executive and legislative branches over the war powers lies not in the dawn of a new era, as Keynes maintains. Rather, the difficulty in developing a satisfactory theory of the war powers arose when the Framers' and Ratifiers' basic expectation—that there would be prior congressional approval of all American use of force except under the very limited circumstances of sudden attack—proved to be unrealistic almost from the moment government began under the Constitution.[12] President Washington with the Indians, Jefferson with the Barbary States, Madison and Monroe as they sought to take Florida from Spain, Polk in pursuing manifest destiny at Mexico's expense, and Lincoln blockading and raising troops against the South—in fact almost all Presidents from 1789 on—have used force offensively, as well as defensively, without prior congressional approval.

Nor was the line between defensive and offensive action much more easily drawn in the nineteenth century than today. In each of the instances just mentioned, Americans disagreed about where to mark the boundary, just as they now differ over how to categorize "deployment of U.S. intermediate-range missiles in Turkey or the stationing of Soviet combat troops in Cuba" (p. 3).[13]

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12. The Framers' unrealistic view of prior approval fits within a larger context of related but equally ephemeral views: that peace and noninvolvement with the rest of the world would be America's customary condition; that the hazard, pace, and complexity of international affairs would remain as they were in 1787–1788, along with the country's virtually nonexistent capacity and need to work its will abroad; that treaties would prove to be the heart of American foreign relations; that the Senate could keep step with the President in diplomacy; that the regular military would not achieve its present size and stand during peace, little restrained by the need for Congress to raise and support it; and that the loyalty of naturalized citizens, the navigation of the Mississippi, and other compelling issues of the late eighteenth century would be indicative of the country's enduring security concerns.

13. But while the war powers do not raise new constitutional issues today, they do present issues of wholly new dimensions that—because of the changes in the international system and the conduct of warfare to which Keynes refers—have unprecedented gravity.

During the first generation under the Constitution, the country suffered the trials of a small, weak nation caught up, if at a distance, in the wars of the prevailing superpowers. The country, nonetheless, was shielded by geography, the limited military technology of its potential foes, the inability of America to intervene abroad, and its slight economic interdependence with other nations. During most of the nineteenth century, America was even further sheltered by the rise of a European balance of power for which it had no direct responsibility.

During the last three decades, the circumstances have changed. The purely physical ability of postwar America to commit its military abroad in large or small numbers, swiftly or slowly, for days or years, vastly exceeds the country's capacity before 1941. America's willingness to intervene abroad also stands in radical contrast to a previous tradition of nouinvolvement except to trade, defend American citizens and property abroad, expand our boundaries, and police the Caribbean. Coupled with this new capacity and will to use force abroad are consequences of intervention that defy prediction and risk catastrophe more than ever before. Even the time when weak states could be roughly handled with little risk of violating international law and political sensibilities has passed. The American military can no longer punish with relative impunity "backward" peoples who have attacked our citizens and property, or pursue criminals across the borders of weak states, or occupy and administer Caribbean countries. See W. Reveley, supra note 2, at 12–13, 165–66, 177, 184–85, 265, 348 n.66.

B. *Judicial Failure to Police the War Powers*

The second major theme of Keynes's argument is that the judiciary's treatment of the war powers has served only to confuse and distort the basic issues. Especially since the Civil War, according to Keynes, the judiciary has allowed Congress and the President to fuse their constitutionally distinct authority into a single war power. That power, in turn, has been exercised by the commander in chief with few limitations. This situation has evolved under a theory of "joint participation," developed by judges and commentators, which, Keynes says, unjustifiably allows Congress to transfer power to initiate military hostilities to the President.[14]

Keynes is correct that the courts have done a poor job of policing the war powers. Usually they have declined to take the job at all. When judges have acted, often they have wrung congressional approval for presidential initiatives out of legislative activity, or inactivity, that fell far short of express authorization of American use of force (pp. 101-09, 120-60).[15]

Nonetheless, the result does not deserve Keynes's grim judgment that "the judiciary has encouraged the legislature and the executive to fuse their separate powers of war and defense into a national war power whose only standard is the extraconstitutional one of success on the battlefield" (p. 167). First, the judiciary has had relatively little to do with the process. Second, those people and institutions that have been heavily involved in it have not done nearly the bad job that Keynes suggests. The "practice of presidential military *fait accompli*" (p. 167) did not begin, as Keynes argues, with the Civil War (although no prior or subsequent President has matched Lincoln's unilateral acts in 1861).[16] Starting with George Washington, Presidents began using the military on their own initiative, some more than others and with varying degrees of congressional ratification.[17] As stated previously, the Framers' and Ratifiers' expectation that Congress would authorize in advance all use of force by this country, except in response to sudden attack, proved unrealistic from the outset.

Thus, the country has been working since 1789 toward a satisfactory theory of the war powers. The process has not simply involved Congress, the courts, and the public supine before rising presidential prerogative over American war and peace.[18] The legislators have been the driving influence behind certain decisions to fight. Some Presidents have sought prior congressional approval, been denied it, and foresworn armed action.[19] On other occasions executives or their subordinates have begun a use of force only to end it when

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14. "Congress cannot prospectively or retroactively authorize the President to choose the enemy, the time and the place of military hostilities" (p. 167).

15. See also W. Reveley, supra note 1, at 11, 140, 148-49, 212-15, 345-46 nn.33-34.

16. In the early months of his Presidency, Lincoln increased the size of the Army and the Navy, called out the militia, summoned volunteers, paid money from the Treasury to private parties to further the war effort, and blockaded confederate ports—all while Congress was out of session. When Congress finally met, it ratified the President's actions. Id. at 125-26.

17. See id. at 121-30, 135-61.

18. See id. at 121-31.

19. Id. at 121.

Congress refused to vote ratification or vital implementing tools.[20] On yet other occasions Presidents have been permitted to go forward subject to congressional constraints, for instance, as to geography or type of force.[21] Presidents, too, have at times declined even to attempt military acton in the face of anticipated congressional opposition.[22] Far more often, of course, majorities in the Senate and House have affirmatively agreed with the President on how force should be used; sometimes the resulting congressional acceptance of executive policy has been the product of genuine interchange between the two branches, and sometimes Congress has acquiesced in presidential initiatives.[23] Then, too, some presidential actions, if ever blessed by Congress, were blessed because the circumstances left no other acceptable option.[24]

Various constitutional standards can be drawn from the interplay that has occurred since 1789. The precise nature of these standards—their definition of a satisfactory theory of the war powers—remains a matter of disagreement among reasonable people. But the state of the art has advanced significantly in recent years, and there is reason to believe that the outline of an emerging constitutional consensus was drawn in the War Powers Resolution of 1973[25] despite presidential objection to certain of its terms. That incipient consensus, stated in broad terms that do not necessarily mirror those of the Resolution, (1) leaves to the President the discretion to begin military action that he thinks in the national interest, so long as he promptly reports the use of force to Congress, but thereafter (2) requires express congressional authorization to continue the military action beyond a few months, and (3) urges the President at all times to consult closely with Congress on matters of war and peace.[26] Element (1) takes most of its constitutional justification from practice since 1789, while elements (2) and (3) are more directly drawn from the actual language of the Constitution and the expectations of its Framers and Ratifiers.

C. *Proposed Congressional Role*

Against this background comes the last of Keynes's central themes. He concludes that since the judiciary has proved to be particularly tolerant of the

20. Id. at 122.
21. Id.
22. Id. at 122-23.
23. Id. at 124.
24. See supra note 16.
25. 50 U.S.C. §§ 1541-1548 (1976 & Supp. V 1981).
26. Arguably, there is a fourth element as well: an understanding that majorities in the Senate and House, via a concurrent resolution, may vote limits on, or an end to, a presidential military initiative at any time during its conduct. The legal force of such a "legislative veto" is doubtful, however, after the Supreme Court's holdings that such vetoes in other contexts are unconstitutional. See INS v. Chadha, 103 S. Ct. 2764 (1983); Process Gas Consumers Group v. Consumers Energy Council of America, 103 S. Ct. 3556 (mem), aff'g Consumer Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982); United States Senate v. FTC, 103 S. Ct. 3556 (1983) (mem), aff'g Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982). Dissenting in *Chadha*, Justice White warned: "Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'" 103 S. Ct. at 2792.

exercise of executive power, opponents of presidential warmaking must look to Congress for relief (p. 175). He suggests, however, that "the concept of an indivisible national war power permits the President to suspend the separation of powers as long as Congress concurs in his decisions" (p. 169). Yet if Congress loses confidence in the President's military policy, Keynes fears that it will have to "mobilize a two-thirds majority to override the commander in chief's actions" (id.). Failing that, Congress's only other remedy is impeachment and removal (p. 170).

Keynes is concerned that Congress may not be equal to the task. His concern, however, largely ignores the War Powers Resolution of 1973. He mentions it only twice in the last pages of his book.[27] Yet the act appears to be directly on point. In unprecedented fashion, it sets out procedures for how the President and legislators are to go about deciding whether to use force, and it constitutes the best chance Congress has had since 1789 for guaranteed opportunities to participate in deciding whether America uses force if the combat lasts more than forty-eight hours. Thus, though largely overlooked by Keynes, the Resolution accomplishes many of the goals he endorses. It does permit "opponents of presidential warmaking" to focus realistically "on Congress rather than the Federal courts" (p. 175). While the act does not deny the President quick, surgical applications of armed force, it makes clear, as Keynes strongly urges, that "explicit legislative authorization" is required for any long-term commitment of American forces to hostilities, thus assuring that "the nation [will] not wage a long, protracted, undeclared war without fundamental prior agreement between Congress and the President" (p. 175). It also avoids the possibility that Congress must mobilize a two-thirds majority to override the commander in chief's actions (p. 169). Under the Resolution, an executive initiative ends (a) within sixty to ninety days unless a majority of Congress votes expressly to authorize its continuance, or (b) at any other time that Congress legislatively vetoes the initiative.[28]

Admittedly, however, the Supreme Court's decision last Term in *INS v. Chadha*[29] cast serious doubt on the constitutionality of all legislative vetoes, including the one created by section 5(c) of the War Powers Resolution:

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27. In the first passage (p.171), Keynes implies that a case involving the war powers might arise outside the context of the Resolution. That is unlikely given its structure: the President must report to Congress his use of force within 48 hours of its initiation, and he must then (a) end the use within 60 to 90 days unless Congress expressly authorizes its continuance, or (b) limit or end it whenever so directed by majority votes in the House and Senate. But see supra note 26.

Keynes's fear that courts might find "some procedural rationale" for refusing to hear the case (p. 173) seems unwarranted. If asked, courts will probably construe the constitutionality of the War Powers Resolution and, assuming it has been found constitutional, then decide whether there has or has not been compliance with its pertinent provisions. Federal courts are not prone to avoid cases brought squarely under federal statutes. They have also become somewhat more willing in recent years to consider cases involving the basic prerogatives of the President and Congress. See, e.g., United States v. Nixon, 418 U.S. 683, 703-05 (1974); see also W. Reveley, supra note 2, at 209-12, 216-17, 242, 262.

28. But see supra note 26; infra text accompanying notes 29-30.

29. 103 S. Ct. 2764 (1983).

> [A]t any time that United States Armed Forces are engaged in hostilities outside the territory of the United States . . . without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.[30]

It follows that section 5(c) probably would not survive a dose of *Chadha*'s rationale.

On the other hand, it is interesting to speculate what the Court might have done had the constitutionality of a legislative veto first been questioned in the context of the War Powers Resolution. Viscerally, the *Chadha* facts were especially compelling—a twelfth-hour, drumhead vote by one house of Congress to expel a benign alien from this country, despite the executive branch's protestations that he deserved to stay.[31] These facts invited the discovery of constitutional flaws in the expulsion procedure. Quite to the contrary, a likely set of war-power facts would place Congress, not the President, in the more sympathetic light; a typical war-power context would involve a considered vote by both houses of Congress to limit or stop use of American armed force abroad, one begun by the President acting solely on his own authority.

Moreover, Justices White, Powell and Rehnquist took varied but serious exception to the *Chadha* majority's reasoning. The arguments of these three Justices—plus the absence in *Chadha* of any explicit indication that the majority meant to overturn section 5(c) of the War Powers Resolution—could provide the basis for the Court some years hence to sustain a legislative veto in the war-power context.[32]

In any event, Congress will very likely keep section 5(c) on the books to use if the need arises. At worst, the result will be a quick judicial ruling that *Chadha* did kill section 5(c). But even if the Court so ruled, it would remain likely as a practical matter that majorities in both houses who are willing to try to end an executive military action by using section 5(c) will also be willing to curb the executive branch by other means as well, for example, by condition-

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30. 50 U.S.C. § 1544(c) (Supp. V 1981).

31. See *Chadha*, 103 S. Ct. at 2770–72. But it should be noted that the Court has summarily affirmed cases striking down legislative vetoes in less viscerally troublesome cases. See supra note 26.

32. "Perhaps I am wrong," wrote Justice White, "and the Court remains open to consider whether certain forms of the legislative veto are reconcilable with the Article I requirements." *Chadha*, 103 S. Ct. at 2796 n.11 (White, J., dissenting). The two most significant figures in the passage of the War Powers Resolution, former Senator Javits and Congressman Zablocki, feel that the act has not been severely harmed by *Chadha*, if at all. See 129 Cong. Rec. S10680 (daily ed. July 22, 1983) (article by Sen. Javits); id. at E3166 (daily ed. June 23, 1983) (remarks of Rep. Zablocki).

On the other hand, Congress's claim to set American policy on aliens is exceptionally strong. See *Chadha*, 103 S. Ct. at 2804–06 (White, J., dissenting). Congress, with executive aquiescence, has historically exercised far more control over aliens than over the use of our military abroad. It may follow that, if a legislative veto is unconstitutional in so clear an area of congressional prerogative as the treatment of aliens, then such a veto would be even more suspect in the more ambiguous area of congressional prerogative over U.S. military intervention abroad.

ing or denying military appropriations,[33] selective service acts and the like, or even by threatening to impeach the Chief Executive. As a glue for holding such majorities together and as a spur for them to restrain the President by cutting appropriations, it would be hard to find anything more effective than a presidential refusal to honor a concurrent resolution passed under section 5(c). His disregard of the sentiment so expressed by both houses, and the implicit challenge to congressional authority, would very likely have a galvanizing effect.

Further, even though section 5(c) may not survive *Chadha*, the rest of the War Powers Resolution almost surely does since section 9 of the Resolution expressly provides for severability.[34] The remaining elements of the Resolution include section 3's presidential consultation obligations, section 4's presidential reporting duties, and section 5(b)'s provision for ending any executive use of force within sixty to ninety days unless approved by Congress prior to the deadline. Provisions expediting congressional consideration of war-power issues also remain largely unaffected. These sections constitute by themselves—wholly without the legislative veto—an assertion of congressional control over American war and peace unprecedented since the framing and ratifying of the Constitution; they provide a powerful vehicle for congressional involvement in shaping American policy. In sum, the War Powers Resolution remains alive and well after *Chadha*.

Just as before *Chadha*, however, the extent to which the Resolution actually results in heightened congressional involvement in American decisions to use force abroad will depend largely on congressional willingness to use the Resolution's procedures and then encourage the President—quite vigorously at times—to do so as well. Having enacted the Resolution over President Nixon's veto and despite his insistence that it was unconstitutional in part, Congress has since done little to persuade Presidents to do more than meet the act's mimimal reporting requirements. Its consultation requirements in particular have gone unobserved, and Congress lost a singular opportunity in April 1975 to give the Resolution substance when the legislators, despite President Ford's invitation, failed to participate in shaping the Saigon evacuation.[35]

Nonetheless, Presidents Ford, Carter, and Reagan have all reported to Congress under the Resolution. It has been on the books for ten years and has gained the stature that age provides. Sometimes, as here, particular relations between Congress and the President can be altered by legislative fiat, responsive to beliefs about what the Constitution requires. These relations can then shape the future play of politics. Through war-power legislation the President

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33. Congress forced an end to American involvement in the Indochina War in this fashion. See W. Reveley, supra note 2, at 122, 226.

34. 50 U.S.C. § 1548 (1976). The statute in *Chadha* was also found severable. 103 S. Ct. at 2774–76. But see the severability views of Justices White and Rehnquist, 103 S. Ct. at 2798 n.16 (White, J., dissenting), 2816–17 (Rehnquist, J., dissenting).

35. See W. Reveley, supra note 2, at 250–53, 261–62.

has been encouraged to inform Congress in detail of his initiatives for war or peace. The legislators have been similarly encouraged to state their views because the act provides them with unavoidable occasions for so doing. And both branches may well be driven to build broader collaborative bridges to one another by the executive's need to report and Congress's need to assume responsibility.

On September 29, 1983, for the first time since the War Powers Resolution became law, Congress actually invoked it, authorizing the continuation of the President's use of armed force in Lebanon, but imposing an eighteen-month deadline on the action.[36] Though questioning the authority of Congress to limit the commander in chief, President Reagan signed the legislation.[37]

III. Conclusion

Keynes's *Undeclared War* has contributed to this country's continuing search for a satisfactory theory of the war powers. Its contribution is greatest in Keynes's review of the role of the courts in developing these powers. The book's contribution could have been greater, however, had it considered more thoroughly the nonjudicial aspects of that development. These aspects dominate and, among them, the War Powers Resolution of 1973 is now particularly telling.

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36. 129 Cong. Rec. 7724–27 (daily ed. Sept. 29, 1983). See generally N.Y. Times, Sept. 30, 1983, at A1, col. 6.

37. N.Y. Times, Oct. 13, 1983, at A1, col. 1.