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The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power

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The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power

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|-------|--|----|
| I. | ARTHUR B. CULVAHOUSE, JR. | 18 |
| II. | WILLIAM BRADFORD REYNOLDS | 19 |
| III. | WILLIAM VAN ALSTYNE | 25 |
| IV. | CHARLES BENNETT | 29 |
| V. | GEOFFREY P. MILLER | 31 |
| VI. | REBUTTAL STATEMENTS | 35 |
| | A. <i>William Bradford Reynolds</i> | 35 |
| | B. <i>William Van Alstyne</i> | 36 |
| | C. <i>Charles Bennett</i> | 39 |
| | D. <i>Geoffrey P. Miller</i> | 41 |
| VII. | QUESTIONS AND ANSWERS | 42 |
| VIII. | ADDITIONAL WRITTEN COMMENT BY WILLIAM VAN ALSTYNE: IN A REPUBLIC AND UNDER A CONSTITUTION SUCH AS OURS, IT IS FOR CONGRESS TO SAY HOW THE ARMED FORCES SHALL BE USED. | 47 |
| | A. <i>Introduction</i> | 47 |
| | B. <i>A Review of the Hypothetical Variations on the War Powers Resolution: Congressional Power and the Uses of the Armed Forces of the United States</i> | 50 |

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- C. *A Postscript Review of the First Principal Case: Who Determines How the Armed Forces Shall and Shall Not Be Used?*..... 53

I. ARTHUR B. CULVAHOUSE, JR.

We will be discussing the President's power as Commander-in-Chief under Article II of the Constitution, versus Congress' War and Appropriations powers under Article I. This is a topic of great moment. It is of particularly great moment to me because of the *Stark* incident on May 17, 1987. As Counsel to the President, I have convened countless meetings of what we call our "War Powers Committee," consisting of senior administration lawyers, and including some of the speakers you will be hearing on later panels.

The Reagan administration is grappling with the thorny constitutional and political issues arising under the War Powers Resolution.¹ At the same time, over 110 members of Congress—not including Congressman Bennett, I believe—have sued the President, asserting that he has failed to comply with the War Powers Resolution. That case is currently being litigated, primarily on standing and justiciability grounds, in the United States District Court for the District of Columbia.²

Congress—the Senate probably more than the House—is grappling with the war powers issue in the context of the Persian Gulf. Senators Byrd, Weicker, Warner, and Congressman Solarz, have all made proposals to resolve this crisis. The debate over which branch wields the "War Powers" is more fundamental than our fifteen years of experience with the War Powers Resolution. It has ebbed and flowed over the 200 years since the Constitutional Convention.

I will try to summarize in brief form what, hopefully, are all the relevant constitutional provisions that will be discussed today. To begin with the constitutional provisions relating to Congress, article I, section 1 of the Constitution vests the legislative power in Congress.³ Section 8 of article I states that Congress shall have the power to

1. 50 U.S.C. §§ 1541-1548 (1982 & Supp. IV 1986).

2. *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987). In *Lowry*, 110 members of the House of Representatives contended that the reporting requirements of the War Powers Resolution had been triggered by the initiation of United States escort operations in the Persian Gulf on July 22, 1987 and by the United States naval attack on September 21, 1987 on an Iranian Navy ship laying mines in the Gulf. *Id.* at 334. The plaintiffs petitioned the United States District Court for the District of Columbia to have the court declare that the President was required to submit a report concerning the continued use of the armed forces in the Persian Gulf. *Id.* The court declined jurisdiction under the constraints of equitable discretion and the political question doctrine. *Id.* at 341.

3. U.S. CONST. art. I, § 1.

declare war,⁴ to raise and support Armies,⁵ to provide and maintain a Navy,⁶ and to make rules for the government and regulation of the land and naval forces.⁷ Section 9 of article I provides that no money shall be drawn from the Treasury but in consequence of appropriations made by law.⁸

With respect to the President, his article II powers include the executive powers, fundamentally vested in his office by section 1 of article II.⁹ Section 2 of article II provides that the President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states.¹⁰ Finally, with respect to the United States, section 4 of article IV provides that the United States shall guarantee to every state in the Union a republican form of government, and that the United States shall protect each state against invasion.¹¹

II. WILLIAM BRADFORD REYNOLDS

I will try to provide somewhat of an overview of what is probably the crucial issue underlying this whole discussion: the relationship between Congress and the Executive, and their respective approaches in the area of foreign affairs. As the sun sets on 1987, it can now be regarded as a year almost unprecedented in its degree of constitutional controversy. The Iran-Contra investigation, the dispute over the interpretation of the ABM Treaty, the debate over the use of American forces in the Persian Gulf, the confirmation fight over Judge Bork, and other dramatic developments of recent months have dominated the spotlight. Taken together, they provide a vivid reminder that today—200 years after our great charter—the Constitution, was signed and submitted to the several states for ratification, the division of powers among the branches of the national government, in many respects, bears little resemblance to that which the Framers intended.

If James Madison were awakened today from nearly two centuries of rest, he would no doubt be taken aback by the awesome growth in the powers of the judiciary—supposedly the “least dangerous”

4. U.S. CONST. art. I, § 8, cl. 11.

5. U.S. CONST. art. I, § 8, cl. 12.

6. U.S. CONST. art. I, § 8, cl. 13.

7. U.S. CONST. art. I, § 8, cl. 14.

8. U.S. CONST. art. I, § 9, cl. 7.

9. U.S. CONST. art. II, § 1, cl. 1.

10. U.S. CONST. art. II, § 2, cl. 1.

11. U.S. CONST. art. IV, § 4.

branch of the government.¹² In contrast, in assessing the legislative branch's persistent encroachment upon the powers and prerogatives of the Executive, he would surely be the first to say, "I told you so."

In our time it is fashionable in some quarters to refer to the "Imperial Presidency," while largely ignoring the transgressions of the often far more imperious Congress. Likewise, in Madison's time the popular sentiment was vigorously inclined against a king-like President, with far less concern directed toward the dangers that were posed by an overweening legislature. For Madison, however, that concern was misplaced, for he viewed Congress as the most dangerous branch. His warnings ring almost prophetic when one examines them in light of the legislative branch's current arrogation of powers in foreign affairs, judicial selection, and indeed, in nearly every quarter of governmental activity.

Commenting upon the experiences of the fledgling American state governments, Madison wrote that "[t]he legislative department [was] everywhere extending the sphere of its activity and drawing all powers into its impetuous vortex."¹³ Madison viewed the legislative branch as more threatening than the other branches of the proposed federal government because of the difficulty inherent in clearly defining the limits of its powers. He thus concluded: "[I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousies and exhaust all their precautions."¹⁴ The experience of 200 years, and particularly our own recent experience, gives us the hindsight to appreciate how wonderfully prescient this warning was. That the Legislature has earned the distinction of being the most dangerous branch may well surprise some in this group [the Federalist Society], which has devoted much of its energy to exposing and criticizing the arrogation of policymaking powers by the judicial branch. I am, nonetheless, not altogether sure that the surprise is warranted.

As I have stated on other occasions, self-aggrandizement is only partially responsible for the growth in judicial power that we have seen over the years. To be sure, the propensity of many judges towards activism is a source of much mischief. But the elective branches, especially Congress, have encouraged this usurpation of their powers by carelessly—more often intentionally—allowing important issues to go unaddressed in the legislative and administra-

12. THE FEDERALIST NO. 78, at 465 (A. Hamilton) (G. Carey & W. Kendall ed. 1966).

13. THE FEDERALIST NO. 48, at 309 (J. Madison) (G. Carey & W. Kendall ed. 1966).

14. *Id.*

tive processes. The result is that the courts are left with the task of filling the policymaking vacuum.

With all due respect to Congressman Bennett, at whom the following observations are not directed, members of Congress, by and large, appear to have become bored and disinterested with the often tedious task of legislating. Many members find their longevity in office aided considerably by ducking the tough and controversial decisions that would be required in any conscientious performance of legislative responsibility. They choose instead to strike a comfortable compromise that is calculated neither to offend, nor satisfy, anyone. The courts are thus invited, indeed expected, to sort out the irreconcilable differences, as the judges see fit. In this context, the expansion of judicial power should not be seen solely in terms of a power grab by judges, but equally as a redistribution of power impelled by Congress. It is not an isolated development, but rather, part of a pattern that has served to seriously erode the allocation of powers among the branches of government as well as among the checks and balances that attend that allocation.

At the same time that Congress has become listless when it comes to legislating, it has become far too infatuated with oversight. Having in large measure relieved itself of the burden of painstakingly writing the people's wishes into law, the legislative branch has turned to second-guessing virtually every decision of the executive branch. In some instances, the legislative branch has even argued that the Executive's decision is really Congress' to make. Many individual members of Congress appear to have become enamored with posturing as Secretary of State or Defense, as Attorney General, and even as Supreme Court Justice. What is most unsettling is that some seem to take themselves seriously. Thus, everything from military deployment, intelligence gathering activities, and international negotiations, to law enforcement, judicial selection, and administration of domestic programs has come under hyperintensive congressional scrutiny.

More often than not these days, this legislative oversight activity has little or no nexus to the legitimate performance by Congress of its constitutionally mandated legislative function, or as in the case of the Senate, its more modest advice and consent function.¹⁵ This preoccupation with oversight has the perverse consequence of affording expo-

15. Article II of the Constitution provides in part:

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments

sure without accountability, a combination seemingly in great demand in this era of slick media images and special interest pressures. Equally disquieting, it provides for many an aura of heightened congressional activity when there is actually nothing very constructive going on. Increasingly, the task of running the House and Senate has been handed off to youthful and inexperienced staff members, who comprise the fastest growing bureaucracy in Washington.

The effect of this development on the separation of powers and on the ability of the executive branch to carry out its constitutional functions has, of course, been dramatic. Congressional inquisitions in recent years have often run roughshod over executive privilege by forcing such comprehensive and miniscule disclosures of every scrap of paper generated, no matter how irrelevant. As a result, the internal discussions and deliberations of the executive branch, vital for effective administration, suffer mightily. This phenomenon is by no means limited to foreign policy. In the context of foreign policy, however, the problem is magnified severalfold by the concern that internal conversations and memoranda may be turned to advantage not only by domestic political opponents but by foreign adversaries as well. The demonstrated inability of congressional committees to preserve the confidentiality of such communications—and to keep secrets generally—compounds the problem immeasurably.

We also have seen, since the Vietnam experience, an increasingly assertive Congress intrude broadly into the execution of American foreign policy by purporting to interpret, and even redefine, treaties and through its passage of such legislation as the Ethics in Government Act,¹⁶ which tends to criminalize interbranch disputes. Congress, of course, does have a legitimate and important role to play in foreign affairs through its proper use of the appropriation power, its power to determine whether to declare war, and its power to advise and consent to treaties. The recent story, however, is less one of a congenial sharing of constitutional powers than of a determined encroachment upon the powers of the executive branch in the interna-

are not herein otherwise provided for, and which shall be established by Law

U.S. CONST. art II, § 2, cl. 2.

16. Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 601-602, 92 Stat. 1824, 1867-74 (codified as amended at 28 U.S.C. §§ 49, 591-598 (1982 & Supp. III 1985)) (providing for the appointment of independent counsels by a court of law to investigate allegations of criminal misconduct committed by certain high level executive officers). Congress has recently renewed the independent counsel provisions of the Act, with amendments, for a period of five years. Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191, 101 Stat. 1293 (to be codified at 28 U.S.C. §§ 591-599.). See *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (sustaining the constitutionality of the use of the independent counsel.).

tional field. This encroachment has taken its toll on American efficacy and prestige abroad, as well as on the bipartisan spirit that long attended foreign policy matters at home.

The framers understood the transcendent importance of national unity in foreign relations, hence Madison's declaration that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."¹⁷ The need for unity in such matters, as well as the capacity for swift and decisive action, counseled not only the creation of a strong national government, but also the vesting of executive authority in a single leader. Referring to the President's role in the conduct of negotiations with foreign powers, John Jay wrote:

They who have turned their attention to the affairs of men must have perceived that there are tides in them; tides very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs is the business of those who preside over them; and they who have had much experience on this head inform us that there frequently are occasions when days, nay, even when hours, are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstances intervening to change the present posture and aspect of affairs may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in capacity to improve them.¹⁸

In defending the validity of President Washington's Neutrality Proclamation of 1793,¹⁹ Hamilton argued that full responsibility for the direction of foreign policy was within the general grant of executive power to the President under article II of the Constitution. Six years later, then-Congressman John Marshall echoed Hamilton's argument when he stated, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign

17. THE FEDERALIST NO. 42, at 264 (J. Madison) (G. Carey & W. Kendall ed. 1966).

18. THE FEDERALIST NO. 64, at 393 (J. Jay) (G. Carey & W. Kendall ed. 1966).

19. In December 1793, President George Washington proclaimed that the United States would remain neutral in the war between France and Great Britain, Austria, Prussia, Sardinia, and the Netherlands. 1 AMERICAN STATE PAPERS 140 (M. Clarke & W. Lowrie ed. 1832). Thomas Jefferson, Washington's Secretary of State, had argued that a presidential proclamation of neutrality would usurp Congress' constitutional power to declare war. In contrast, Alexander Hamilton, Washington's Secretary of the Treasury, had argued that such a proclamation was merely an executive act within the President's constitutional powers. See E. CORWIN, THE PRESIDENT: OFFICE & POWERS, 1787-1984, at 208-10 (R. Bland, T. Hindson, J. Peltason, 5th rev. ed. 1984); C. THOMAS, AMERICAN NEUTRALITY IN 1793, at 36-39 (1967).

nations."²⁰ In 1936, Justice Sutherland's opinion for the majority in *United States v. Curtiss-Wright Export Corp.*²¹ referred 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."²²

While the breadth of the general executive power over foreign relations is properly subject to continuing debate, the grant of authority to the President as Commander-in-Chief, and the distinction made by the Framers in substituting the phrase "declare war" for "make war" in the delineation of Congress' powers, fortify a broad interpretation of the scope of presidential authority. This has been the dominant view throughout our history, up until the last two decades.

As of 1970, American Presidents have dispatched troops or sent significant arms abroad 199 times, but in only five of those instances did Congress declare war, and in only 62 of them was there any Congressional consent given by specific appropriation, resolution, or treaty. On 137 occasions, the President acted without any congressional approval at all. Such activity, of course, has continued under the three most recent Presidents with the *Mayaguez* rescue, the aborted hostage rescue mission in Iran, the liberation of Grenada, the air raid on Libya, and the current naval operations in the Persian Gulf. Similarly, there have been only 1,000 formal treaties in our history, but well over 4,000 executive agreements with foreign governments.

As Congress has moved of late to assert authority in these areas, it has done so circuitously, and in ways that are constitutionally suspect. For example, rather than simply exercising its power to cut off funding for military operations it does not support, thereby joining the issue in circumstances affording accountability, Congress has taken refuge in the War Powers Resolution, which contains a highly questionable feature requiring automatic termination of any use of American armed forces in the event of a congressional stalemate exceeding sixty days.²³

20. 10 ANNALS OF CONGRESS 613 (1800).

21. 299 U.S. 304 (1936).

22. *Id.* at 320.

23. The War Powers Resolution provides that within sixty calendar days after the President submits, or is required to submit, a report detailing the deployment of troops in the absence of a declaration of war, whichever is earlier, the President is required to do the following:

[T]he President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day

In the nightmarish case of the Boland amendment,²⁴ Congress addressed the critical issue of American aid to the Nicaraguan freedom fighters in an ambiguous amendment to a massive continuing resolution. Congress then responded to the inevitable questions of interpretation by holding high profile public hearings, that more meaningfully illuminated our adversaries than ourselves. As the old saying goes, this is no way to run a railroad.

The proper resolution of the apparent conflict in the allocation of war and foreign policy-related powers between the executive and legislative branches has been, and is sure to remain, a matter of hot debate as administrations and Congresses come and go. Congressional attempts, nonetheless, to reallocate those powers by statute, such as the War Powers Resolution, or by inquisition, as seen dramatically in the Iran-Contra probe, hardly represent a positive development. As Madison observed, and as we see again today, "the tendency of republican governments is to an aggrandizement of the legislative [branch]."²⁵ This bicentennial year of the Constitution, and the tumultuous events that have attended it, should alert us anew to this danger and rekindle our determination to preserve the delicate balance of powers devised by the framers to guard our liberties.

III. WILLIAM VAN ALSTYNE

I will be directing my remarks more explicitly to the War Powers

period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

50 U.S.C. § 1544(b) (1982).

24. Between 1982 and 1984, Congress adopted three initiatives sponsored by Congressman Edward Boland of Massachusetts to limit aid to paramilitary forces, popularly known as the Contras, fighting Nicaragua's Sandinista government. The Boland amendment, passed December 21, 1982, prohibited aid "to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua." Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982). The Boland compromise, passed December 8, 1983, limited financial support for the contras to \$24 million. Department of Defense Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452 (1983). The Boland cutoff, passed October 12, 1984, provided that no funds made available to the intelligence agencies and the Department of Defense could be used to support the Contras during fiscal year 1985, but permitted Congress to provide up to \$14 million in such aid after February 28, 1985, if the President requested it. Continuing Appropriations Act for the Fiscal Year 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935-37 (1984). For a short history of aid to anti-government guerrillas in Nicaragua, see *Congress Sought to Place Limits Early on U.S. Covert Assistance to 'Contras'*, 41 CONG. Q. ALMANAC 76-77 (1985).

25. THE FEDERALIST No. 49, at 315-16 (J. Madison) (G. Carey & W. Kendall ed. 1966).

Resolution and the tedious question of its technical constitutionality, rather than its political wisdom. It is my personal view that the President should promptly ask Congress to authorize him to extend the time during which the American armed forces may be maintained in the Persian Gulf, so as to secure the free navigation of that waterway to all peaceful commerce. I also hope that if the President were to make that request in the appropriate manner, Congress would responsibly approve such a measure.

It is my professional view, on the other hand, that once sixty days has elapsed, absent such an authorization by Congress for the maintenance of the American armed forces in the Persian Gulf, the President will be without any continuing authority as Commander-in-Chief to maintain the military involvement of those forces. Indeed, he will be in violation of a valid act of Congress if he does not, under such circumstances, terminate those forces' involvement in the Persian Gulf at once. As I have said, I would deeply regret such a termination, but this is a step the President would have to take under the War Powers Resolution, which is a perfectly valid act of Congress.

I want to reemphasize very briefly some clauses in the Constitution in order to recenter where I believe the only sensible constitutional issue lies. The issue does not concern the clause empowering Congress to declare war because this clause is not the source of the War Powers Resolution. Neither does the issue concern the question of who is the country's first minister in foreign affairs. I do not doubt that the President is the nation's first minister in foreign affairs. The question, rather, is simply who determines the extent to which the armed forces of the United States shall be used as an instrument of foreign policy? More bluntly, who, between Congress and the President, shall determine the lawful uses of the armed forces of the United States? This is not the conventional way in which the question has been phrased, but it is the proper question.

The power to determine whether we shall have an army and a navy at all is vested solely and explicitly in Congress. There is a separate clause in the Constitution providing that Congress shall have the power to provide for the government and regulation of the Army and Navy.²⁶ A third, and very cogent clause provides that Congress shall have the power to make all laws that shall be necessary and proper, not merely to carry into execution its own enumerated powers, but also to carry into execution all other powers vested in the government of the United States or any officer or department thereof.²⁷ One does

26. U.S. CONST. art. I, § 8, cl. 14.

27. U.S. CONST. art. I, § 8, cl. 18.

not often hear the necessary and proper clause quoted in its full expanse. In short, the clause places in Congress the power to enact legislation that is otherwise in its power to enact, to the extent that it feels it appropriate to use its powers to aid the other departments of government—the President and the courts—in the execution of their powers and responsibilities.

Would it be unconstitutional if Congress provided no army and navy at all? It would not. Indeed, not the least discussed subject in the course of the Constitutional Convention was whether it would be wise to entrust to Congress the powers to levy armies during peacetime at all, or whether it would be wiser to confine their power to raising armies only in circumstances of outstanding war. The lack of realism reflected in the latter proposition, though it enjoyed substantial support among anti-Federalists, merely moved the Constitutional Convention to confide in Congress the authority to establish an army and a navy—that is to say national armed forces—even in peacetime, and to provide for their appropriate use.

Suppose that in the middle of the 19th century—a period of mythical isolation—Congress were to provide for an army and a navy, but also explicitly provide by law, either with the President's signature, or over his veto by two-thirds of both houses, that in no event shall the armed forces of the United States be deployed outside the Western hemisphere. Some might, in my mythical society, regret this as a matter of policy. No scholar, however, as far as I am aware, would deny the constitutional power of Congress to limit the use of armed forces in such a manner.

Such a restriction would not be much different in character than restrictions that Congress already has placed on the use of our armed forces. You may be aware, for instance, that even in times of urban riot or domestic violence, we do not usually use the Army. Rather, we nationalize the militia or the state guard, primarily because there are acts of Congress that forbid the use of the standing Army against the civilian population, except under the most extraordinary circumstances. The President, then, is Commander-in-Chief and a civilian accountable for obeying acts of Congress. He may not presume to turn the standing Army loose upon the civilian population when Congress has not authorized—but has, rather, forbidden—him to do so, no matter how riotous the circumstances may be. Presidents have abided by this admonition since time out of mind. There have been very few extraordinary exceptions, each of which Congress has authorized.

Suppose that Congress, by positive enactment, were to unwisely

adopt a statute emphatically providing that no armed forces of the United States shall be deployed to the Persian Gulf under any circumstances. Suppose again, that the President vetoes the enactment and inveighs against it, yet the veto is, nonetheless, overridden by a two-thirds majority in both houses of Congress. May the Commander-in-Chief still deploy armed forces to the Persian Gulf? The answer is no. As Commander-in-Chief, he is precisely accountable to Congress' decision to constrain the use of the armed forces. It is Congress' option to impose such restrictions as it deems appropriate.

Congress may not be so foolish as to set those kinds of strict geographic limitations. Circumstances are sufficiently volatile that a geographical restriction of this type obviously does not commend itself in modern life. Congress, therefore, may choose not to lay down this kind of restriction; rather, it may lay down a different one. It might lay down a restriction that prohibits the President from deploying armed forces in the Persian Gulf in a situation of existing hostilities, or in a situation in which hostilities are obviously imminent given all the circumstances. Under such a restriction, there are no ambiguities surrounding the presence of troops that may already be in place, for they are unaffected by this act. In this scenario, there are two sources of congressional power. The first is the power of Congress to raise, support, maintain, and provide for the government and regulation of armies and navies. The second is the power of Congress to furnish such armed forces as are, in Congress' opinion, necessary and proper to aid the President in carrying into execution his executive responsibilities. The judgment is Congress' own.

Such a scenario described above lies on the threshold of the War Powers Resolution. The War Powers Resolution is less of a restriction on the President than those hypothetical resolutions just described. It allows the deployment of armed forces into an environment of imminent hostilities. The Resolution, nonetheless, contains an automatic sunset provision that requires the President to withdraw any deployed forces after a period of sixty days, unless Congress affirmatively approves an extension within that time subject only to such exceptions as the act otherwise provides.²⁸ This aspect of the Resolution, moreover, does not involve a so-called legislative veto. Rather, it is wholly self-executing, subject only to the calendar.

I do not suggest that enforcement of the Act is necessarily justiciable in court—though it may be—for it is very difficult to engage the courts in this issue. It is quite possible that the only recourse against the President for violating the Act is the very unpleasant one of initi-

28. 50 U.S.C. § 1544(b) (1982). For the text of the sunset provision, see *supra* note 23.

ating impeachment inquiries through the Judiciary Committee of the House of Representatives. This would be a dismal, profoundly unsatisfactory political solution, though it is a solution the President may provoke the House to pursue. The appropriate thing to do would be to try to work within the framework of the War Powers Resolution, which the President has failed to do.

IV. CHARLES BENNETT

It is an exciting thing to be an American. We are part of an American revolution that is still taking place. We must look at what our ancestors did, think about what they constructed, and try to preserve it. The war powers issue is not a contest between the executive, legislative, and judicial branches. Think back to the time period when the Constitution was being written and when the Declaration of Independence was signed. When Thomas Jefferson wrote that "all men are created equal," he meant that there is no single person who is sovereign over our society. The Declaration of Independence recognized the right of the people to direct the destiny of this nation by invoking a concept of a nation where the people were sovereign. James Madison similarly held to the concept that "all power is originally vested in, and consequently derived from the people."²⁹ As Chief Justice Jay said, "[W]e see the people acting as sovereigns of the whole country."³⁰

With the signing of those two historic documents, we had a real revolution of the spirit, one in which people were given control of their own destiny, and in which the Constitution provided that the powers granted to government would be very limited. The Constitution was a gift from the people to the nation; it was not a gift from the nation to the people. The people decided that certain powers would be given to certain branches of the government, and that all else would be retained by the people themselves. The tenth amendment to the Constitution echos this principle.³¹ Thus, the issue of war powers is not a conflict between the executive and the legislative branches. Rather, it is a question of whether or not we want to follow what our forefathers wrote into the Constitution: that it would be Congress which would control whether the people would go to war. Why did they provide that element of Congressional control? Because most of

29. Address of James Madison to the House of Representatives on June 8, 1789, 1 *ANNALS OF CONG.* 433-34 (J. Gales ed. 1789).

30. *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793).

31. The tenth amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

them were soldiers. There are not many erstwhile soldiers who favor readily going into war, or to the edge of war.

Sometimes, when I read and hear people make statements referring to the Presidency, I sense that they feel that they are going to put "religion" back into that office—that the President should be the head of the church, the head of the people, and the head of the government. This, however, is exactly opposite to the way in which our country was intended to operate. "[I]t has grown into an axiom," wrote James Madison, "that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence."³² Accordingly, the Founding Fathers, with studied care, vested control over the initiation of war in the legislative branch. This was done because this branch becomes concerned with reelection every two years; therefore, it must respond to the people, or they will turn it out. To contend that the President ought to control the war powers because he is our great national leader is to forget what our ancestors thought. They wanted to see to it that the power remained in the people. They did not want this nation to enter into unnecessary wars, and they protected against just such a situation.

In recent history, Lebanon has been followed by Grenada, and the Iran hostage transfer has been followed by the Persian Gulf. It is fairly obvious to me that the President felt embarrassed about Lebanon, so ordering the invasion of Grenada was the answer. Likewise, the President was embarrassed about the Iran hostage situation, so reflagging the ships in the Persian Gulf was the answer.

These incidents were personal to the President. We as a nation were not consulted. Our country was not consulted, for example, when the President traded hostages for weapons. This was a mistake that he made; it was not a mistake that the people of this country made. I would like the President to feel better about himself, but it is not our responsibility to shed blood or to be in a position of going to war in order for him to do so.

The revolution still continues. The "American Revolution" is a revolution in which the people control their government. The people do not want unnecessary wars. They do not want demonstrations of our great power over the surface of the earth for the purpose of making themselves look grand or noble as a nation. They want, in fact, to have as much peace in the world as they can. They want freedom in the world. They want to demonstrate that we can have a free people

32. *Helvidius No. IV*, Gazette of the United States (Philadelphia) September 14, 1793, in 15 *THE PAPERS OF JAMES MADISON* 109 (T. Mason, R. Rutland & J. Sisson eds. 1985).

in this country. Therefore, this current gradual movement toward the remonarchizing of our nation is something that we certainly should watch with great care and try to prevent.

The War Powers Resolution was, and is, bad legislation, regardless of its constitutionality. I voted against it, not on constitutional grounds, but because I thought that it gave power to the President that he should not have. It allows the President to have a sixty day war at his own request. Why in the world would you want to allow that? There is no reason for it. We ought to keep out of as many wars as we can, for we will be safer in the long run if we do so.

While I believe that placement of the war powers under the Constitution is a challenging subject to think about, we ought to think about it in more simplistic terms. We ought not to think about it just from the standpoint of who, between the executive, legislative, and judicial branches, has the power. We must see to it that the people themselves control their government, and see to it that the people are not involved in unnecessary wars. It is not a thing we are doing for ourselves; it is a thing we are doing for humanity, for our country, and for future generations.

V. GEOFFREY P. MILLER

I would like to propose five simple points that might help clarify the debate on this subject, even if they do not command universal acceptance. They range from the self-evident to the plainly debatable, and I would like you to think about how long you stay on this "train of thought" before you decide to get off. I hope that some of you will stay on until the last stop.

The first proposition is that it is essential to the national interest, and implicit in the Constitution, that the nation be able to engage in military operations without a formal declaration of war. I think that this proposition would gain assent from virtually everyone, for the reasons are rather clear. First, a declaration of war takes time, and as Dr. Brzezinski has eloquently and poignantly demonstrated, time is something we simply do not have in modern warfare. While the speed of congressional action may have increased arithmetically, the speed of military action has increased geometrically. Further, even if there is time to declare war, we often would not want to do so. A declaration of war is a major diplomatic step with serious international repercussions. It heightens conflict, challenges the other side, deters compromise, complicates relations with allies, and may even benefit the enemy by dignifying the very behavior that we are opposing. Constitutional history, as Brad Reynolds has pointed out, dem-

onstrates that there have been some 200 instances in the past two centuries in which we did engage in international hostilities without a formal declaration of war.

The second proposition is that the President is the official who oversees and supervises warmaking. Again, few people would disagree with this proposition because the President's warmaking powers are textually based in the Constitution, both in the Commander-in-Chief clause,³³ and the clause giving the executive power to a unitary President.³⁴ Executive control over warmaking has been a uniform practice for 200 years.

It is obvious that Congress cannot do the job. The Continental Congress attempted to do so during the Revolutionary War, but the results were disastrous.³⁵ Late in the War, the Congress passed the supervision responsibility to congressional committees, with equally bad results. The Congress then attempted to pass the responsibility to committees of individuals outside of the Congress. Again, the results were unsatisfactory. Finally, the Continental Congress created executive agencies to supervise the Revolutionary War, a scheme that did work. The Congress did not want to give power away, but it had to. Otherwise the nation would not have won the War. It became evident, and remains evident today, that it is simply impractical for Congress either to carry out military operations, or to supervise them on a daily basis.

The third proposition is that the President has inherent authority, even in the absence of implementing or authorizing legislation, to commit troops in hostilities that fall short of war. This proposition probably will gain assent from most people, although it might be opposed by some of the more vigorous advocates of congressional authority. Committing troops to hostilities is a classic function of the Executive that finds textual support in the Commander-in-Chief and unitary Executive clauses cited above.

The President's inherent authority in this area also follows from functional concerns. Only the President can act with the necessary speed in emergencies. Moreover, if Congress were to authorize this kind of action by statute, such an authorization would not be much different from a declaration of war. Requiring Congressional authorization for actions short of war would undermine many of the advantages that such actions provide.

The fourth proposition is that Congress may, by legislation, limit

33. U.S. CONST. art. II, § 2, cl. 1.

34. U.S. CONST. art. II, § 1.

35. See Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 67-71.

or stop particular commitments of troops by the President that fall short of a declaration of war. As Professor Van Alstyne points out, this proposition is textually based in the Constitution. Further, it is also supported by history. Presidents have generally acquiesced when Congress has, by legislation, tried to stop presidential actions. Such acquiescence seems reasonable in terms of the constitutional system of separated powers.

If, for example, the President commits troops to an area of ongoing hostilities in Central America, Congress could pass a statute forcing him to remove those troops. Similarly, Congress could accomplish the same end by legislation prohibiting the expenditure of federal funds for the conduct of military operations in Central America.

This legislative power carries with it a corresponding congressional right to be informed of the President's actions. The President can legitimately be required to tell Congress—in advance, where possible—what his plans are. If advance notice is impossible, the President can be required to inform Congress within a reasonable time after the events in question. The degree to which the President must provide information to Congress probably should depend upon the degree to which Congress is able to give assurances that there will not be leaks or other damaging use of the information.

The fifth and final proposition is that Congress may not unreasonably restrict the President's inherent power to commit troops to hostilities short of war by the passage of general legislation not directed at particular controversies. Though Congress can force the President to remove troops from a particular situation by passing specific legislation, it cannot tie the President's hands in advance through broadly worded general restrictions.

Many people would accept this proposition as a reasonable middle ground between the powers of both the President and Congress. Advocates of executive power might argue that Congress cannot simply prohibit the President from engaging in hostilities, even by subsequent legislation, because the President has the inherent power to conduct such operations. This view, however, seems too extreme on behalf of the executive branch. On the other hand, advocates of congressional authority might argue that Congress has the power to prevent the President, generally, from engaging in hostilities short of a declaration of war, and that Congress can do so simply by passing a statute stating that the President cannot engage in such hostilities unless Congress has declared war. This view, however, goes too far in the direction of congressional authority. The reasonable middle

ground is to acknowledge that the President can commit troops short of war, and that Congress can reverse or modify the President's actions by passing legislation specifically directed to that particular use or controversy. Congress, nonetheless, cannot unreasonably limit the President's power to engage in this kind of activity. This intermediate position is consistent with the text of the Constitution and provides a sensible approach to balancing the interests of the President and Congress.

With these five propositions in mind, I want to address the War Powers Resolution, the subject which dominates the debate in this area. In many ways, the War Powers Resolution is a commendable piece of legislation. It seeks to provide a means of resolving the tension between the President and Congress in the area of foreign affairs. Further, it makes a good faith effort to give both branches of government a role. And finally, it encourages, as Dr. Brzezinski said, cooperation and consultation between the President and Congress.

The War Powers Resolution, however, is flawed in a number of respects. The first problem is somewhat technical, but nevertheless important. The Resolution provides that Congress can veto the President's actions by passing a concurrent resolution that does not require the President's signature to become effective.³⁶ This provision completely cuts the President out of the process of debate and deliberation concerning what should be done with regard to the military operations he initiated. This provision is clearly unconstitutional under the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*.³⁷

Second, and more fundamentally, the Resolution, is flawed because it requires the President to cease military operations if Congress has not expressly approved such operations within sixty days.³⁸ This places the burden and consequences of Congress' inertia on the President and the President's military program, thus severely limiting

36. Notwithstanding the sixty day "sunset" provision, the War Powers Resolution provides that "at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution." 50 U.S.C. § 1544(c) (1982).

37. 462 U.S. 919 (1983). In *Chadha*, the Court held that legislative vetoes of executive branch actions must conform with the express procedures for legislative action contained in the Constitution: passage by both Houses and presentment to the President for his signature or veto. *Id.* at 959. In so holding, the Court struck down a provision of the Immigration and Nationality Act, which authorized either house of Congress, by resolution, to invalidate executive branch decisions to permit individual deportable aliens to remain in the United States. *Id.* at 959.

38. 50 U.S.C. § 1544(b) (1982). For the text of the sunset provision, see *supra* note 23.

his ability to carry out actions that fall within his inherent authority under the Constitution. In this respect, the Resolution fails my fifth proposition: It significantly limits the President's power in general terms that are not directed at any particular controversy.

The War Powers Resolution could easily be amended to go along with my five propositions. We could keep the requirements that the President inform and consult with Congress, provided that these requirements are interpreted in a manner that does not unduly burden the President. Earlier, Brad Reynolds mentioned some of the ways in which these information and consultation requirements could be problematic, but I think that they could, nevertheless, be reasonably interpreted. I would, however, eliminate both the requirement that the President cease the deployment of troops if Congress has not approved their deployment within sixty days, and the provision that allows Congress to veto by concurrent resolution military actions initiated by the President. Instead, I would simply allow Congress to veto, amend, or modify the President's actions in specific cases by passing a joint resolution, requiring the President's signature or passage over the President's veto to become effective. Congress could adopt provisions, either by internal rules or by statute, expediting the procedures for consideration of a joint resolution of modification or disapproval. These alterations would bring the President into the process and would better achieve a reasonable balance of power between the executive and legislative branches.

VI. REBUTTAL STATEMENTS

A. *William Bradford Reynolds*

Problems always arise when lawyers dive into the Constitution and begin to talk about legislative interpretation. Inevitably, there is that which is emphasized, and there is that which is not referred to. To sort through the constitutional questions, one must look at a whole range of constitutional provisions and a great deal of language.

An earlier analysis suggested that Congress would be able to craft some kind of legislation in this area, provided that it flowed from its proper legislative authority under the Constitution. In the war powers arena, the relevant constitutional power probably is the appropriations power vested in Congress. Provided that the legislation called upon both houses of Congress to act, and upon the President to be part of the process, Congress could devise legislation limiting the actions that the President could take as Commander-in-Chief.

There certainly are a lot of questions that need to be answered with regard to the War Powers Resolution, both in view of the recent

separation of powers decisions by the Supreme Court, such as *Chadha*, and the fact that the Resolution undoes, or seeks to undo by legislative inertia, certain activities that are clearly within the President's prerogative under the executive power. These two features of the Resolution need to be corrected in order for legislation of this kind to pass muster. We have heard today the considerations relevant to efforts to fashion the corrections that must be made.

An emphasis on seeking bipartisan political solutions to the kinds of problems that are necessarily introduced whenever we enter the foreign relations field is better calculated to lead us to the right place than is specific legislation that may be interpreted one way or another. There is one fundamental problem at the threshold of any issue that arises in the foreign relations field, including this tussle over executive and legislative power: how to get the matter into court for decision. The questions of who may bring these cases to court, and whether they are controversies of a nature that the courts can entertain under article III of the Constitution, are probably more difficult than any of the questions we have been discussing. Their difficulty leads us to a point where the proper resolution of these kinds of tussles between the two branches is more likely to be struck, not in terms of how lawyers divine or define the constitutional language, but rather in the political arena, where we can reach some accommodation on a more bipartisan basis, with the two branches working together.

B. *William Van Alstyne*

There were three points raised by two of my colleagues that I want to address briefly. Mr. Miller suggested that the President may be able to act to a certain extent without affirmative authorization from Congress, deploying armed forces to various tense environments around the world with no particular statutory authorization. This may be true, but it does not address the effect of the War Powers Act.

Those of you who recall your basic course in constitutional law may remember that perhaps the most famous dictum ever expressed in the area of presidential powers is Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.³⁹ Justice Jackson's concurrence suggested that there are three categories of presidential power. The first is when the President acts on his own authority, affirmatively backed by the express or implied authorization of Congress. The second is when the President acts on his own authority and Congress has done nothing to support or disavow his actions.

39. 343 U.S. 579, 634-55 (1951) (Jackson, J., concurring).

The third and final situation is when the President acts on his own authority to take actions incompatible with Congress' express or implied will.⁴⁰ The case that I have been outlining to you falls within the last of these three categories: Congress has exercised its power affirmatively, expressing the extent to which the armed forces may or may not be used, whether by the President or anyone else.

My analysis runs generally along this assumption, and I think that it stands on a very strong footing. I do not know of any plausible argument suggesting that the President, merely as the Executive or Commander-in-Chief, may deploy armed forces abroad in the teeth of an act of Congress that either provides for the existence of no armed forces, or that provides for them but restricts their use to the Western Hemisphere alone. The President is Commander-in-Chief only with regard to such armed forces as Congress provides, and such uses as Congress deems appropriate.

Professor Miller said earlier that Congress cannot unreasonably limit the President's ability to engage in certain activity. I want to distinguish part of this statement from my own discussion regarding the War Powers Resolution. Professor Miller's statement is supported upon different legal supposition: the existence of a declaration of war. If the country is engaged in hostilities, and if Congress has authorized the continuation of those hostilities on whatever magnitude it has determined to be appropriate, I do not doubt that Professor Miller's comment, with qualification, is correct.

When read together, the declaration of war and the commander-in-chief clauses of the Constitution make clear that within an authorized field of a declared war, the President is made the responsible agent of conducting that war as Commander-in-Chief. The combined clauses prohibit Congress from meddling in the particulars or minutia of tactics in the combat zone. The original phrasing of Congress' war power was changed in the Constitutional Convention from the power to "make war" to the power to "declare war,"⁴¹ to divide responsibilities in this way. Thus I quite concur with Professor Miller that, to the extent Congress has affirmatively authorized the engagement of American armed forces in acts of war, within the scope of the authorization, the President's orders control. Congress clearly has the power, however, to determine whether these forces shall be committed, and indeed, as to what must be done with them after a certain

40. *Id.* at 635-38.

41. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (M. Farrand rev. ed. 1937).

time has elapsed. This congressional power is evident in the propositions I previously shared with you.

I respect Professor Miller's suggestion for a revised War Powers Resolution, but his changes would produce a totally different resolution in substance, and a very weak one indeed. To the extent that Congress would have to act in each instance to affirmatively terminate the deployment of armed forces and that mechanism would be subject to the President's veto that Congress could only override by a two-thirds vote, such a War Powers Resolution effectively will have accomplished nothing at all. The ambition of the Resolution, as it is currently written, is to limit—subject to subsequent congressional action of affirmative support—the circumstances in which armed forces may be initially deployed into highly volatile communities, as well as those in which hostilities are either already underway, or where the circumstances make the imminence of hostilities self-evident.

The War Powers Resolution involved an effort to try to discourage a sense of adventurism in the Presidency. Similarly, conversations in the original constitutional debates discussed the means of allocating the powers between Congress and the President to achieve the same objective. I personally recall from my readings on the debates the example of the English King who was forever getting his realm involved in foreign escapades. After the *fait accompli*, Parliament would have no choice but to try to defend the realm from the terrible consequences of the King's choice to involve his nation in hostilities. The War Powers Resolution is a good faith effort to mitigate such a consequence in our time, and it can be made viable on the bases that I have suggested.

Finally, Congressman Bennett's observation that this resolution creates in the President a blank check to make war at his discretion for sixty days, if true, would surely bring me to suggest that it is not only inappropriate, but unconstitutional. The Resolution itself, however, states that it shall not be interpreted as enlarging the powers of the President,⁴² which indicates that nothing in the Resolution was

42. The War Powers Resolution provides:

Nothing in this chapter—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

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

50 U.S.C. § 1547(d) (1982).

meant to permit the President to go to war and conduct it to his delight for sixty days.

There is no such provision in the Act, on the other hand, to hamstring the President to the extent that American vessels might come under sudden attack in the Persian Gulf. I take it the President has, of course, an exigent emergency warmaking power to protect American vessels from attack. He may, in addition, report to Congress and ask authority, if necessary, to enlarge the field of hostility. The Congress may accordingly endorse taking aggressive action against the sources from which the raids proceeded.

What the President would do in these circumstances is exactly what Thomas Jefferson did in a similar situation—oddly enough, in the same part of the world. In his report to Congress of equivalent circumstances arising in the Mediterranean, Jefferson noted:

I sent a small squadron of frigates into the Mediterranean, with assurances to [Tripoli] of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. The measure was seasonable and salutary. The Bey had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the Tripolitan cruisers having fallen in with and engaged the small schooner *Enterprise*, commanded by Lieutenant Sterret, . . . was captured. . . . Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.⁴³

C. Charles Bennett

My theory is that the President, not because of the Constitution, but because of the inherent necessities of government, would have the power to involve military forces in a purely defensive action. Reflagging the vessels in the Persian Gulf, however, was not defensive. It

43. President's Message to Congress, 1 MESSAGES AND PAPERS OF THE PRESIDENTS 314-15 (Dec. 8, 1801).

was an invitation to war. Congress had not decided that it wanted to engage in warlike activity over there.

I would like to address briefly one or two issues. One issue is the concept of the declaration of war. I do not know why we are so unwilling to go to the dictionary to define a "declaration of war." It is simply an announcement of combat. It does not require a vellum document with a blue ribbon and gold seal, nor does it require a joint session of Congress. It simply requires that Congress debate the question of whether we are going to be at war or make appropriations for the military that will be deployed, call people up for war, and perform all of the other acts that need to be done in anticipation of going to war.

Several speakers referred earlier today to 199 instances in which American armed forces have been in a warlike or combat situation. Almost all of these incidents involved something along the lines of protecting an embassy. Many times not a single round was fired, but military people were present. Well, so what? No one has ever said that the President should not be allowed to protect the interests of the United States in this manner.

What I say, and what most people who have been in combat say, is that we do not want any unnecessary wars. We want the decision to enter into combat to be made only after we have reached the conclusion that it is the only thing that we can properly do under a given set of circumstances. The Constitution gives to the Congress the power to make that decision; it does not belong to the President.

There has been much discussion here about the Commander-in-Chief's power. I am an amateur historian who has written and published five books.⁴⁴ One of them, concerning the American Revolution, has to do with this very issue of why the President was declared to be the Commander-in-Chief under the Constitution. The real reason was that neither George Washington, nor his continental superior generals, had control of the militia during the War. When the Constitutional Convention met, it was decided not to allow this lack of control to occur again. The Convention, therefore, chose to place the President in charge of the militia under the Constitution. This is the historical source of the commander-in-chief provisions of the Constitution.

Again, one can also read the dictionary for a definition of Com-

44. C. BENNETT, *FLORIDA'S FRENCH REVOLUTION* (1981); C. BENNETT, *THREE VOYAGES* (1974); C. BENNETT, *SOUTHERNMOST BATTLEFIELDS OF THE REVOLUTION* (1970); C. BENNETT, *SETTLEMENT OF FLORIDA* (1968); C. BENNETT, *LAUDONNIERE AND FORT CAROLINE* (1964).

mander-in-Chief. I doubt if any dictionary, of any language, states that a Commander-in-Chief decides when the nation will go to war. Rather, the Commander-in-Chief merely executes the military power after the government has already made that decision.

The commander-in-chief power does not give the President the ability, as the commanding general of all the military forces, to decide whether we go into war. There is no vestige of such power in history, in the dictionary, or anywhere else. Too much has been made of this supposed power.

D. *Geoffrey P. Miller*

Professor Van Alstyne agrees that the President has inherent authority to commit troops in the absence of war. He also agrees that Congress may not constitutionally interfere with the President's daily tactical conduct of military operations. This is an interesting point of congruence between our views. Professor Van Alstyne and I disagree, however, on two points of emphasis and degree.

First, Professor Van Alstyne believes that Congress has the plenary power to limit the President's inherent authority to commit troops to hostilities short of war. I agree that Congress has a large measure of authority in this area, but I cannot follow Professor Van Alstyne in the view that congressional authority is virtually limitless. Professor Van Alstyne would say, for example, that Congress could constitutionally tell the President that he could commit troops in the Western Hemisphere and nowhere else. How far could such logic go? Could Congress constitutionally tell the President that he could not commit troops anywhere, unless Congress has formally declared war? This seems to be too extreme, but where would such a proposition stop? The President has to have some inherent authority to commit troops, even if Congress has attempted, by general legislation, to prevent him from doing so.

Professor Van Alstyne errs by essentially reading the President's inherent authority out of the Constitution to the extent that it conflicts with congressional command. It is useful to remember that Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*⁴⁵ did not say that the President is without power to act if Congress has decided against a particular alternative. Rather, Justice Jackson said that the President's power to act is at a minimum if Congress decides against a particular alternative.⁴⁶ Thus, even if one agrees with Justice Jackson's point of view, it does not follow that the

45. 343 U.S. 579 (1951).

46. *Id.* at 637.

President is completely divested of inherent authority if Congress rejects a particular course of action.

Finally, Professor Van Alstyne agrees that Congress cannot unreasonably interfere with the President's conduct of daily military operations. While acknowledging that this limit on congressional authority exists, however, he gives it an extremely niggardly interpretation. The "daily operation of military affairs" cannot be cabined so neatly. Because hostilities cannot be conducted effectively without some overall plan, the President must be involved in strategy decisions as well as in daily implementation. Military operations must be conducted with a view towards all kinds of subtle inferences about the United States' interests and military needs. Thus, the President's inherent authority cannot be limited to the minutia of daily military operations. Rather, the constitutional authority to supervise and conduct military operations supports both the President's power to commit troops short of war, and Congress' lack of power to interfere unreasonably with the President's action by the passage of general framework legislation. Congress can, however, veto or modify the President's specific actions by suitable legislation enacted under a bona fide claim of congressional authority.

VII. QUESTIONS AND ANSWERS

SPEAKER: I have a question primarily for Mr. Reynolds, but other members of the panel might wish to comment as well. May Congress constitutionally use the appropriations power to cut off funds for a Presidential military operation that it opposes? If not, what can Congress lawfully do to terminate such an operation?

CONGRESSMAN BENNETT: Since Congress actually declares war by making an appropriation with the knowledge that it is going to be used to fund combat, Congress would have the authority to stop such an appropriation. Good authority could be found for that proposition.

MR. REYNOLDS: Congress has the authority to act under the spending power; therefore, Congress could probably constitutionally pass such legislation. Whether it would be wise or prudent is another question.

SPEAKER: I direct this question in the first instance to Professor Van Alstyne. Anyone else who wishes to comment of course may do so. In May of 1941, the British lost track of the German battleship *Bismarck*, and under orders from the President, the United States Navy searched for the ship. In fact, an American plane found the *Bismarck* and radioed its position to the British, who then picked up

the chase. At that time, not only was the United States not at war, but it was also under the provisions of the Neutrality Act. In your judgment, does the President have any authority to act under inherent power in circumstances like that, and if so, would you extend this authority to any other situations?

PROFESSOR VAN ALSTYNE: I must necessarily disclaim enough familiarity with the actual episode, in order to be bound to an answer that is only hypothetically correct. If the Neutrality Act were in place, and if, as I understand it, the President's actions were inconsistent with it—according to both the act itself and standards of international law—I do not doubt that he would be acting both improperly, and lawlessly. The President cannot claim inherent authority to ignore a neutrality act passed by Congress. That would be an absurd proposition.

I want to be clear that the scope of my concession about inherent power in the executive branch to act is always qualified by the primary proposition offered in my opening remarks: It is still up to Congress to decide, in the first instance, the extent to which the armed forces of the United States shall be used as an instrument of national or foreign policy. To the extent that Congress provides that the armed forces shall not be used in a particular manner or situation, its determination is quite conclusive. The source of Congress' authority to control the matter is its own exclusive and plenary authority to raise, to provide for and maintain, and to provide for the government and regulation of the Army and Navy. It is just as simple as that. It is not enmeshed with these other constitutional problems. My answer to your specific question, though, is that I believe the President, if the circumstances were exactly as you have described, violated a valid act of Congress.

SPEAKER: Professor Van Alstyne, Professor Miller believes that any general restriction on the use of the Army—prohibiting deployment of forces in the Western Hemisphere, for example—would be too general. Would you limit in any way Congress' authority to impose similar restrictions on the use of the Army?

PROFESSOR VAN ALSTYNE: Absolutely not. Congress may furnish no Army and Navy at all, or it may provide one that consists solely of a battalion of people carrying slingshots. The President may feel tremendously frustrated. Too bad. He will command nothing more than a battalion of slingshots. Congress may also authorize, as part of the armed forces, a nuclear fleet that includes nuclear weapons and hydrogen bombs. Congress' power to declare war of a qualified kind means that Congress could also positively forbid the President

from using atomic weaponry in a given theater of engagement. That degree of restraint over the President's program, at least, is generic enough. In my view, the President, as Commander-in-Chief, would be bound by that admonition.

SPEAKER: My question deals with a congressional power related to the war powers that no one, I believe, has ever addressed: Congress' power to grant letters of marque and reprisal.⁴⁷ There is little history on this clause. Is it a provision that could be applied in modern times?

PROFESSOR VAN ALSTYNE: I like the marque and reprisal clause, partly because it is among a half dozen wonderfully obscure clauses in an antiquarian Constitution which we appropriately celebrate in part for its unique age. The marque and reprisal clause has rarely been used. It was put into the Constitution on the belief that it would be, otherwise, unclear whether small acts of even privateers might be authorized. The clause was included in the Constitution out of an abundance of caution. It makes clear that Congress could engage in the war powers, even through these kinds of "retail" devices—such as letters of marque and reprisal—against nations with whom the United States does not want to deal on an official basis. It is a refinement of Congress' total command over the war powers—the graduation of them right down to the level of private action.

SPEAKER: Mr. Reynolds has provided a rather convincing case for the breadth of the executive branch's power over foreign policy. The Oval Office, however, does not seem to have heard Mr. Reynolds' case. Why is it that President Reagan does not seem to be willing to assert the leadership that you are saying is constitutionally the President's in foreign policy? It seems, for example, that if the President had difficulty with the Boland amendment, it would have been wise to have said so in 1984. As far as I know, nothing was said; instead, methods were found to get around the Boland amendment, rather than confronting Congress directly.

Another even more egregious example occurred after the Iran-Contra hearings had ended. Less than a week after those hearings were over, it was clear to many people that the hearings were not successful in terms of Congress' effort to extend its involvement in

47. In addition to its power to declare war, the Constitution confers upon Congress the power to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. CONST. art. I, § 8, cl. 11. Historically, sovereign states issued letters of marque and reprisal either to persons injured abroad, authorizing them to capture at sea the equivalent of their losses from any subject of the foreign state refusing to grant redress, or to privately owned, armed ships, authorizing them to capture ships and cargoes belonging to citizens of a third state. See F. GROB, *THE RELATIVITY OF WAR AND PEACE* 238-39 (1949).

foreign policy. The President, nonetheless, simply collapsed to Congress' demands for a new policy with regard to the Contras. Mr. Reynolds cited many historical examples demonstrating the Executive's control over foreign policy. President Reagan is obligated to continue that history. If he does not, he is really weakening the case for the executive branch's control over foreign policy.

MR. REYNOLDS: The example of the Boland amendment points out one of the major difficulties that exists in this whole area of war powers. The Boland amendment was tacked onto authorization legislation. This places the President in a position in which he does not have the flexibility to respond to the amendment on its own terms, because pressures require that the legislation containing the amendment be approved in order to prevent the government, as a whole, from grinding to a very dramatic halt. We have seen Congress do this often in recent years. Such maneuvering ties the President's hands, in terms of his ability to respond as he would want—and should—with regard to pieces of legislation that do not deserve his signature. He often cannot take that action because the political pressures and the political calculus at the time require that he approve the legislation as a whole. The Boland amendment is a classic example of this.

In the foreign affairs arena, it is particularly easy for those on the outside—the “Monday morning quarterbacks”—to question the calls that are made by those who are on the inside. It is always the case that the information people on the outside have is about one-tenth of the total picture confronting the President at any particular time, on any particular issue.

I cannot and would not, in this setting, speak particularly to all of the different pieces of the calculus that enter into the President's decisionmaking, with regard to Nicaragua or any other situation. I would say, however, that what all of us plug into our frame of reference when we talk about these issues is really but a small percentage of the whole calculus. It is very easy to second-guess decisions made by others based on one's own particular limited knowledge, and to forget that there is a lot of other information—involving politics, policy, and so forth—brought to bear on these questions. If we were all privy to these considerations, it probably would help to explain in better terms, and to the satisfaction of many people, why certain decisions are made at particular times.

SPEAKER: Professor Van Alstyne first concluded that under the spending power, Congress really has no obligation to provide for an Army and Navy, or to expend money for their maintenance. From that, he concluded that the commander-in-chief clause does not pro-

hibit Congress from withholding powers from the President, and that it gives the President no residual power to order spending, or to deploy troops, once Congress has decided to so limit his power.

If the commander-in-chief clause is to have any independent value, it may be helpful to analogize it to constitutional precedents holding that although government may have no obligation to give some kind of right or benefit, once it decides to do so, equal protection, due process, or some other positive component of the Constitution, obliges the government not to restrict it in some unconstitutional manner. Thus, there may be instances in which Congress does not have to spend anything. Once Congress does make an appropriation, however, the tactical and strategic deployment of those assets lies within the core of the commander-in-chief clause.

Second, is it necessarily a foregone conclusion that the spending power extends indefinitely, even after the expenditures have been made? Money is spent, for example, when troops are deployed in tactical troop movements. Does this mean that the spending clause permits Congress to involve itself in the actual tactical deployment? Is it possible that other provisions of the Constitution suggest limitations? The two year limitation on appropriations to support the Army, for instance,⁴⁸ suggests that the framers intended that whatever oversight role Congress has would naturally be met through oversight alone, and that the President was to have some power to act independently within that two year period.

PROFESSOR VAN ALSTYNE: My presentation is not really built on the spending clause at all. Article I, section 8, starts out by saying that Congress shall have the power to levy taxes. The spending clause then follows as a limitation on the functions for which taxes may be levied. I was, however, speaking of a separate enumerated source power granted to Congress, quite aside from the spending power. This is why the main body of my line of argument differs from that of many of my colleagues.

There is a separate power vested in Congress to raise and support an Army, to provide and maintain a Navy, to make rules for the government and regulation of these forces, and to make all laws necessary and proper to carry into execution the express powers of the President, to the extent Congress thinks it is helpful. This is where I put the main body of my case. Congress may want to spend money to provide for the common defense, and there are a variety of things

48. The Constitution vests in Congress the power to "raise and support Armies," but does so with the caveat that "no Appropriation of Money to that Use shall be for a longer Term than two Years." U.S. CONST. art. I, § 8, cl. 12.

Congress may do, and always has done, in that regard. It also has a distinct enumerated power to provide for armies and navies, and to prescribe the uses to be made for them. There is nothing inconsistent between this proposition and another one, which arises from a combined reading of the declaration of war clause and the President's power as Commander-in-Chief. This is the proposition that under those circumstances in which Congress has affirmatively embraced a commitment to belligerent activities overseas on a sustained basis, it may not presume to dictate the minute strategy and tactics of the President's conduct of the authorized enterprise.

MR. REYNOLDS: The terms "raise and support" and "provide and maintain" differ somewhat from the terms "deploy" or "commit." It is not quite so obvious, as was suggested earlier, that the necessary and proper clause allows one to read into the "raise and support" and "provide and maintain" language the legislative branch's ability to get involved in deployment and commitment of forces in the manner that Professor Van Alstyne seems to have suggested. The spending clause, which does allow Congress to withhold or expend funds in this arena, does not carry with it any expanded notion that Congress may micromanage foreign affairs, military operations, or the tactical employment of those expenditures. It is placing an awful lot of pressure on the constitutional text to suggest that Congress can engage in these more expansive sorts of activities by reason of the words that the framers used.

VIII. ADDITIONAL WRITTEN COMMENT BY WILLIAM VAN
ALSTYNE: IN A REPUBLIC AND UNDER A
CONSTITUTION SUCH AS OURS, IT IS FOR
CONGRESS TO SAY HOW THE ARMED
FORCES SHALL BE USED.

A. *Introduction*

In 1973, exceptional majorities in both houses of Congress overrode President Nixon's veto of the War Powers Resolution, thereby restricting the uses of our armed services overseas.⁴⁹ Successive Presi-

49. Pub. L. No. 93-148, 87 Stat. 555 (codified as amended at 50 U.S.C. §§ 1541-1548 (1982 & Supp. IV 1986)). The Senate voted to override President Nixon's veto of the War Powers Resolution by a vote of 75 to 18. 119 CONG. REC. 36,198 (1973). The House of Representatives similarly voted to override the veto by a vote of 284 to 135. 119 CONG. REC. 36,221 (1973). For the text of President Nixon's veto message and subsequent reaction to the veto override, see Veto of the War Powers Resolution, 1973 PUB. PAPERS 893 (Oct. 24, 1973) and White House Statement About House Action Overriding the War Powers Resolution Veto, 1973 PUB. PAPERS 915 (Nov. 7, 1973).

The critical sections of the Resolution that are reviewed in this Comment are:

dents have said that the War Powers Resolution, as enacted, is an unconstitutional constraint upon the powers of the Executive. Except for one minor feature of the Resolution—quite unrelated to the main issue discussed in this comment—I believe it is not unconstitutional. Rather, I believe it is a lawful restriction, within the power of Congress, concerning the extent to which the President may or may not use or engage the Armed Forces of the United States.

Generally, the debate surrounding the constitutionality of the War Powers Resolution centers on whether the Resolution usurps the President's powers as both Chief Executive and Commander-in-Chief to determine when and where our armed forces shall be deployed, how long they shall remain, and to what end they shall be used. I argue in this Comment that it is Congress, rather than the President, who is expected to set the terms of the Executive's use of our armed forces both at home and overseas. Through the War Powers Resolution, Congress sets the terms quite precisely and in a manner that is well within Congress' power.

The determination of whether there are to be any armed forces at all is one the Constitution entrusts solely to Congress. Indeed, the Constitution confides to Congress and no other authority the power to say whether there shall be a standing army, and if so, to determine its

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

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

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

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

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

§ 5(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to [section 4(a)(1),] whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

Public Law 93-148, 87 Stat. 555, §§ 4, 5 (1973) (codified at 50 U.S.C. §§ 1543(a), 1544(b)(1982).

size, configuration, and force. Once Congress provides for substantial national armed forces, however, it may choose to say little about how, when, where, for what, or for how long those forces may be deployed. In such cases, it may fall within the President's wide, albeit not unbounded, discretion to assign and control them, as he must, within his enumerations of responsibility in article II of the Constitution. That discretion is itself contingent, however, for if Congress does not want the armed forces to be used in certain ways or in excess of certain self-executing conditions, it may certainly provide so by the proper enactments. In any case, there is no constitutional entitlement granting the President the power to disregard such affirmative restrictions set by Congress on the uses of the Armed Forces of the United States.

This short Comment was prepared from notes used to address the Federalist Society in Washington, D.C. in the panel presentation to which this Comment has been appended.⁵⁰ Section B of this Comment presents a series of hypothetical cases respecting Congress' power to regulate the use of the nation's Armed Forces. Section C elaborates a brief argument on the general issue.⁵¹

50. *See supra* Parts III and VI(B).

51. This written comment touches upon a number of constitutional provisions which allocate powers and duties to Congress and the President. Though the interactions of the provisions are discussed more fully in Section C, it may be helpful to the reader to have a preliminary listing of the relevant provisions. The powers delegated to Congress relevant to this discussion include the powers:

Article I, § 8, cl. 1: To lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States;

Article I, § 8, cl. 3: To regulate Commerce with foreign Nations, . . .;

Article I, § 8, cl. 10: To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

Article I, § 8, cl. 11: To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

Article I, § 8, cl. 12: To raise and support Armies . . . ;

Article I, § 8, cl. 13: To provide and maintain a Navy;

Article I, § 8, cl. 14: To make Rules for the Government and Regulation of the land and naval Forces;

Article I, § 8, cl. 15: To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

Article I, § 8, cl. 16: To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States . . . ;

Article I, § 8, cl. 18: To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Provisions of the Constitution discussed in this comment relevant to the powers and duties of the President include:

Article II, § 1, cl. 1: The executive Power shall be vested in a President of the United States of America

Article II, § 1, cl. 1-2: The President shall be Commander in Chief of the Army and

B. *A Review of the Hypothetical Variations on the War Powers Resolution: Congressional Power and the Uses of the Armed Forces of the United States*

Suppose Congress provides by law that none of the armed forces it has authorized shall be deployed in a certain place or be put to a certain use. May the President, as Commander-in-Chief of the Army and Navy, nonetheless direct them to that place or that use, despite Congress' proscription? Certainly, he may not.⁵² The extent to which the President may use the military may not exceed what Congress provides for, regardless of whether the President is using the military for the protection of commerce on the high seas, for the protection of American citizens abroad, or for any other purpose. It is the obligation of the President to ensure that acts of Congress respecting authorized uses of our armed services are fully complied with. His personal views concerning the wisdom or propriety of their authorized use are, for this purpose, irrelevant. Deploying or involving our nation's armed forces in conflicts in excess of a restriction imposed by an act of Congress is not a power vested in the President.

Suppose, instead, that Congress enacts something less categorical than the preceding law—in other words, a resolution less categorical than a flat and unqualified prohibition on the deployment of armed forces for certain purposes or in certain places. Assume that in the hypothetical resolution, Congress provides that the armed forces are not to be deployed in any situation “where imminent involvement in hostilities is clearly indicated by the circumstances,”⁵³ unless Congress first approves of the intended use or is unable to convene to consider the matter.

The question arises under such an act as to what powers would be left to the President to deploy the nation's armed forces? Clearly, the President would be free to assign armed forces to certain places, such as the Persian Gulf, in “ordinary circumstances.” Such ordinary circumstances might include deployment of the armed forces pursuant to a treaty arrangement, an executive agreement with a friendly country, or a decision to assign the Seventh Fleet to training maneu-

Navy of the United States, . . . He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .

Article II, § 1, cl. 3: [The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses . . . he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed. . . .

52. For further argument and elaboration, see *infra*, Section VIII(C).

53. 50 U.S.C. § 1541 (1982).

vers. This resolution would not be a complete restriction on the discretion of the President; rather, it would be circumstance specific and clear in its proscription. Note also that the hypothetical resolution would be precautionary— that is, absent circumstances Congress deems sufficient to act upon, deployment of our nation's armed forces to the named region would not be ordered when there are existing hostilities, or "where imminent involvement in hostilities is clearly indicated by the circumstances." The President is, therefore, constrained by the resolution exactly as it is framed.

Changing the hypothetical once again, suppose Congress passes a resolution slightly more permissive than the one in the second hypothetical. Assume that the resolution does not absolutely forbid the deployment of armed forces in an area "where imminent involvement in hostilities" is clearly indicated by the circumstances. Rather, assume that the resolution provides that, if the forces are deployed in such circumstances, they shall be withdrawn no later than sixty days thereafter, unless the President asks for and receives approval from Congress for the extended use. This third hypothetical resolution, which is essentially a description of the mechanics of the War Powers Resolution, does not differ substantially from the second in any constitutional sense. Both enactments would be equally controlling on the President as Commander-in-Chief.⁵⁴

If there is any serious question about the War Powers Resolution in respect to the constitutional distribution of the war power authority, it is not one concerning the President's substantive power to determine what uses he may make of the armed forces that Congress has seen fit to provide. Rather, the question is whether insofar as the War Powers Resolution might be carelessly misread, does it imply that the Executive may "introduce" our armed forces into existing hostilities and engage them without limit in any measure during the sixty day period authorized by the Resolution? If the answer is yes, the Resolution itself may amount to an unconstitutional authorization to the President to engage the armed forces in a war for up to sixty days, contrary to the limitation framed by the declaration of war clause in article I.

To illustrate in a manner that is all too easy to imagine, suppose

54. If disengagement consistent with minimum safety in its effectuation, could not be accomplished within the time frame set by the Resolution, the matter would, nonetheless, almost certainly be understood as resting within the terms of the Resolution. The War Powers Resolution as enacted contains, several express conditions extending the sixty-day time limit of the act under certain circumstances. Since 1973, however, there has been no actual incident where failure to comply with the Resolution was, or could have been, asserted on grounds of an extraordinary contingency insufficiently foreseen by the Resolution.

that ten years after the War Powers Resolution was adopted, two countries the United States had peaceful relations with at the time of the adoption went to war with one another in the Persian Gulf. If the Resolution is interpreted as an affirmative authorization to the President to introduce our nation's armed forces into the ongoing hostilities solely on his own discretion, and to direct those forces to engage in sustained action against one or both of those parties—albeit merely for a quick, sixty-day war—the Resolution would essentially permit the President the discretion of initiating and conducting a war without a timely determination by Congress of its appropriateness under the circumstances. It is quite doubtful whether Congress may delegate its warmaking powers in this manner. Such a delegation would cause Congress to evade its own responsibility to determine whether the United States shall or shall not engage in war.⁵⁵

The War Powers Resolution, nevertheless, expressly guards against this very interpretation, or rather, misinterpretation. Section 8(d)(2) of the Resolution explicitly provides that the Resolution shall not be construed as granting to the President any authority that “he would not have had in the absence of” the Resolution.⁵⁶ Thus, the Resolution carefully provides that, if the President could not otherwise constitutionally “introduce” our armed forces into an environment of existing hostilities—thereby clearly involving the United States in an act of war that Congress has not affirmatively authorized—he may not claim authorization to do so by force of the War Powers Resolution. The question of whether the War Powers Resolution does confer such authority is sometimes obscured, however, by the overall tenor of the Resolution. The overall tenor seems to concede that the President has a broader prerogative for engaging our armed forces in acts of war than the Constitution actually allows Con-

55. See Van Alstyne, *Congress, The President, and The Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 13-19 (1972). But see Rostow, “Once More Unto the Breach,” *The War Powers Resolution Revisited*, 21 VAL. U.L. REV. 1, 22-35 (1986). For earlier writings by Rostow also strongly faulting the War Powers Resolution on constitutional as well as on policy grounds, see War, *Foreign Affairs and the Constitution*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2007-13 (1986); *Commander-in-Chief*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 316, 317 (1986); *Learning Lessons from Vietnam*, in CONGRESS, THE PRESIDENT, AND FOREIGN POLICY 89 (1984); *Response to Professor Henkin*, 61 VA. L. REV. 797 (1975); *Great Cases Make Bad Law*, 50 TEX. L. REV. 833 (1972); see also *War Powers: Hearings Before the Subcomm. on Nat'l Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93rd Cong., 1st Sess. 395 (1973) (statement by Eugene V. Rostow). For additional contrary views with citations to other works, see Lofgren, *On War-Making, Original Intent, and Ultra-Whiggery*, 21 VAL. U.L. REV. 53 (1986).

56. War Powers Resolution, Pub. L. 93-148, § 8(d)(2), 87 Stat. 555, 558 (1973) (codified as 50 U.S.C. § 1547(d) (1982)).

gress to commit prospectively to the President. In this regard, the Resolution may, contrary to its purpose, invite a measure of executive abuse.

Finally, there is a problem of lesser importance under the Resolution that concerns what is now known as the problem of the "legislative veto." Section 5(c) of the Resolution provides that during the sixty-day period permitted for the deployment of troops, the armed forces will be withdrawn from deployment "if the Congress so directs by concurrent resolution."⁵⁷ Without anything more occurring, the concurrent resolution would essentially alter the President's authority as it previously had been exercised under the terms of the War Powers Resolution itself. The purpose of Section 5(c) is clear. It enables Congress to compel the President to cease, at once, the engagement of our nation's armed forces in ongoing hostilities when Congress has not previously approved the military engagement. Further, it refuses to grant to the President a "blank check" to continue in a war for sixty days, despite the ultimate requirement that he disengage or obtain the permission of Congress to continue after that point.

If, however, Section 5(c) has the effect of altering "the law" otherwise applicable to the sixty-day period—as does seem to be the case—then under decisions of the Supreme Court since the enactment of the War Powers Resolution, such as *Immigration and Naturalization Services v. Chadha*,⁵⁸ the provision is invalid under the presentment clause of the Constitution. In any regard, although the issue of Section 5(c)'s constitutionality is somewhat debatable,⁵⁹ the defect merely affects the continued vitality of Section 5(c) and not the Resolution in general because the provision would be deemed severable under Section 9 of the Resolution.⁶⁰ Aside from the ultimate determination of the fate of Section 5(c), the Resolution is both constitutionally valid and useful and should not have been ignored.⁶¹

C. *A Postscript Review of the First Principal Case:
Who Determines How the Armed Forces Shall
and Shall Not be Used?*

It is appropriate to note the Constitution's elaborate listing of

57. War Powers Resolution, Pub. L. 93-148, § 5(c), 87 Stat. 555, 557 (1973) (codified as 50 U.S.C. §§ 1544 (a)).

58. 462 U.S. 919 (1983).

59. See, e.g., Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330, 1348-50 (1984).

60. War Powers Resolution, Pub. L. 93-148, § 9, 87 Stat. 555, 559 (1973) (codified as 50 U.S.C. § 1548 (1982)).

61. See e.g., *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (discussed *supra* note 2.)

Congress' constitutional powers in respect to the armed forces of the United States. First, the Constitution does not provide for any national armed forces in the first instance. Consequently, the determination of whether there is to be any army or navy is left entirely to the option of Congress.⁶² The provisions permitting Congress to "raise and support Armies"⁶³ and "provide and maintain a Navy,"⁶⁴ were controversial at the time of their adoption in 1787. At that time, antifederalists strongly objected to the possibility of any standing national peacetime armed forces. Their objections were overcome, however, by an informed concern that invasion or armed attack might come on such short notice that a lesser provision—for example, one permitting the creation of a national military force only when war broke out—would be unrealistic. Similarly, an exclusive reliance upon state militias as a national armed force was rejected as too risky. Therefore, the power to provide for standing national armed forces was given to the new government. To allay fears of an overly powerful Executive, however, the power was granted to Congress and not to the President. Congress, likewise, was given the sole power to "provide for" calling the militias of the several states into national service.⁶⁵

Second, in reviewing Congress' powers relating to the Armed Forces of the United States, it is important to note the other "war" powers of Congress' that are significant in their relationship to the power to create an army and a navy. For instance, Congress is given the power to levy such taxes as it determines are required to "provide for the common Defense . . . of the United States;"⁶⁶ the power "[t]o make Rules for the Government and Regulation of the land and naval Forces;"⁶⁷ the power to provide for "governing such Part of" the militia as may be called pursuant to an act of Congress into national service;⁶⁸ the power to "make Rules concerning Captures on Land

62. Note in this respect the wholly separate references to "the Militia"—a reference to the armed citizenry of each state, maintained and regulated under state constitutional and state statutory law in the first instance, and not by the national government at all. Article I, section 8 insures that Congress may, by statute, provide "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," and to provide similarly for "organizing, arming, and disciplining, the Militia," when thus called for the Service of the United States." The Second Amendment anchors the right to keep and bear arms in respect to this militia and obliquely bears on these questions as well.

63. U.S. CONST. art. I, § 8, cl. 12.

64. U.S. CONST. art. I, § 8, cl. 13.

65. U.S. CONST. art. I, § 8, cl. 15.

66. U.S. CONST. art. I, § 8, cl. 1.

67. U.S. CONST. art. I, § 8, cl. 14.

68. U.S. CONST. art. I, § 8, cl. 16.

and Water;"⁶⁹ the power "to define and punish . . . Offences against the Law of Nations;"⁷⁰ the power "[t]o declare War;"⁷¹ the power to "grant letters of Marque and Reprisal"⁷² to authorize privateers; and finally, Congress is given the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."⁷³ Certainly, such broad power includes the power to impose such restrictions as Congress may deem appropriate to restrain the use of the armed forces it provides.

Finally, aside from its decidedly martial powers, Congress is entrusted with the authority "[t]o regulate Commerce with foreign Nations."⁷⁴ Matched with the necessary and proper clause, the authority to regulate commerce with foreign nations carries with it the possibility that Congress might find it appropriate to provide for the use of the Army and Navy to help safeguard that commerce. If such action is necessary, it is for Congress to provide pursuant to its vested powers, and to do so in the manner and to the extent it deems best advised.

Compare the several powers vested in Congress with the slim, albeit related, profile of executive powers provided in article II. It is particularly significant to note who addresses whom when determining what needs to be authorized and supplied with respect to the Army and Navy. The President is enjoined to "give to the Congress Information of the State of the Union," and to "recommend to their Consideration such Measures as he shall judge necessary and expedient."⁷⁵ Thus, while the President recommends, it is the Congress that decides. On extraordinary occasions, the President may "convene both Houses" of Congress although one or both may be in recess or in adjournment between elections.⁷⁶ The point of such power is obvious—to give the President authority to convene Congress to present requests for congressional action as exigent circumstances may require.

The President is also made "Commander in Chief of the Army and Navy."⁷⁷ Nonetheless, in that capacity, as in any other, the Constitution orders that "he shall take Care that the Laws be faithfully

69. U.S. CONST. art. I, § 8, cl. 11.

70. U.S. CONST. art. I, § 8, cl. 10.

71. U.S. CONST. art. I, § 8, cl. 11.

72. *Id.*

73. U.S. CONST. art. I, § 8, cl. 18.

74. U.S. CONST. art. I, § 8, cl. 3.

75. U.S. CONST. art. II, § 3.

76. *Id.*

77. U.S. CONST. art. II, § 2, cl. 1.

executed.”⁷⁸ In brief, even as Commander-in-Chief, the President answers for such uses of the armed services as Congress has provided for, even while advising and recommending to Congress what he deems to be the necessary and proper authority that he should be granted. Note that, insofar as the President believes a particular armed force may be necessary to make him effective as Commander-in-Chief, or similarly, insofar as he believes a certain authorization to use those forces may be necessary and proper to enable him as Commander-in-Chief to effectively meet the foreign policy objectives he deems to be in the best interest of the United States, the Constitution accommodates the President’s prerogative in the same manner. Under the schema of the Constitution, the President may recommend what he judges to be necessary, and Congress then decides what it is willing to do. That the Constitution contemplates such an interaction between the Executive and the Legislature is reflected in the necessary and proper clause, which not only vests in Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” its own powers but also to carry out “all other Powers vested . . . in the Government of the United States, or in any Department or Officer thereof,” including those of the President.⁷⁹

Returning to an earlier example, Congress may determine that the regulation of commerce with foreign nations may be served by providing an armed escort for commercial vessels in the Persian Gulf. Alternatively, should Congress decide it does not wish to risk the engagement of American armed forces in the Gulf, it may limit their use to situations when there is no ongoing war in the region. In either regard, the determination is for Congress to make and to provide for by the proper enactment.

The President may, of course, wholly disagree with what Congress decides. It may be his emphatic opinion that a far more aggressive presence is necessary to the security of commerce in the Gulf, or to the credibility of our foreign policy among the various Gulf states, the Soviet Union, or even our Western European allies. If he does disagree, he may voice his disagreement loudly and clearly. He may bring such pressure to bear against Congress by appealing over its head to the American public, in order to gain popular support for the measures he thinks appropriate. Moreover, he may provide such information to Congress that ought to persuade Congress to adopt his view of the national interest. Indeed, in his capacity to do the latter, there is a definite risk that he may “invent” the information—in other

78. U.S. CONST. art. II, § 3.

79. U.S. CONST. art. I, § 8, cl. 18.

words, he may lie—to get Congress to adopt his proposals. This is a risk the Constitution, by its design, accepts. In the end, however, it will be Congress who will determine whether the President will prevail in securing the necessary authority.⁸⁰ Even if he does not prevail, the President will undoubtedly continue to act within the authority Congress has provided, while pressing for such enlargement of his authority that he believes is more conducive to the national interest. Insofar as circumstances may prove the President to have been “right” and Congress “wrong,” he may have history’s judgment in his favor. But that is all.

There is one scenario where the President may have an advantage and where it would be entirely appropriate for him to press that advantage as he sees fit. That scenario, while significant, is simply stated as follows: If prior acts of Congress concerning the use of armed forces provide executive discretion as to their deployment, such that the proposed resolution would modify such discretion of the President, the President may prevail in retaining his discretion and authority by successfully vetoing the new, limiting resolution of Congress. He may, therefore, prevail against congressional majorities in both Houses and still presume to act legally within the more permissive, preexisting law which will remain fully in effect. In this manner and under such circumstances, the veto clause favors the status quo concerning what uses the President may make of the Army and Navy, by giving him a provisional trump over a restriction of the sort proposed in the War Powers Resolution. The President’s advantage, however, is only the result of a qualified power that may be overridden by a two-thirds vote in each House, exactly as is in the case of the passage of the War Powers Resolution. At this point, the President’s authority to assert his own preference is, in a nation governed by law, at an end.

In one of its most famous separation of powers decisions *Youngstown Sheet & Tube Co. v. Sawyer*,⁸¹ the Supreme Court took note of this constitutional calibration of powers between the President and Congress much in the same manner I have pursued here. As Justice Jackson noted in his famous concurring opinion in *Youngstown*, one

80. Similarly, it may be the desire of the President to lower spending and increase taxes to check inflation, or to bring international trade accounts into balance, or to infuse vitality in interstate commerce within the United States. He may seek authority to make adjustments in trade, in national spending, or in modifying certain taxes under specified conditions. Congress may grant him this authority. If Congress denies the President the authority, however, then the matter is settled until Congress becomes convinced that it was in error and provides otherwise. Meanwhile, the President must ensure that the laws are faithfully executed.

81. 343 U.S. 579 (1952).

may rightly acknowledge the gray area of overlap between the larger number of express powers vested in Congress by article I and the discretion of the President inherent in his role as both President and Commander-in-Chief, pursuant to article II.⁸² The gray area is gone, however, when Congress specifically and clearly speaks with all the strengths of its several powers pertinent to a given subject, convinced even to the point of mustering special majorities overriding the President's veto.⁸³ The issue then is not how far the President might go with affirmative congressional support, how far he might go had Congress not addressed a given use of the armed services at all, or how far the President might go, consistent with some antecedent law previously furnished by Congress, as against a change made by Congress, where the change succumbed to an executive veto and no sufficient two-thirds majorities could be mustered in Congress to overwhelm that veto. The issue is, rather, whether the President may still claim an executive prerogative to use the armed forces by authority of the very slim profile of express and implied powers entrusted to him under article II as against the whole aggregate of express legislative powers vested in Congress.⁸⁴

If one goes back to the beginning of this section and looks again at the whole aggregate of powers expressly invested in Congress on this subject, and considers the logic of how and why those powers are vested in Congress, it will go far to dispel one's doubts about the questions raised by the opponents of the War Powers Resolution. The President is not given the power to determine the extent to which we shall have standing armies in the United States, the manner in which they shall be governed, the extent to which the armed forces of the United States may or may not be used as an instrument of national policy or to enforce judicial orders, the extent to which we supplement, or even displace, federal marshalls or state or local police in circumstances of domestic tumult, whether to assure navigational

82. *Id.* at 637 (Jackson, J., concurring).

83. *Id.* at 637-38.

84. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). In *Little*, a United States frigate captain was held personally liable to a Danish shipowner whose vessel the frigate captain had seized while carrying out, in good faith, President Adam's executive order to seize vessels "bound to or from French ports," during a period of war-like hostilities between France and the United States. *Id.* at 179. In an unanimous opinion written by Chief Justice Marshall, the Supreme Court held that in the absence of a controlling resolution of Congress, the executive order might well have been within the President's authority as Commander-in-Chief in implementing the neutrality resolution. *Id.* at 177-78. However, because there was an express resolution of Congress authorizing the President to give instructions on the use of U.S. public armed vessels to intercept only such vessels as were bound to a French port, the resolution limited the President's authority and was, therefore, controlling on his action. *Id.* The President's broader order was thus invalid.

freedoms on the high seas for our own vessels or those of other nations; and whether, and to what extent, our armed forces are to be used to police commerce with foreign nations, to implement treaty obligations, and/or to be used generally or selectively as an armed instrument of foreign policy. These matters, one and all, are subject to the decisionmaking power of Congress. In a republic like ours, which is governed by a constitution like ours, one ought not be surprised. The War Powers Resolution is but a modest and good faith effort to regain some lost ground. Regrettably, it has failed.