

Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*

Gerhard Casper†

But in the exercise of such a prerogative, as declaring war, dispatch, secrecy, and vigor are often indispensable, and always useful towards success. On the other hand, it may be urged in reply, that the power of declaring war is not only the highest sovereign prerogative; but that it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. War, in its best estate, never fails to impose upon the people the most burthensome taxes and personal sufferings. . . . It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead; and in a republic, whose institutions are essentially founded on the basis of peace, there is infinite danger, that war will find it both imbecile in defence, and eager for contest. . . . The cooperation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all others.

JOSEPH STORY, COMMENTARIES ON
THE CONSTITUTION OF THE UNITED
STATES, Vol. III, 60-61 (1833)

Although Congress attempts much, it accomplishes comparatively little.

JAMES BRYCE, in KARL BAEDERER,
THE UNITED STATES, HANDBOOK FOR
TRAVELLERS 11 (4th ed. Leipzig, 1909).

The manner in which recent Presidents have conducted United States foreign and defense policy suggests an absence in practice of constitutional constraints and the presence of surprisingly few political constraints.¹ The Vietnam tide of unrestrained

executive policy making reached its high-water mark in 1967 when President Johnson said of the Gulf of Tonkin resolution: "We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we're doing."² In light of the constitutional plan of coordination between the legislative and executive branches in the conduct of foreign and defense policy, such claims of unrestrained executive power pose some puzzling questions about constitutional law in particular, and perhaps about our theory of law in general.

This paper examines the trend toward unilateral executive policy making in the areas of defense and foreign affairs from the vantage point of legal theory. The first part finds that the trend was facilitated by the prevailing "judicial" model of constitutional constraints. In the second part of the paper, an alternative constraint model, not dependent on judicial intervention, will be explored in light of the concepts of separation of powers and checks and balances.

I

To ask what constitutional constraints limit the conduct of foreign and defense policy is to assume that such constraints exist. This assumption seems reasonable enough on one level of analysis: the Constitution neither confers unlimited authority over foreign and defense policy on the President, nor exempts him from accountability. One of the most firmly established principles of American political theory is that the Constitution, in Marshall's phrase, is "fundamental and paramount law."³ The Supreme Court has, if not consistently, then occasionally, gone out of its way to

* A preliminary draft of this paper was prepared in response to an invitation by the Council on Foreign Relations, Inc. and presented to a discussion group chaired by Senator Charles McC. Mathias, Jr., held in Washington, D.C. on April 8, 1975. The views expressed are, of course, those of the author. I am grateful to Stanley Katz and Philip Kurland, who read an early draft.

† Professor of Law and Political Science, The University of Chicago.

¹ An analysis of these developments from the vantage point of Congress is provided by SENATE COMM. ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, S. REP. NO. 797, 90th Cong., 1st Sess. (1967).

² Quoted in G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 442 (9th ed. 1975).

³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

stress that not even "the great exigencies of government" suspend the Constitution. Perhaps the best-known formulation of this principle in Supreme Court decisions is the statement made by Justice Davis at the end of the Civil War: "The Constitution of the United States is a law for rulers and people, equally in war and peace"⁴

As soon as this high level of normative abstraction is abandoned, however, one seems to be standing in quicksand. Assumptions about the existence of constitutional constraints quickly become questionable when the actual conduct of foreign and defense policy is examined. An empirical concept of constitutional law, rooted in legal realism, rather than the prescriptive one, has been generally accepted when it comes to the Constitution and foreign affairs.

If a philanthropist were to establish a prize for the unpretentious facile phrase, he would do well to name it in honor of Justice Holmes: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁵ While the exact mischief caused by this definition is difficult to ascertain, it, as well as Langdell's invention of the "case method" as the primary mode of legal education, has clearly contributed to a neglect of the basic institutional arrangements of government.⁶ Thus, in teaching and research, reference has been primarily to the constitutional law embodied in Supreme Court decisions.⁷ A remark made by Charles Evans Hughes, when Governor of New York, has become the most famous shorthand expression of this attitude: "The Constitution is what the judges say it is."⁸

More importantly, however, Holmes and the legal realists, with their disdain for mere "paper rules" and their desire for the "scien-

⁴ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866).

⁵ O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 173 (1920). On the prediction theory of law, see G. CASPER, *JURISTISCHER REALISMUS UND POLITISCHE THEORIE IM AMERIKANISCHEN RECHTSDENKEN* 56-64 (1967).

⁶ See Casper, *Two Models of Legal Education*, 41 TENN. L. REV. 13, 17-18 (1973).

⁷ A look at any constitutional law casebook will prove this proposition. However, one of the more interesting by-products of the constitutional developments concerning Vietnam and Watergate has been the inclusion in such "casebooks" of significant amounts of non-case materials, a somewhat belated adoption of a more general trend among authors of casebooks in other areas. See, e.g., G. GUNTHER, *supra* note 2. The trend is even clearer in P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (1975).

⁸ THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 143 (R. Danelski & J. Tulchin ed. 1973). Hughes complained that his words were taken out of context, that he had not intended to be flippant, but rather had been speaking of the essential function of the courts in the American system. Either way, he confirms the American preoccupation with the courts.

tific" verification of law, gave new currency to a Hamiltonian theme. Writing in the tradition of Hobbes, Hamilton had stressed that resolutions or commands that pretend to be laws amount to nothing more "in fact" than advice, "if there be no penalty annexed to disobedience."⁹ The realist likewise insisted that law had to have "consequences" before it could be viewed as "real" law. While this is not the place to evaluate the "bad man's theory of law,"¹⁰ its continued popularity is important to an understanding of the prevailing view of constitutional constraints as it arose in the context of precedent-oriented American legal culture.

The lack of effective sanctions to enforce constitutional constraints on the conduct of foreign and defense policy has caused many of the constitutional rules prescribing governmental organization for the conduct of such policies to be viewed more as "recommendations" than as actual legal constraints. Critics of executive or congressional action in the field of foreign affairs who have the audacity to argue straight from the constitutional text are likely to be belittled as "fundamentalists."¹¹ The tendency to view constitutional rules as no more than recommendations has been further encouraged by the relative scarcity of case law, particularly Supreme Court decisions, defining constitutional constraints on the conduct of foreign and defense policy. The common law tradition has led to a virtual identification of legal reasoning with incremental advances of doctrine from case to case. The organizational principles of the Constitution, if unassisted by case law, do not quite fit the rest of the law. Their ambiguity (real or alleged) leads to a perception of this part of constitutional law as even "softer" than those areas in which the courts are active. Moreover, litigation normally leads to an accumulation of precedents and consequently to a reduction of legal uncertainty. Where there is little litigation, uncertainty tends to be high; in the area of foreign affairs, such uncertainty appears to favor the actor who, under difficult and trying circumstances, takes the initiative.¹²

⁹ THE FEDERALIST NO. 15, at 95 (J. Cooke ed. 1961) (A. Hamilton).

¹⁰ On Holmes, see Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

¹¹ McDougal and Lans used the colorful pejorative "mechanical, filiopietistic theory." McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 212 (1945). For a recent expression of the same point of view, see Rostow, *Response*, in *Symposium—Organizing the Government to Conduct Foreign Policy: The Constitutional Questions*, 61 VA. L. REV. 747, 798 (1975).

¹² An important illustration of this proposition is the House Judiciary Committee's refusal to include among the articles of impeachment an item accusing President Nixon of

The scarcity of case law on foreign and defense matters seems to be the key to the perception of constitutional constraints in this area as amorphous, uncertain, and hence, for the most part, advisory rather than prescriptive. It has had other effects as well. For example, the manner in which judicial decision making has been avoided (particularly through the "political question" doctrine) has created a demarcation between law and politics which, in turn, has diminished the effectiveness of existing nonjudicial sanctions. Another, perhaps inevitable corollary of the scarcity of decisions has been an exaggerated emphasis on the few that do exist and an irresistible opportunity for the creation of constitutional and political mythologies. Before turning to a closer examination of these effects, however, I shall explore in detail some of the factors that have produced the lack of case law.

The relative lack of judicial decisions on foreign and defense matters is not only a function of the case-or-controversy requirement in its various manifestations, but also of the doctrines of justiciability and the nature of foreign and defense policy. Principles of standing, ripeness, mootness, and the prohibition on advisory opinions, at least in the past, often stood in the way of adjudication. Since many of the questions about separation of powers and the system of checks and balances arise out of conflicts between the executive and the legislature (or members thereof), they often remain unlitigated because the parties involved are either unable or unwilling to submit their dispute to judicial resolution.

To be sure, recent developments in the law of standing¹³ have produced some changes that, in the future, may lower the standing barriers to legislator suits. While some lower federal courts continue to refuse standing to legislators¹⁴ because they do not fit the "private rights" model of adjudication,¹⁵ other federal courts have drawn liberal conclusions from the Supreme Court's liberalization of standing criteria.¹⁶ Yet the final outcome of such efforts is uncertain,

illegally bombing Cambodia. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 1305, 93d Cong., 2d Sess. 219 (1974).

¹³ See Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1379-83 (1973); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 660-69 (1973); Note, *Standing to Sue for Members of Congress*, 83 YALE L.J. 1665, 1666-67 (1974) [hereinafter cited as YALE NOTE].

¹⁴ See, e.g., *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973); *Gravel v. Laird*, 347 F. Supp. 7 (D.D.C. 1972).

¹⁵ Monaghan, *supra* note 13, at 1365; Scott, *supra* note 13, at 648.

¹⁶ See, e.g., *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); *Mitchell v. Laird*, 488

not only because the courts are in conflict, but also because the rationale sometimes advanced for granting standing to legislators (that is, adjudication of the dispute would have an impact on the plaintiffs' duties to consider impeachment, make appropriations, and take other legislative action)¹⁷ seems to be in stark conflict with the rule against advisory opinions. Even if it were wise to shift the inquiry normally associated with standing toward other questions concerning justiciability,¹⁸ I find it difficult to believe that many legislator suits would ever be decided on the merits.¹⁹

Even if the courts were open to legislator suits, however, the parties involved in conflicts over foreign and defense policies would often be unwilling to litigate them. Put differently: the relative scarcity of case law on foreign and defense matters is a function also of the particular kind of politics involved. A President who acts on his own initiative frequently can get away with actions of dubious legality. As Stanley Hoffman, describing the unilateral act as a "gambler's move," said: "If things go well no questions will be asked, even if it leaves a lingering resentment. If things go sour, knives will be sharpened"²⁰ The knives that are sharpened, however, will rarely be legal knives. The actual or imagined international consequences of attempting to undo a presidential *fait accompli* will always temper Congress's willingness to take a President to task in order to vindicate its views on the proper role of the Congress in shaping foreign policy. In short, while legal and constitutional arguments will always be relevant, it is in the nature of things that their significance will be limited. Furthermore, until recently, antagonism between the Congress and the President over foreign policy was generally understood to be "political" in nature—leading to the employment of political means of "getting back" at a President who had aroused congressional displeasure.²¹

F.2d 611 (D.C. Cir. 1973); *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973); YALE NOTE, *supra* note 13, at 1666.

¹⁷ *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973).

¹⁸ This is the approach advocated by the YALE NOTE, *supra* note 13, at 1685.

¹⁹ Apart from all other considerations, the prohibition against advisory opinions should be taken most seriously. Its function is not merely to implement the article III case-or-controversy requirement, but also—and perhaps more importantly—to force the other branches of the government to perform their tasks, at least initially, independently of the judiciary.

²⁰ S. HOFFMAN, *GULLIVER'S TROUBLES, OR THE SETTING OF AMERICAN FOREIGN POLICY* 263 (1968).

²¹ It should go without saying that use of other weapons, such as the appropriations process, is fraught with serious difficulties of its own. See A. FRYE, *A RESPONSIBLE CONGRESS: THE POLITICS OF NATIONAL SECURITY* 11 (1975).

Of course, questions concerning the scope of executive and congressional powers over foreign affairs and defense may sometimes crystallize into "cases" or "controversies" in a more conventional sense. Given the fact that at present a wide variety of "personal interests" and "injuries" are considered sufficient to demonstrate a plaintiff's stake in the outcome,²² separation of powers questions can now be litigated even when those most directly affected do not resort to the courts.²³ Important as these changes in the law of standing are, a proper plaintiff nevertheless will frequently run into the barrier of the so-called "political question" exception to federal court jurisdiction.

Controversies in the areas of foreign affairs and defense have traditionally been recognized as prime examples of "political questions." At first glance, the political question doctrine seems to do no more than categorize certain subjects as nonjusticiable, that is, not amenable to judicial resolution; yet this characterization has had consequences far beyond making certain issues noncognizable in the courts.

While everything Chief Justice Marshall had to say about political questions in the case of *Marbury v. Madison*²⁴ constituted dicta, his pronouncements have nevertheless provided the foundations for a complex doctrine:

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. . . . The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. . . . The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.²⁵

²² See Scott, *supra* note 13, at 660-69. .

²³ The most famous example in the "directly affected" category is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). For an example of a case in which a more remotely affected plaintiff was held to have standing, see *Consumers Union of United States, Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974) (challenge to executive efforts to bring about a reduction in steel imports by means of self-imposed limitations on foreign producers).

²⁴ 5 U.S. (1 Cranch) 137 (1803).

²⁵ *Id.* at 165-70.

On their face, these observations say little more than the following: *if* and when the Constitution confers discretion on the executive, the courts will not review the exercise of that discretion. Marshall did not say that questions concerning the existence of discretion are political. Yet over the years the doctrine has taken on a life of its own, until it has come to mean that certain cases are outside the judicial sphere, not because their resolution devolves upon the executive, but because they belong to an area of human affairs, like defense, too delicate or too difficult to be dealt with by legal rules. This was clearly the theory underlying the refusal of the Supreme Court and some lower courts to entertain challenges to the legality of the Indochina war.²⁶

Chief Justice Marshall's ambiguous emphasis on questions "in their nature" political juxtaposed law and politics in a way that made it plausible to conclude that constraints concerning primarily "political" matters were, properly speaking, political rather than legal constraints. *Marbury v. Madison* is also the case in which Marshall uttered his famous cliché: "It is emphatically the province

²⁶ The closest the Supreme Court came to relying expressly on the political question doctrine as a barrier to these suits was in a class action challenging the constitutionality of the Indochina war. A three-judge district court had granted a motion to dismiss on political question grounds. *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972). The Supreme Court summarily affirmed on appeal, with Justices Douglas, Brennan, and Stewart dissenting. *Atlee v. Richardson*, 411 U.S. 911 (1973). Most Supreme Court action concerning the Indochina war took the form of denying petitions for certiorari. In *Mora v. McNamara*, 389 U.S. 934 (1967), Mr. Justice Stewart, joined by Mr. Justice Douglas, dissented with a short opinion indicating that he believed the Court should face the issue of justiciability and perhaps some substantive problems as well.

Judge Mulligan of the Second Circuit concisely summarized judicial feelings of inadequacy to deal with "political" issues, such as the war: "The situation fluctuates daily and we cannot ascertain at any fixed time either the military or diplomatic status. . . . While we as men may well agonize and bewail the horror of this or any war, the sharing of presidential and congressional responsibility, particularly at this juncture, is a bluntly political and not a judicial question." *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311 (2d Cir. 1973). Before this Court of Appeals decision, the plaintiffs had obtained a District Court injunction against the bombing of Cambodia. *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973). The stay of that injunction by the Court of Appeals on July 27, 1973, led to a peculiar involvement on the part of the Supreme Court. After Mr. Justice Marshall, as the Circuit Justice, had denied an application to vacate the stay, Mr. Justice Douglas granted the application. Thereupon, the Solicitor General asked Mr. Justice Marshall to stay the District Court injunction. This stay was granted after consultation with the other Justices by "seriatim telephone calls" (Mr. Justice Douglas' characterization) and with Justice Douglas dissenting. See *Schlesinger v. Holtzman*, 414 U.S. 1321 (1973); *Holtzman v. Schlesinger*, 414 U.S. 1304, 1316 (1973). Thus, for a few hours on August 4, 1973, there was in effect a federal court injunction against the bombing of Cambodia obtained by a member of Congress: the only such instance of this nature, as far as I know.

and duty of the judicial department to say what the law is."²⁷ Thus, again the unwary observer might assume that no legal constraints exist where the courts refuse to say what the law is.

It should, of course, be clearly understood that not all cases involving foreign affairs or defense are political questions in the technical sense. Instead, as Justice Brennan said recently, "cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action."²⁸ Also, courts have been reluctant to apply the doctrine when important individual rights are at stake.²⁹

At first blush, the political question doctrine is nothing more than a limitation on court jurisdiction. I am suggesting that it spills over into nonjudicial debates over legal constraints and has the net effect of lessening those constraints—in spite of the fact that a court's refusal to decide a political question does not imply that the acts the court abstains from reviewing are constitutional.³⁰

Let me illustrate the point. I recently testified before a congressional committee on presidential emergency powers. I argued that Congress's failure to provide for the termination of states of emergency amounted to an unconstitutional abdication of legislative powers. In response, the administration representative posed

²⁷ 5 U.S. (1 Cranch) 137, 177 (1803). For a recent commentary criticizing the misuse of this notion in *United States v. Nixon*, see Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 U.C.L.A.L. REV. 30, 33 (1974).

²⁸ *Baker v. Carr*, 369 U.S. 186, 211-12 (1962). See also Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 583 (1966).

²⁹ Scharpf, *supra* note 28, at 584. For a general survey, see *Developments in the Law—The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972). While Scharpf is clearly right when he speaks about the courts' reluctance to invoke the political question doctrine when important individual rights are at stake, this statement must be qualified in light of the Indochina experience; even though it is difficult to conceive of a more important individual right than the right to life, the Court refused to adjudicate challenges to the draft and the war even when they were brought by individuals about to be sent to the battlefield.

³⁰ Some of those who advocated adjudication of the legality of the Indochina war sacrificed this important point by stressing the link between "political question" and constitutional commitment of a subject matter to another branch of the government: "Decisions that consider the dangers of the nation speaking with two voices in foreign affairs do not use the language of abdication but of decision that the scheme of separation of powers validates the claim that the Executive has the power to decide which he has." Tiger, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A.L. REV. 1135, 1170 (1970). Compare this statement with that of Judge Mulligan, quoted at note 26 *supra*.

the following question: "Although as a *policy* matter, it may well be that Congress should provide for limits on the duration of emergency, it is hard to find any evidence that the *courts* consider endless emergencies unconstitutional. In fact, the cases you cite . . . pretty much hold that the courts will not interfere if Congress goes on making broad delegations. . . . Can you provide any authority for your statement that these laws are unconstitutional?"³¹

Courts are, of course, reluctant to second-guess Congress or the executive on the existence of emergency conditions,³² yet this fact alone can hardly dispose of the constitutional issue.³³ The question

³¹ *Hearings on the Termination of the National Emergency Before the Special Comm. of the United States Senate*, 93d Cong., 1st Sess., pt. 1, at 494 (1973) (emphasis added).

³² See, e.g., *Block v. Hirsh*, 256 U.S. 135, 154 (1921). Judge Friendly even stated that courts "will not review a determination so peculiarly within the province of the chief executive" (concerning the continuance in 1966 of the Korean War Emergency unilaterally declared by President Truman in 1950). *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966). An interesting exception to the notion that courts are not fit to judge the existence of emergency conditions was legislated by the Second Congress with respect to certain domestic emergencies. Act of May 2, 1792, ch. 28, 1 Stat. 264. The Act dealt with federalizing the militia "to execute the laws of the Union, suppress insurrections and repel invasions," provided that the militia could not be federalized to execute federal laws until the President had been notified of opposition to those laws by an associate justice or the district judge. *Id.* § 2. President Washington relied on this procedure in calling out the militia to suppress the Whiskey Rebellion. See 1 MESSAGES AND PAPERS OF THE PRESIDENTS 162 (J. Richardson ed. 1900). It should be noted that judicial notification was restricted to a subject matter perhaps peculiarly within the province of the federal judiciary: the breakdown of federal law enforcement in one of the states. This particular rule was repealed in 1795. See Act of Feb. 28, 1795, ch. 36, 1 Stat. 424. In *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827), Justice Story, speaking for a unanimous court, found questions concerning the federalization of the militia during the War of 1812 to be political.

³³ Justice Jackson was perhaps the most sensitive on the question of emergency powers. Concurring in a case upholding a post-World War II rent control act on the basis of the "war power," he wrote:

We still are technically in a state of war. I would not be willing to hold that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended. I cannot accept the argument that war powers last as long as the effects and consequences of the war, for if so they are permanent—as permanent as the war debts.

Woods v. Miller Co., 333 U.S. 138, 147 (1948). For a recent adjudication of the emergency powers issue, see *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560 (C.C.P.A. 1975). The case involved the legality and constitutionality of the import surcharge imposed by President Nixon in August 1971. The court first upheld broad delegations of power found in the Trading with the Enemy Act and then, commenting on the role of the courts, said: "Though courts will not normally review the essentially political questions surrounding the declaration or continuance of a national emergency, they will not hesitate to review the *actions* taken in response thereto or in reliance thereon. It is one thing for courts to review the judgment of a President that a national emergency exists. It is another for courts to review his acts arising from that judgment." *Id.* at 579 (emphasis in original).

For my views on presidential emergency powers, see *Hearings, supra* note 31, at 75-94, 493-96; CASPER, ON EMERGENCY POWERS OF THE PRESIDENT: EVERY INCH A KING? (Occasional Papers from The Law School, The University of Chicago No. 6, 1973).

put to me illustrates rather clearly the widespread tendency to view constitutional law as being restricted to adjudicated principles. The political question doctrine, which can easily be misunderstood as drawing the line between law and politics, has added to the difficulties of clearly defining constitutional constraints on foreign and defense policies.³⁴

One answer to the question asked of me at the hearing would be that constitutional rules are authoritative regardless of whether the courts are able to interpret and enforce them. How then does one "prove" the unconstitutionality of the unchecked delegation of emergency powers to the President? Whether or not the judiciary has the power to pass on the action taken, the duty to interpret the Constitution in the first instance belongs to the other two branches of the government, jointly and severally. What has been missing to a large extent from the congressional rush to delegate ever more responsibilities to the President in a sense of authority and obligation to determine whether the constitutional allocation of powers is being stretched to a breaking point. In the performance of this task, both the legislative and the executive branches must be ready to reconsider fundamental constitutional policies and basic propositions of political theory. These may be more relevant than the most recent judicial dicta taken out of context from a few cases. They may also be less ambiguous than might be supposed.

The American fixation on the courts not only has weakened our capacity to deal "legally" with political questions within the constitutional framework, but also has emasculated the one constitutional institution expressly designed as a nonjudicial constitutional constraint on the executive: impeachment. Putting to one side the difficulties inherent in the drastic nature of impeachment, the complex developments during the Watergate crisis suggest that im-

³⁴ Maybe discourse on the political question doctrine would have been less confused if less emphasis had been placed on the positive commitment of a subject matter to other branches and, instead, the negative aspect—non-commitment to the judiciary—had been stressed. While the constitutional distribution of war powers between the executive and legislative branches may be doubtful in a given situation, the non-commitment approach would simply reflect the fact that the task of allocating those powers had not been committed to the judiciary. The negative formulation makes it somewhat harder simply to dissolve the constitutional issues in a vast sea of discretion. It goes without saying that I should not like to be misunderstood as favoring the wholesale abolition of the political question doctrine. For instance, I agree with the proposition that the legality of the Indochina war was not amenable to judicial resolution. Various elements of the political question doctrine converged in this case, leading to the conclusion of nonjusticiability: non-commitment to the judiciary, lack of manageable standards, embarrassment from multifarious pronouncements and lack of necessary information. On this last point, see Scharpf, *supra* note 28, at 567.

peachment has also been weakened as a sanction by the proclivity to reduce questions about its use to purely legal ones. This ascendancy of law over politics leads to an ultimate irony: after most constraints have been dissolved into political ones, the remaining constitutional constraint, impeachment, is blunted by being turned into a narrowly legal proceeding.

The legal disputes during the Watergate crisis about grounds for impeachment, access to evidence, procedures of the House Judiciary Committee and the like were only the beginnings of a legal thicket that grew denser and thornier the closer the country moved to an actual impeachment trial. This prominence of legal issues in connection with impeachment was in part caused by the Framers, who set the tone when they decided to adapt the English institution of impeachment trials to their purposes. Thus the Constitution speaks of "trial" and "conviction" when referring to impeachment proceedings. To be sure, the Constitutional Convention debates, as well as subsequent commentary, amply demonstrate that the Framers distinguished between the "sphere of ordinary jurisprudence" and impeachments. The latter, James Wilson said, "are founded on different principles; are governed by different maxims; and are directed to different objects." By this he meant that they were confined to "political characters, to political crimes and misdemeanors, and to political punishment."³⁵ Yet the very mix of political and adjudicatory elements (the Senate, specially sworn, renders judgment upon accusation by the representatives of the people for offenses against the state) indicates that, once again, the Framers chose a solution that tempered politics with law, while seasoning the law with politics.

A reading of the Convention debates and other contemporary sources yields the following purposes associated with impeachment:

- i. The threat of impeachment provides security for the good behavior of the executive and his aides (the "deterrent" function).³⁶
- ii. Impeachment serves to give meaning to the "government of laws" concept: not even the executive can be secure when he violates the Constitution and the laws (the "constitutionalist" function).³⁷
- iii. Impeachment is a means for removing an "obnoxious"

³⁵ 2 THE WORKS OF JAMES WILSON 166 (R. McCloskey ed. 1967).

³⁶ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (M. Farrand ed. 1911) (remarks of Gerry).

³⁷ *Id.* at 65 (remarks of Mason).

executive and serves as a substitute for violence (the "domestic tranquility" function).³⁸

iv. Impeachment and removal serve to defend the community against the executive's betrayal of his trust (the "defensive" function).³⁸

v. Impeachment and removal serve as punishment for injuries done to the society itself (the "retributive" function).⁴⁰

During the impeachment debates of 1974, it quickly became apparent that members of Congress preferred legal syllogisms borrowed from the criminal law to constitutional judgments in determining what was meant by "high crimes or misdemeanors." As a matter of constitutional perspective, this was inappropriate. The broad purposes of impeachment call for political judgments of the highest order, since the welfare of the polity and its institutions must be considered in a complex fashion wholly unrelated to the normal application of the criminal law.⁴¹ Yet the great constitutional debate was largely reduced to a discussion of criminal offenses such as obstruction of justice and conspiracy.

The tendency to assign disputes to the discrete realms of "law" and "politics" has resulted in the deconstitutionalization of issues concerning the allocation of powers over foreign and defense policy. It has also had the paradoxical effect of assigning a disproportionate importance to the few "legal" precedents that do exist. Absent the continuous consideration and reconsideration of rules and principles, a few oracles have led to the emergence of a constitutional mythology that does not bear close analysis.

A search of briefs on the constitutional allocation of foreign affairs powers would probably show that *United States v. Curtiss-Wright Export Corp.*⁴² is the single most frequently cited case on the subject.⁴³ It retains this significance despite the fact that most of Justice Sutherland's fancy pronouncements amounted to no more than dicta, since the problem before the Court was the narrow one of the constitutionality of a tightly circumscribed delegation of powers by the Congress to the President over arms shipments to the Chaco. Similarly, the importance of the decision has not been

³⁸ *Id.* (remarks of Franklin).

³⁹ *Id.* at 66, 68 (remarks of Madison and Morris).

⁴⁰ *Id.* at 67 (remarks of Randolph).

⁴¹ Professor Black's views of the subject are generally very close to my own. See his treatment of impeachable offenses in C. BLACK, *IMPEACHMENT: A HANDBOOK* 25-52 (1974).

⁴² 299 U.S. 304 (1936).

⁴³ For some of the evidence, see Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 *YALE L.J.* 1, 3-5 (1973).

diminished by the recognition that Justice Sutherland made use of the occasion to recite as the law his previous writing on the subject.⁴⁴

In his opinion for the Court, Justice Sutherland located the source of the so-called foreign affairs power of the United States. Instead of engaging in a close scrutiny of constitutional provisions, he identified the foreign affairs power with the international law concept of "external sovereignty." Sutherland sought to domesticate this concept by quoting the reference in the Declaration of Independence to the "full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other facts and things which independent states may of right do." He traced this power back through the Continental Congress to the British Crown and then placed it, more or less exclusively, in the hands of the President.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.⁴⁵

After admitting that the Senate does have the power of advice and consent with respect to treaties, Sutherland nevertheless summarized his theory by quoting, out of context,⁴⁶ a speech made by John Marshall in his capacity as a member of the House of Representatives on March 7, 1800, in which Marshall referred to the President as "the sole organ of the nation in its external relations, and its sole representative with foreign nations."⁴⁷

While Justice Sutherland did not reject the notion of constitutional constraints, his most poetic rhetoric was reserved for his discovery "that the presidential powers over foreign affairs derived not at all from the Constitution, but rather from the Crown of England."⁴⁸ A short quotation will suffice:

⁴⁴ See G. SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* (1919); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L.J.* 467 (1946); Lofgren, *supra* note 43, at 11.

⁴⁵ 299 U.S. 304, 319 (1936).

⁴⁶ See Lofgren, *supra* note 43, at 24-25.

⁴⁷ 299 U.S. 304, 319 (1936), quoting 10 *ANNALS OF CONG.* 613 (1800). Marshall saw presidential authority as subject to congressional legislation.

⁴⁸ Kurland, *The Impotence of Reticence*, 1968 *DUKE L.J.* 619, 622.

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the *very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations*—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.⁴⁹

The point I am attempting to make here is not primarily that Justice Sutherland was wrong—though I believe he was, both as to the origins of foreign affairs powers and in his concept of an all-inclusive executive foreign affairs power—but rather that the relative scarcity of case law in the field has made it easier for judges to engage in unchecked flights of fancy, which in turn have facilitated the creation of a constitutional mythology. In that mythology, the role of Zeus is usually assigned to the President, who rules with the aid of such abstractions as *the executive power, the war power, the foreign affairs power, or the emergency power*. Collecting and summarizing diverse, limited, and sometimes petty constitutional and statutory authorities into undifferentiated, all-inclusive powers was, and is, an important technique for dissolving constitutional constraints.⁵⁰ Who can claim to know the boundaries and the exact locus of something like the “war power” or the power of the President as “mankind’s Chief Executive for Peace?”⁵¹

The effect of this type of thinking is compounded by the great authority frequently accorded the “gloss” that life has allegedly written upon executive power to conduct foreign affairs. In an article written a few years ago on the role of constitutional arguments dur-

⁴⁹ 299 U.S. 304, 319-20 (emphasis added).

⁵⁰ A parallel use of this technique may be found in the reliance on *the spending power* for overcoming constraints imposed by constitutional federalism.

⁵¹ Bundy, *The Presidency and the Peace*, 42 FOREIGN AFFAIRS 353 (1964). Justice Jackson described the disappearance of constraints most eloquently:

The Government asserts no constitutional basis for this legislation other than this vague, undefined and undefinable “war power.” No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.

Woods v. Miller Co., 333 U.S. 138, 146 (1948) (separate opinion).

ing congressional debates on the Cooper-Church amendment, Mikva and Lundy criticized the opponents of the amendment for continually engaging in long recitations of past wars and armed conflicts in which Congress had not performed the function envisioned by supporters of the amendment.⁵² While extremely slippery, reference to past practice in foreign affairs can claim more than ordinary plausibility, due to the absence of the customary long line of judicial precedents. Lawyers like to reason by means of precedents, and nonjudicial precedents seem to be better than no precedents at all. Indeed, the use of precedents is often considered preferable to reasoning from "first principles," that is, from the constitutional text. When the Constitution is applied to foreign affairs, this attitude leads to a weakening of legal constraints by creating a widespread belief that uncertainties can and should be resolved by an uncritical reliance on past political practice.⁵³ Moreover, this "gloss of life" mode of argumentation occasionally includes the further notion that the Constitution is subject to modification by practice. From that view a sociological concept of constitutional law springs into full bloom.

Here too, most of the trouble begins with Chief Justice Marshall's facile pen. In his exposition of the nature of the Constitution, he emphasized that it differed from a detailed legal code, that it was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." We must never forget, he added, "that it is *a constitution* we are expounding."⁵⁴ When one reads Marshall's statements in context, they are duly qualified and not greatly objectionable. Subsequent generations, however, have tended to cite the Chief Justice as authority for an "adaptive" theory of constitutional interpretation that substitutes usage for constitutional mandates.

Perhaps the most egregious expression of this theory is the famous article by McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments*

⁵² Mikva & Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 492 (1971).

⁵³ It should perhaps be noted that the accounts of past practice that are given for this purpose are often self-serving and the products of shoddy historical scholarship. See, e.g., Berger's critique of the famous Rogers Memorandum on executive privilege. R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 163-208 (1974). For a critical review of Berger's book, see Casper, *American Geheimniskrämerei*, in 3 *REVIEWS IN AMERICAN HISTORY* 154 (1975).

⁵⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

of National Policy.⁵⁵ Though the textual and historical obstacles that confront any attempt to negate the treaty provisions of the Constitution are formidable, the authors did not find them insurmountable: "For even if the widespread use of executive agreements in dealing with all kinds of problems was not within the conscious contemplation of the statesmen who foregathered at Philadelphia . . . , the continuance of the practice by successive administrations throughout our history makes its contemporary constitutionality unquestionable."⁵⁶

Legal and political advocates of usage find encouragement in contemporary judicial pronouncements as well. Justice Frankfurter, for instance, found it unacceptable to confine constitutional law to the words of the Constitution, disregarding "the gloss which life has written upon them." While Frankfurter did not believe that even "deeply embedded traditional ways" could supplant the Constitution, he nevertheless accorded not insignificant authority to usage: "A systematic, unbroken executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II."⁵⁷

Again, I am referring to this mode of argumentation primarily as an element that must be taken into account when constitutional constraints are considered. The merits of the argument depend upon the completeness of the view. It would be unsound not to acknowledge the historical fact that the Constitution has been adapted to changing needs by Supreme Court jurisprudence and governmental practice. On the other hand, unconstitutional practices cannot become legitimate by the mere lapse of time. There is no way around the question of whether certain practices are in accord with the

⁵⁵ McDougal & Lans, *supra* note 11, at 234. For a critique, see R. BERGER, *supra* note 53, at 88. One can distinguish the following types of international agreements made by the United States: (1) treaties; (2) executive agreements made pursuant to treaties; (3) executive agreements made pursuant to legislation; (4) executive agreements made subject to congressional approval; (5) executive agreements made pursuant solely to the President's own constitutional powers. It is this last category that has proved to be constitutionally most troublesome. While such agreements may be small in number, they are great in potential political significance. The most complete information on the subject matter can be found in *Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972).

⁵⁶ McDougal & Lans, *supra* note 11, at 291.

⁵⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 610 (1952) (Frankfurter, J., concurring).

basic scheme and purposes of the Framers. For instance, the circumvention of the Senate's role in treaty making by means of executive agreements may be unconstitutional, in spite of the volume and frequency of such agreements.⁵⁸ Of course, no constitutional argument nor any number of Supreme Court decisions can keep power in the hands of Congress if Congress "is not wise and timely in meeting its problems."⁵⁹

Throughout American history, the "gloss of life" argument, with its emphasis on usage rather than original understanding, has received a powerful impetus from the persistence of the view "that the American political system is singularly unfitted to the effective pursuit of foreign policy."⁶⁰ In this case, Tocqueville may stand as a representative for many other critics, both past and present.

Tocqueville's doubts about the capacity of the American democracy to conduct foreign affairs wisely stemmed from his opinion of democracies in general. "A democracy can only with great difficulty regulate the details of an important undertaking, persevere in a fixed design, and work out its execution in spite of serious obstacles. It cannot combine its measures with secrecy or await their consequences with patience."⁶¹ Secrecy, attention to detail, continuity, perseverance—all are qualities which, he believed, a democracy necessarily lacks. In the early years of the Republic, the United States had been saved from its inherent deficiencies in this area by the fact that the Constitution and "the favor of the public" had entrusted the direction of foreign affairs to one individual, Washington, who had been able to establish the basic principle of noninvolvement in European affairs.⁶² To overstate Tocqueville's argument only slightly: ultimate judgment as to American capacity in foreign affairs had to be suspended because, as of the time of his writing, the foreign policy of the United States consisted of having no foreign policy at all.⁶³

⁵⁸ For a quantitative breakdown, see *Hearings on S. 3475*, *supra* note 55, at 416.

⁵⁹ 343 U.S. 579, 654 (Jackson, J., concurring).

⁶⁰ S. HOFFMAN, *supra* note 20, at 219.

⁶¹ 1 A. DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 243 (Vintage ed. 1954).

⁶² Tocqueville's view of the matter was simplistic, to say the least. His account of American attitudes toward revolutionary France was based on the assumption that only the "inflexible" character of Washington prevented the Americans from declaring war against England, a policy that Tocqueville believed would have been wrong. The underlying model is a polar one: the lone President against popular passion. It does not take into consideration the fact that policy toward France and England was determined with both houses of the Congress fully participating under President Washington, as well as under President Adams. See M. DAUER, *THE ADAMS FEDERALISTS* 86-91, 168-70 (1953).

⁶³ A. DETOCQUEVILLE, *supra* note 61, at 242.

Tocqueville's skepticism as to the capacity of a democracy to conduct an effective foreign policy was based on the deficiencies of democracies, as opposed to other forms of government, in particular aristocracies. He arrived at his conclusion from an analysis of ideal types, not from a review of actual comparative data. Such a study of the impact of constitutional arrangements on foreign policy then, as now, would clearly have been an undertaking so complex as to be almost impossible.⁶⁴ In spite of the understandable lack of empirical support, however, Tocqueville's view has become part of the political mythology that supports the constitutional mythology described earlier, consecrating Presidents and their experts as the only possessors of the perspective and knowledge needed to define the national interest in a hostile world.⁶⁵ Not only have all recent Presidents and their "bright young men" been reared to this conviction, but the view has been shared by many influential members of Congress as well. As recently as 1971, L. Mendel Rivers, then Chairman of the House Armed Services Committee, said: "Congressmen don't understand these military things. My members rely on me, and I know who to rely on. I'd rather have one general who knows this business than a hundred senators who don't."⁶⁶

II

In the first part of this paper, I have attempted to analyze some of the difficulties associated with the concept of constitutional constraints within the context of the American political and legal culture, with its heavy emphasis on precedent. Among the most interesting political and legal developments of the last few years has been an increasing awareness that the judicial model of constitutional constraints is not an all-purpose model. In response to this new awareness there has emerged from Congress a type of legislation that, while not unprecedented,⁶⁷ is novel in the context of foreign affairs. I am referring, in particular, to the War Powers Resolution,⁶⁸ which attempts to implement the intent of the Framers "and insure that the collective judgment of both Congress and the President" will apply to military intervention. In a way, the Resolution substi-

⁶⁴ S. HOFFMANN, *supra* note 20, at 219.

⁶⁵ See Frankel, *The Lessons of Vietnam*, in THE PENTAGON PAPERS 642 (Quadrangle Books ed. 1971).

⁶⁶ As quoted by A. FRYE, *supra* note 21, at 5.

⁶⁷ I have in mind the various "lois organiques" passed by the First Congress and some of the Reconstruction acts.

⁶⁸ Act of Nov. 7, 1973, Pub. L. No. 93-418, 87 Stat. 555.

tutes legislation for adjudication; as such, I would define it as constitutional "framework" legislation⁶⁹ which interprets the Constitution by providing a legal framework for the governmental decision-making process. Examples in addition to the War Powers Resolution are the Congressional Budget and Impoundment Control Act of 1974⁷⁰ and bills now pending concerning governmental emergency powers,⁷¹ executive agreements, so-called covert action and other matters.

Framework legislation is different from ordinary legislation in that it does not formulate specific policies for the resolution of specific problems, but rather attempts to implement constitutional policies. Both declaratory and regulatory in nature, it describes the constitutional distribution of powers and regulates the decision making of the President and the Congress. Framework legislation thus forces both Congress and the President to focus on constitutional considerations, which are ordinarily submerged in disputes concerning specific policies. By providing institutionalized forms for consultation and the resolution of disagreements, it also gives greater specificity to the notion of legal constraints and attempts to stabilize to a greater extent expectations about the ways in which governmental power is exercised. Finally, by providing procedures for the evaluation and control of exercises of presidential power, it strives for constitutional legitimacy.

There are a few concepts in political theory that are best treated in a relatively simple-minded way. The events of the last fifteen years should have taught us that "legitimacy" is one such concept. If democracy requires that the individual accept the majority decision after a vote has been taken,⁷² democracy also requires that the voting process be in accord with the necessary legitimating procedures, that is, those set forth in the Constitution. The "legitimacy" of the Indochina war was so easily questioned precisely because nonconstitutional notions of legitimacy were substituted for the constitutional procedures. But little legitimacy can be conferred by the nationwide popular mandate that Presidents claim to hold in

⁶⁹ Professor Gunther speaks of "an unusual, quasi-constitutional variety of congressional action, delineating not substantive policy but processes and relationships." G. GUNTHER, *supra* note 2, at 429.

⁷⁰ Act of July 12, 1974, Pub. L. No. 93-344, 88 Stat. 297. On the problems that gave rise to the legislation, see L. FISHER, *PRESIDENTIAL SPENDING POWER* (1975).

⁷¹ The bill relating to national emergencies (H.R. 3884) passed the House on September 4, 1975. For a status report, see 33 CONG. Q. WEEKLY 1958 (1975).

⁷² See H. PITKIN, *WITTGENSTEIN AND JUSTICE* 283 (1972).

their sole possession;⁷³ the same can be said of attempts to legitimate executive action by reference to the temporary support of a majority in a public opinion poll, the allocation of funds through the appropriations process, or a favorable report by an "expert" administrative elite. While it may be empirically accurate to view the governmental decision-making process as "plebiscitarian" in nature or as a reflection of the desires of special interest groups or elites, such facts are dangerous guides, for they ignore the constitutional standards of representative government to which, in the United States, the notion of legitimacy refers.⁷⁴ Many of the modern admirers of *McCulloch v. Maryland* and adaptation by usage tend to ignore the qualifiers of Marshall's position: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."⁷⁵

The present generation, like preceding generations, seems to be re-evaluating its concept of constitutional law and what it considers to be the "spirit" of the fundamental constitutional arrangements. In so doing, it reacts to what it considers to be miscarriages. I am thinking particularly of the "imperial presidency." The exaggeration of presidential claims to constitutional authority has revealed that the colossus may have feet of clay after all. The long-accepted assumption that Presidents and their experts alone possess the perspective and knowledge needed to define the national interest in a hostile world seems to have been discredited to a considerable extent by the Indochina war and Watergate. We are beginning to understand the danger that lurks beneath the facade of "mankind's Chief Executive for Peace." I suppose historians call enterprises of this nature "revisionist." The fresh look we are taking is limited by our own experience, to be sure. Yet we should be able to avoid myopia.

In this connection, the War Powers Resolution may be less significant for what it accomplishes than for what it endeavors. Section 2(c), for instance, provides:

⁷³ As to foreign policy, the claim may frequently be refuted. Cf. Kurland, *supra* note 48, at 622.

⁷⁴ On the concept of legitimacy, see PERKIN, *supra* note 72, at 280-86. For a concise statement of the form of political rule in the United States that emerged from World War II and its consequences, see Wolin, *The New Conservatives*, The N. Y. Review of Books, Feb. 5, 1976, at 6. See especially *id.* at 10, cols. 3 & 4.

⁷⁵ 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added).

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

For reasons that I shall detail shortly, there can be little doubt that this is a fairly precise summary of the Framers' intent. Critics of the resolution, such as Dean Rostow, in addition to arguing its impracticability, contend that it impermissibly limits the vague collection of presidential powers "inherent in his role as the nation's chief diplomat, commander-in-chief, and head of state."⁷⁶ The critics ignore the fact that the Resolution is mostly a reaffirmation of principle, quite ambiguous as to its scope and binding effect.⁷⁷ Thus there is some doubt as to whether section 2 was meant to be an operative part of the statute,⁷⁸ what its peculiarly Germanic use of the passive present tense instead of the imperative entails ("are exercised" instead of "shall be exercised"), and, finally, what significance is to be attributed to section 8(d)(1) which states that nothing in the joint resolution "is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties."

If the Resolution is to be faulted for transgressing constitutional limitations, it must be because of the termination provisions of sections 5(b) and (c). Section 5(c) calls for the termination of presidential action if the Congress so directs by concurrent resolution. This mechanism is sometimes viewed as violating the executive veto provisions in the Constitution⁷⁹ since a concurrent resolution is not subject to veto. While this argument might be persuasive in other contexts, accepting it here would mean that the President could,

⁷⁶ Rostow, *supra* note 11, at 803. Rostow's views are set forth in more detail in Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEXAS L. REV. 833 (1972).

⁷⁷ See COMM. ON THE ORGANIZATION OF THE GOVERNMENT FOR THE CONDUCT OF FOREIGN POLICY, REPORT 197-98 (1975).

⁷⁸ See H.R. REP. NO. 547, 93d Cong., 1st Sess. 7-8 (1973). See also T. EAGLETON, WAR AND PRESIDENTIAL POWER 201-05 (1974); ANNUAL CHIEF JUSTICE WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES OF AMERICA, THE POWERS OF THE PRESIDENCY, FINAL REPORT 13 (1975).

⁷⁹ S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 122-23 (1975). As to concurrent resolutions in a nonstatutory context, and the War Powers Resolution in particular, see the careful analysis in Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1084-86 (1975).

supported only by one-third plus one of the membership of *either* house, commit the nation to war for as long as available appropriations lasted. It seems to me that such a result stands the congressional power to declare war on its head.

More problematic, by far, is section 5(b), which forces the President to terminate the use of armed forces after sixty or ninety days unless the Congress affirmatively authorizes the action. It is highly doubtful whether Congress may constitutionally indulge its own inclination toward indecision by attaching legal consequences to its passivity vis-à-vis executive judgments on questions of war and peace.⁸⁰ I agree that the Constitution mandates "collective judgment of both the Congress and the President,"⁸¹ but judgment means exactly that: *judgment*.⁸² To the extent that the War Powers Resolution is an attempt to put the congressional house in order as well as an effort to control the executive, this provision falls short of the goal. The history of the Indochina war is not just a lesson in the "imperial presidency," it also provides textbook illustrations of congressional irresponsibility.

Since, as stated above,⁸³ I consider defense issues to be political questions in the jurisdictional sense, the question of the constitutionality of the War Powers Resolution is unresolvable in the sense that only the "court of history"⁸⁴ will ultimately determine the merits. That does not mean, however, that the constitutional issues involved should be ignored; for if they were, we would run the risk "of leaving large areas of our system of constitutional limitations neglected or through inattention made the butt of partisan contest."⁸⁵

It is a widespread belief that the Framers did not consider foreign policy as the first priority when establishing their network of institutions.⁸⁶ The opposite is more likely correct. The federal government set up by the Framers was essentially created for the effective and controlled conduct of foreign and defense policy;⁸⁷

⁸⁰ To this extent I agree with President Nixon's veto message. 119 CONG. REC. 34,990 (1973).

⁸¹ Act of Nov. 7, 1973, Pub. L. No. 93-148, 87 Stat. 555, § 2(a).

⁸² I disagree with Frye, *supra* note 21, at 214, who apparently views the requirement of termination following sixty (or ninety) days of congressional inaction as the equivalent of rendering judgment.

⁸³ See note 34 *supra*.

⁸⁴ For a judicial reference to the "court of history" (which found the Sedition Act unconstitutional), see *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964).

⁸⁵ D. MORGAN, CONGRESS AND THE CONSTITUTION 11 (1966).

⁸⁶ S. HOFFMANN, *supra* note 20, at 220.

⁸⁷ See THE FEDERALIST No. 45, at 313 (J. Cooke ed. 1961) (J. Madison): "The powers

“domestic” improvements were not considered to be within the domain of the federal government. Indeed, foreign affairs were the predominant concern of the new government during the first three decades of the Constitution.⁸⁸

A commentator making this historical assertion is likely to encounter a response juxtaposing the simple world of the early republic with the “complexities of the modern world.” Clearly, this argument proves too much, condemning the entire Constitution to irrelevancy. But one may also doubt its accuracy. As I have written elsewhere, “[A]t the time of the Constitutional Convention, Europe presented America with incredibly intricate foreign policy problems. The Europe of that period was a tangled skein of shifting alliances, dynastic ambitions, incipient revolution, and trade rivalries. In dealing with these problems under the Articles of Confederation, the Framers undoubtedly came to appreciate the complexity of foreign affairs in a troubled world.”⁸⁹

These background facts should be kept in mind as one looks at the Constitution’s distribution of powers in the areas of foreign and defense policy. The following list is offered, not to reduce the complexities of the governmental process to an enumeration of “mays” and “must nots,” but rather because it is useful occasionally to derive a few simple points from fairly indisputable facts, that is, from the actual constitutional arrangements themselves, instead of from involved analyses of the convention debates.⁹⁰

A. Powers concerning foreign relations.

1. Presidential powers

- a. Power to make treaties (Senate consent required).
- b. Power to appoint envoys (Senate consent required).
- c. Power to receive envoys.
- d. *The executive power* (?).

delegated by the proposed Constitution are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce.”

⁸⁸ J. YOUNG, *THE WASHINGTON COMMUNITY 1800-1828*, at 160 (1966).

⁸⁹ Casper, *Response*, in *Symposium—Organizing the Government to Conduct Foreign Policy: The Constitutional Questions*, 61 VA. L. REV. 747, 777 (1975). For a chronicle of the American diplomatic efforts from the Declaration of Independence to the ratification of the Constitution, see S. BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES 15-84* (1936).

⁹⁰ The list is reasonably complete, although a few petty powers have been omitted. The list is restricted to powers actually mentioned in the Constitution, except that on two specified occasions, I have added clearly implied powers.

2. Senate powers
 - a. Power to advise on and consent to treaties.
 - b. Power to advise on and consent to appointment of envoys.
 3. Congressional powers
 - a. Power to regulate foreign commerce.
 - b. Power to lay duties.
 - c. Power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations.
- B. Powers concerning defense.
1. Presidential powers
 - a. Power of Commander-in-Chief.
 - b. Power to repel sudden attacks on the United States or its armed forces (not mentioned in the constitutional text but indisputably granted).
 2. Congressional powers
 - a. Power to raise and support armies.
 - b. Power to provide and maintain a navy.
 - c. Power to make rules for the government and regulation of the land and naval forces.
 - d. Power to provide for calling forth the militia to repel invasions.
 - e. Power to suspend the writ of habeas corpus when in cases of rebellion or invasion the public safety may require it.
 - f. Power to declare war.
- C. General powers relevant to the conduct of foreign and defense policies.
1. Presidential powers
 - a. "Power" (duty) to inform the Congress about the state of the union and make recommendations.
 - b. Power to convene both Houses of Congress or either of them on extraordinary occasions.
 - c. Veto power.
 - d. "Power" (duty) to execute the laws (this includes unmentioned, delegated rulemaking powers).
 - e. Power of appointments (Senate consent generally required).

2. Senate Powers
 - a. Power to advise on and consent to appointments.
3. Congressional powers
 - a. Power to lay taxes, etc., and provide for the common defense and general welfare.
 - b. Power of appropriations.
 - c. Power to make all laws necessary and proper for carrying into execution congressional powers, and all other powers vested in the government, or in any department or officer thereof.
 - d. Impeachment.

A list of this nature establishes three points rather graphically. First, given the fact that the Constitution works with detailed and specific authorities, one should be extremely wary of "sweeping in" and locating in one branch powers derived from such abstractions as *the war power* or *the foreign affairs power*. The dispute over whether the particular wording of the vesting clause in article II was designed to add powers not specifically enumerated is textually unresolvable. Article II vests *the executive power* instead of, by analogy to article I, "all executive powers herein granted." The dispute cannot be resolved by an analysis of the convention debates either.⁹¹ My own opinion is that the Constitution makes most sense if enumerations are read as being exhaustive. On the other hand, if a power not mentioned can be conceived of as indisputably "executive," it was probably not meant to be withheld. In any event, the controversial subjects, such as the legitimacy and scope of executive agreements, are not disposed of by this qualification. Second, much of the search of convention debates and other contemporary sources for characterizations of the Framers' intent in polar terms like "congressional preeminence" or "strong executive" is rather beside the point. Third, "separation of powers" is not the most meaningful way to summarize the constitutional arrangements.

One cannot quarrel with the notion that the creation of a one-person national executive with veto power, power to make treaties and the like was intended to remedy the inefficiencies of the Continental Congress system of administrative committees.⁹² The famous statement by Mr. Justice Brandeis that the doctrine of separation of powers was adopted not to promote efficiency, but to preclude the

⁹¹ See C. THACH, *THE CREATION OF THE PRESIDENCY 1775-1789*, at 117 (1969).

⁹² *Id.* at 74. See also L. FISHER, *PRESIDENT AND CONGRESS 18* (1972).

exercise of arbitrary power,⁹³ does not adequately account for all the aspects of the constitutional arrangement. A serious review of the distribution scheme just outlined indicates that the Framers sought to achieve both purposes.

For instance, the Framers clearly wanted to ensure the effective pursuit of war if the occasion arose, which accounts for making the President Commander-in-Chief, an "executive" function. On the other hand, the decision as to whether or not the nation should go to war was entrusted to Congress, except that if there were an emergency (sudden attack), the President was given authority to act. That latter authority, in turn, was diminished because the Congress retained the power to refuse to back the sword with the purse.⁹⁴ Yet even in the exercise of this power the Framers limited Congress by restricting appropriations to a two-year term. Checks were heaped upon checks so that the love of power of those occupying the various branches of government could be harnessed, while the deficiencies of the Confederation were avoided.⁹⁵

In view of these facts, which emerge from the text of the Constitution itself, the Framers' own characterization of the system as one of separation of powers seems much less satisfactory than the "checks and balances" formula.⁹⁶ While this formula has become widely accepted as describing the specific arrangements of the United States Constitution, separation of powers has remained an ambiguous concept, open to the most diverse interpretations.⁹⁷ Indeed, the only question one can ask about separation of powers that yields some positive result is: what does it mean *not* to have separation of powers? The response of Montesquieu and the Framers to

⁹³ *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

⁹⁴ See Young's account of the War of 1812. J. YOUNG, *supra* note 88, at 184.

⁹⁵ See Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 416 (1935).

⁹⁶ At the time of the Revolution, just as during the English Civil War (and, later, the French Revolution), the pure doctrine of separation of powers came to dominate American constitutional thought. Later, as in the English Restoration era, the notion of balance (specifically, the concept of checks and balances) reasserted itself to temper the radical implications of the pure doctrine.

Katz, *The Origins of American Constitutional Thought*, in 3 PERSPECTIVES IN AMERICAN HISTORY 474, 488 (1969).

⁹⁷ [S]eparation of powers theorists—and even the same theorists at different times—have not been agreed about the institutional arrangements which satisfy the requirement of that doctrine, a fact to be recognized in judging whether, even if valid in some general sense, the separation of powers doctrine is specific enough to be a useful constitutional standard.

W. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 128 (1967). See generally *id.*; M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967); Sharp, *supra* note 95.

this question is well known: there can be no liberty if legislative, executive and judicial powers are united.⁹⁸ In this sense, separation of powers is a functional concept: separation is a necessary, if not a sufficient condition of liberty. Beyond this point, however, little else can be said with conviction, since the different powers do not signify clearly differentiated functions and the actual arrangements show the powers closely intertwined.⁹⁹

Superficially, the legislative and the executive branches seem to possess fairly identifiable functions: lawmaking and law-executing. The third branch, through dispute-settling, performs one part of the executive function under special conditions and by means of special procedures. In reality, however, both the executive and the judiciary engage in lawmaking through interpretation and rulemaking. The power to review enables the judiciary to negate the legislative function. The executive can do the same with the help of the veto power. The legislative branch, on the other hand, partakes of many executive functions through legislative oversight, appropriations decisions and the like. In short, under the system of checks and balances, each branch exercises powers clearly subsumed within a function attributed to another branch.¹⁰⁰

We might well be better off to forgo invocation of the catchphrase "separation of powers"—especially since it has other connotations in other countries that tend to get mixed up with American usage. For instance, the concept may be employed, as it was in France, Italy and other European countries during the first half of the nineteenth century, to protect public administration against judicial meddling. Thus the famous French law of 16-24 August 1790 provides: "Judicial functions are distinct and will always remain separate from administrative functions. Judges may not, under pain of forfeiture of their offices, concern themselves in any manner whatsoever with the operation of the administration, nor shall they summon administrators to appear before them on account of their official functions."¹⁰¹ The opening sentence of the provision clearly indicates that the separation of powers concept was used to justify the prohibition. American Presidents like to use the concept in this "French" way, though they tend to extend its meaning to cover congressional interference with the executive as well.¹⁰² In practice,

⁹⁸ G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 152 (1969).

⁹⁹ Sharp, *supra* note 95, at 436 & *passim*, speaks of "blending."

¹⁰⁰ Cf. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 89 (1972).

¹⁰¹ 1 J. DUVERGIER, *COLLECTION COMPLETE DES LOIS, DECRETS, ETC.* 361, 363 (1824).

¹⁰² See, for instance, the brief on behalf of President Nixon in the case of *Nixon v. Sirica*,

however, most arguments derived from "separation of powers" tend to be resolved by a balancing of interests, which is more profitably carried on under the rubric of checks and balances. This principle applies even to a claim as deeply rooted in separation of powers connotations as executive privilege.

In its decision in *United States v. Nixon*,¹⁰³ the Supreme Court accorded recognition to executive privilege when needed to protect military, diplomatic, or sensitive national security secrets. It also recognized a "presumptive privilege" for confidential presidential communications. While the case dealt with executive privilege as an evidentiary privilege rather than with congressional-executive relations, the broad language of the Court appears to give it more general implications.

The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. . . . Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.¹⁰⁴

The Supreme Court decided the specific issue before it by taking a balancing approach, since the doctrine of separation of powers "without more" could not sustain an absolute presidential privilege.¹⁰⁵ It seems to me that an analogous approach has to be taken in the area of congressional-executive relations. Some legal constraints should be created by means of what I have called framework legislation so that the mere fact that the courts have had no occasion or jurisdiction to adjudicate congressional-executive conflicts does not create a situation where the only constraints that exist are purely political ones. The lack of such a legal framework tends to create unnecessary tensions between the executive and the legislative branches and encourages the use of political sanctions (like the withholding of appropriations) that may have undesirable consequences unrelated to the dispute. Congressional authority to enact such legislation flows from the specific power of Congress to make

487 F.2d 700 (D.C. Cir. 1973). It was argued that executive privilege, derived from the doctrine of separation of powers, "protects" the executive branch from the other two branches. The administration generously argued that "all" branches benefit from the independence thus secured to them by the constitutional separation of powers. N.Y. Times, Aug. 8, 1973, at 18, cols. 1-3.

¹⁰³ 418 U.S. 683 (1974).

¹⁰⁴ *Id.* at 708, 711.

¹⁰⁵ *Id.* at 706.

all laws necessary and proper for executing all powers vested in the government or in any department or officer of the government,¹⁰⁶ as well as from the constitutionally-based need of Congress for information in the areas where it has legislative and other duties.

In drafting such legislation Congress will have to balance the interests at stake: its own needs for information and the President's interest in the confidentiality of his communications.¹⁰⁷ There are no hard and fast rules. For instance, some argue that the case for executive privilege is strongest as to the President and his "immediate advisers" and weakest as one reaches the outskirts of the bureaucracy.¹⁰⁸ This way of looking at the question is singularly unhelpful. The issue is not proximity to the President, but the need of the United States government (in the broad sense of the word, not restricted to the executive) for confidentiality. Any congressional balancing eventually may come up against a core of executive privilege which, in view of *United States v. Nixon*, Congress cannot constitutionally impair. However, it is impossible to determine in the abstract where this "core zone" begins, since the determination depends in part on the manner in which both Congress and the executive safeguard the confidentiality of information.¹⁰⁹

Let me attempt to "apply" the constitutional framework as I see it to an important issue. Professor Henkin has stressed the President's authority to declare policy and make informal commitments, undertakings and understandings, and reflect general attitudes in the daily conduct of foreign relations.¹¹⁰ He has also argued that Congress is "probably" constitutionally obliged to implement what the President is constitutionally entitled to formulate.¹¹¹ If this means that Congress has the obligation to provide money for

¹⁰⁶ U.S. CONST. art. I, § 8.

¹⁰⁷ Lowi stressed the need for Congress and the executive branch "to find means of dealing with each other frankly, yet confidentially" in order to avoid the dangers of oversell that accompany presidential attempts to rely mainly on popular support:

The involvement in Vietnam was sold by American image-makers as a case of unambiguous aggression and therefore of the need for military victory. Perhaps it was both of these things, but to sell it on the front pages that way in order to insure support at home, left world diplomats, including our own, with almost no options. Under increasing popular pressure, magnified by congressmen who might rightly feel that they have not been properly informed, the extremes of oversell are exceeded over and over again."

T. LOWI, *THE END OF LIBERALISM* 179 (1969).

¹⁰⁸ See R. BERGER, *supra* note 53, at 264.

¹⁰⁹ On this subject, see *id.* at 288-94.

¹¹⁰ Henkin, "A More Effective System" for Foreign Relations: *The Constitutional Framework*, in *Symposium—Organizing the Government to Conduct Foreign Policy: The Constitutional Questions*, 61 VA. L. REV. 747, 755 (1975).

¹¹¹ *Id.* at 758.

embassies in countries the President has recognized, I will not quarrel with the assertion. On the other hand, if it implies that Congress, as a matter of constitutional—as distinguished from international—law, is bound to deliver on the President's undertakings, I disagree. Given congressional powers over defense, commerce, the purse and legislation, the President has little authority unilaterally to make any binding commitments on behalf of the nation. The President clearly may make "informal" commitments, but an argument that the authority spills over into the domestic power distribution is one of the "slippery slope" variety. While Professor Henkin would certainly be unwilling to slide down the slope for very long, recent events demonstrate what such a confusion between international and domestic authority may lead to. I should like to discuss one example: the 1973 bombings of Cambodia.

On April 30, 1973, Secretary of State Rogers submitted a memorandum to the Senate Foreign Relations Committee in which he set forth the basis of presidential authority to continue bombing Cambodia.¹¹² The memorandum started out by suggesting that authority to bomb Cambodia was linked to article 20 of the Agreement on Ending the War and Restoring Peace in Vietnam, signed in Paris on January 27, 1973, an agreement not ratified by the Senate. Article 20 required the withdrawal of foreign armed forces from Laos and Cambodia and obligated the parties to refrain from using the territory of these countries to encroach on the sovereignty and security of other countries. The administration argued that North Vietnam was then violating article 20. It failed to recognize, however, that whatever authority the United States may have possessed under international law to retaliate against North Vietnam for its breach of the agreement could not supply the President with constitutional authority so to act. To argue otherwise leads to the conclusion that the President may, in disregard of constitutional processes, engage the country in war whenever he finds that an executive agreement has been violated.

Since the United States had undertaken no congressionally authorized commitment to come to the defense of the Cambodian government, the President could invoke no treaty, legislation or resolution to that effect. The memorandum seemed to admit this much by stating that the American bombing did not "represent a commitment by the United States to the defense of Cambodia" but rather was "a meaningful interim action to bring about compliance

¹¹² For the text, see *N.Y. Times*, May 1, 1973, at 10, cols. 3-8.

with this critical provision in the Vietnam agreement." It seems to be a fair summary of the memorandum to say that it sought to justify the bombing of Cambodia as a continuation of the Vietnam war. Since American forces had been withdrawn from Vietnam and since all prisoners of war had been returned, the only one of the three purposes for military action listed by President Nixon on May 8, 1972 that was still being pursued was "prevention of the forceful imposition of a Communist government in South Vietnam." While it is doubtful that Congress had ever authorized such a war goal, it clearly had not authorized its accomplishment by waging an air war in a third country. The President's authority to conduct day-to-day military operations in a congressionally authorized war is beyond question; but without fresh authority from the Congress, I doubt that he could continue military activities, such as the prolonged bombing of a third country, after the war had ended on the theory that it was necessary to preserve the gains won in the peace agreement.

The memorandum correctly stated that under the Constitution the war powers are shared between the executive and legislative branches of government. The memorandum erred, however, when it threatened the Congress with the specter of a zero-sum game by saying that this allocation of powers had misled some to argue that "the Constitution required immediate cessation of the air strikes in Cambodia because of the Paris agreement," "an automatic self-destruct mechanism designed to destroy what has been so painfully achieved." The Constitution, of course, required no such thing. The proper sharing of the war powers, or what the memorandum termed "cooperation between the Congress and the President," simply called for the President to go back to Congress for authority to bomb Cambodia in order to prevent a Communist takeover in Vietnam. Then Congress would have been compelled to decide whether international law, national commitments and the national interest made such a policy feasible and desirable. As we know, Congress ultimately decided this question in the negative.¹¹³

¹¹³ This occurred in a "compromise" bill following a successful presidential veto of an earlier "cut-off" of funds for the bombing. The compromise postponed the termination by several weeks to August 15, 1973, Act of July 1, 1973, Pub. L. No. 93-49, 87 Stat. 99.

The memorandum also relied on the kind of misreading of the political question doctrine I discussed earlier, quoting Judge Wyzanski's discussion of President Nixon's duty to bring the war to an end "with a profound concern for the durable interests of the nation—its defense, its honor, its morality," in *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973). In fact, the court had expressly rejected the theory, put forward in the Rogers memorandum, that appropriation acts or extensions of the draft constituted approval of the war in Vietnam.

The system of checks and balances requires coordination in the development of foreign and defense policies. In spite of the recent past, it seems fair to say that most of the questions that arise are not primarily questions of authority or institutional capacities. Secretary Kissinger, though, has recently expressed his concern over what he perceives as a growing tendency of the Congress to legislate in detail the day-to-day or week-to-week conduct of foreign affairs. It should be recognized, he said, that the legislative process—deliberation, debate and statutory law—is not well-suited to the detailed supervision of the day-to-day conduct of diplomacy. Making a Tocqueville-style argument, he added: “Legal prescriptions, by their very nature, lose sight of the sense of nuance and the feeling for the interrelationship of issues on which foreign policy success or failure so often depends.”¹¹⁴

While there can be no doubt that legislation may limit the options available to the executive branch and generally create rigidities, and while there can also be no doubt that Congress is under an obligation to provide itself with the capacity to respond more quickly and in a more ad hoc fashion when necessary, the particular congressional interventions the Secretary cited hardly prove his case. The conditions Congress attached to trade with the Soviet Union,¹¹⁵ the exclusion of the OPEC countries of Venezuela and Ecuador from benefits conferred by trade-reform legislation,¹¹⁶ or the dispute over arms aid to Turkey¹¹⁷ can scarcely be explained in terms of an institutional incapacity to recognize “the interrelationship of issues.” A more proper explanation would appear to be the failure of the administration to convince the Congress that the executive cost-benefit analysis was more accurate than the congressional one. As the Secretary realized, congressional power over trade or aid was not in question. The issue was simply the wisdom of a particular policy—pursued, admittedly, in a world-wide context. To

“This Court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to extend the draft, a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war.” *Id.* at 615. Yet even this passage is irrelevant, pro or con, since it was mere dictum. The court ultimately refused to exercise jurisdiction on the ground that the constitutionality of the President’s measures to end the war was a political question beyond the judicial power conferred by article III.

¹¹⁴ N.Y. Times, Jan. 25, 1975, at 6, col. 4.

¹¹⁵ Act of Jan. 3, 1975, Pub. L. No. 93-618, § 402, 88 Stat. 2056.

¹¹⁶ Act of Jan. 3, 1975, Pub. L. No. 93-618, § 502(b)(2), 88 Stat. 2067.

¹¹⁷ Act of Oct. 6, 1975, Pub. L. No. 94-104, § 2(c), 89 Stat. 509 (allowing limited presidential suspension of embargo); Act of Dec. 30, 1974, Pub. L. No. 93-559, § 22, 88 Stat. 1813 (imposing embargo).

be sure, Congress is bound to make mistakes, and, for all we know, the three acts may all have been grave errors, but making mistakes is hardly an exclusively congressional prerogative.

The proper way to conceptualize the interdependence of Congress and the executive is by thinking in terms of *coordination*, rather than cooperation or partnership. Though partnership is obviously desirable, the idea of coordination expresses more precisely the constitutional demands of the system of checks and balances. While coordination is perhaps inefficient in the narrow sense of making hard and fast international commitments by Presidents very difficult, it is the constitutional scheme. It is also efficient in the broader sense that freely-given congressional consent is probably more durable and reliable in the long run than consent coerced by presidential *faits accomplis*.

CONCLUSION

The primary mode of enforcing the constitutional system of checks and balances must be legislation. Only if Congress is willing to restrain, will we have anything approaching effective legal constraints. My concern has been with the conduct of foreign and defense policy. When we turn to national security and individual rights, perhaps more reliance can be placed on the courts, though their performance is bound to remain uneven, with as many hits as misses in determining the balance between national security interests and individual rights.¹¹⁸ And, even where threats to individual liberties are concerned, the only effective safeguards are often legislative ones: if nobody, overseers or victims, knows what the CIA, FBI, Secret Service, or Internal Revenue Service are up to, a legal challenge may be practically impossible. It is also important that the delicate balancing required when individual rights are restricted is carried out in times of calm. In periods of passion, moderation is frequently not to be had from administrators, legislators, or judges. Thus, for example, the wild growth of clandestine activities that has surfaced in recent years must be carefully reviewed for constitutionality.¹¹⁹

¹¹⁸ See *Developments in the Law*, *supra* note 29.

¹¹⁹ I am referring here to so-called "covert activities." The public record suggests that such activities undertaken on behalf of the United States and other countries range from "mere" propaganda efforts to the use of violent means, including the employment of warlike force (as in the Bay of Pigs invasion). Most covert activities may be conceptualized as *interventions from within*: a foreign country makes use of methods that the target government would probably label as ranging from the seditious to the rebellious if they were employed

One objection to the concept of coordination is likely to be that it will further exacerbate the tendency already present without the existence of legislative restraints: formulation of policies in a political vacuum.¹²⁰ If this habit is an element of the "national style," it may indeed be reinforced, though I have my doubts. But even as-

by domestic opposition groups acting in isolation. An examination of the 1947 National Security Act, 50 U.S.C. § 402, suggests that the legislation is exclusively concerned with better *formulation and coordination* of national security policy. It does not address the propriety of covert activities. The Central Intelligence Act likewise focuses on the coordination of intelligence activities and charges the Central Intelligence Agency with performing "such other functions and duties *related to intelligence* affecting the national security as the National Security Council may from time to time direct." 50 U.S.C. § 403(d)(5) (emphasis added). The public record does not justify the assumption that at the time of its enactment in 1947, the term "intelligence" was used by the Congress to include covert activities. While neither section 402 nor section 403 can be viewed as legal authority for covert activities, it is also clear that they do not attempt to restrict such activities if they were authorized, for instance, by inherent presidential powers. There is a problem, though, concerning the use of the Central Intelligence Agency for the execution of presidential policies, since the Agency is congressionally established. One might therefore argue that the President may not employ it for purposes not specifically mentioned in the Central Intelligence Act, though such purposes may be otherwise legitimate. As a matter of first impression, it seems that the Central Intelligence Agency differs from the "independent agencies" in that it is thoroughly attached to the executive branch by means of the National Security Council "direction" under which it operates. Therefore, it would appear that the President is not clearly barred from making use of the Central Intelligence Agency for the execution of national security policies that he is constitutionally empowered to pursue. The matter is, however, not free from doubt and perhaps deserves further clarification.

The heart of the issue is the question of "inherent" presidential power to engage in covert activities. An abstract answer is not easy to give, in view of the fact that even a narrow definition of covert activities covers "mere" propaganda. To the extent that covert activities are related to major foreign policy decisions (like participation in the overthrow of a foreign government) with far-reaching consequences for the foreign policy, national security, and international position of the United States, it must be kept in mind that the constitutional scheme for the conduct of foreign and defense policy is one of shared responsibilities and checks and balances. All inquiry should start from the premise that unauthorized and unreported covert activities are not in accord with the spirit and the letter of the Constitution. This is not to say that one cannot conceive of rare emergency-type situations where the President would have to take responsibility for independent action. One could argue that in 1974 Congress authorized future covert activities in section 662 of the Foreign Assistance Act of 1974, Act of Dec. 30, 1974, Pub. L. No. 93-559, 88 Stat. 1795. While section 662 refers only to "intelligence activities," the context in which it was enacted suggests that the language referring to "activities other than those intended solely for obtaining necessary intelligence" is a euphemism for covert activities. If this is so, then covert activities are now (for the first time) expressly authorized, provided that two statutory conditions are met: (1) there is a presidential finding of importance to the national security and (2) the President reports in a "timely" manner to the appropriate congressional committees. Conclusion: "Although Congress attempts much, it accomplishes comparatively little."

For the analysis and proposals of the Church Committee on Intelligence Activities concerning covert activities, see SEN. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FOREIGN AND MILITARY INTELLIGENCE, S. REP. NO. 755, 94th Cong., 2d Sess. 141-61 (1976).

¹²⁰ See S. HOFFMANN, *supra* note 20, at 152-53.

suming that such reinforcement would occur, it may be a necessary evil. United States foreign policy has suffered gravely from a disregard not only for the outside real world, but for the domestic real world as well. Coordination should have the beneficial effect of filling some of the domestic vacuum. One of the greatest defects in foreign and defense policy in recent years has been that it was formulated and carried out without having been legitimated. But legitimacy is not to be had unless constitutional constraints, both procedural and substantive (Bill of Rights), are taken seriously. The well-being of the United States in the system of international relations and its domestic well-being can no more be separated than governmental powers can be clearly differentiated into foreign and domestic ones, or the Government can be divided into branches of natural leaders and natural followers.