THE WAR POWERS AND THE POLITICAL QUESTION DOCTRINE

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A fundamental and potentially healthy tension exists between democratic government, under which the majority ordinarily prevails, and judicial review, by which the judiciary may check unconstitutional actions of the political branches. A balance must be struck between the two concepts, or one could consume the other. Unchecked majoritarianism could erode not only constitutional protections of individual and minority rights, but also federalism and the constitutional separation of powers. Judicial review without limit would result in the degradation of democratic government and a corresponding rule by judges.

Devices built into the American system of government prevent unbridled majoritarianism. Most significant among the inherent controls are the impact of federalism upon the national government [1] and republican rather than direct democratic rule or government by plebiscite. Moreover, an elaborate system of checks and balances flowing from a separation of powers is designed not only to prevent autocracy by a few but tyranny of the majority as well.[2] Other methods of avoiding unbridled majoritarianism include bicameralism as part of the constitutional compromise; the responsibility of each of the political branches to raise within its own house the issue of the constitutionality of its own acts; sensitivity within the political branches toward acts which could impinge upon the domain of a sister branch; popular resistance to acts by the political branches which could undermine the independence of the judiciary; and our long accepted tradition of the doctrine of judicial review.

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1. WECHSLER, *The Political Safeguards of Federalism—The Role of the States in the Composition and Selection of the National Government,* in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 49-82 (1961).

2. Although the system of checks and balances was purchased at the cost of efficiency, that very cost seems to promote the ultimate goal of the system. In Myers v. United States, 272 U.S. 52, 293 (1926), Justice Brandeis stated in his dissent:

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

Unchecked judicial review is avoided in part by constraints imposed by the judicial branch itself. These constraints include a number of constitutional and extraconstitutional judicial doctrines, including the "case and controversy" limitation upon judicial review, standing, ripeness, justiciability, abstention, the rejection of economic substantive due process, and the political question doctrine.

The political question doctrine is that principle under which the courts defer the determination of an issue to the political branches of government. The relationship between this doctrine and the war powers presents a most sensitive problem because core values are at issue and are to some extent in opposition to each other. Foreign policy generally, and the war powers in particular, can involve questions of national survival, and these questions are constitutionally committed primarily to the political branches. For obvious reasons, the courts have not been expected to play as large a role in these areas as they have in the protection of individual rights. Yet the manner of the exercise of the war powers determines not only the nation's freedom from external danger, but also the respect which the national government has for law and for constitutional limitations on the exercise of power. The courts have played a particularly vital function in requiring lawful behavior from government.

The political question doctrine has produced spirited disagreement over its objective, its legitimating source, and its confines. The importance and seriousness of the debate arise primarily from one fact. Under the political question doctrine, a court may refuse to render an independent ruling on an issue arising under the Constitution in a case in which all normal prerequisites, constitutional and non-constitutional, to an independent juridical determination have been met. Jurisdictional requisites and the "case and controversy" requirements of standing and adversariness are present and the issues are sufficiently "concrete." The case is properly "ripe" and yet not overripe or moot. The famous dictum of Chief Justice Marshall in *Cohens v. Virginia* that the Court "will not take jurisdiction if it should not; but . . . must take jurisdiction, if it should," [3] would seem finally to apply. Nevertheless, under the political question doctrine the court may fashion a rule of decision based conclusively upon a prior determination of the issue by a political branch, or it may refuse to decide the merits of the case because the resolution of the issue has been constitutionally committed to a branch which has not yet spoken

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3. 19 U.S. (6 Wheat.) 264, 404 (1821). Marshall's dictum continues: With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.

Id. See text accompanying notes 40-49 *infra*.

definitively. Additionally, the court may conclude that the political branch whose acts have been challenged as illegitimate is the judge of its own acts within a broad range of discretion granted it by the Constitution, and thus the court determines in double negative that the branch has not acted unconstitutionally. This issue of the political question doctrine is distinguished from typical adjudication in that the court does not affirmatively legitimate the challenged act as consistent with the guidelines provided by the constitutional text, but affirms only that the branch in question possesses authority to decide the merits of that question itself.

The political question doctrine has often been linked with the conduct of foreign policy, sometimes by sweeping dicta to the effect that the entire area of foreign policy is covered by the doctrine.[4] A more accurate view,[5] however, is that the criteria most often associated with the doctrine—constitutional commitment to the political branches, the need for fact-finding by the political branch, a lack of judicially manageable standards, and prudential considerations—are often, but not always, present in the resolution of issues in the conduct of foreign policy.

Several conclusions are drawn in the material that follows. First, the Constitution granted to the political branches primary but not exclusive direction of foreign affairs in general and the use of the war powers in particular. Second, the Constitution placed Congress in a dominant position in determining broad policy in foreign relations and granted Congress the sole power to initiate hostilities, with the exception of allowing presidential response to foreign initiated hostilities against the United States. Third, an obvious erosion of congressional power and a consequent aggrandizement of executive power has occurred in the conduct of foreign policy and the use of the war powers during this century. Fourth, the federal courts have acted

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4. *E.g.*, in Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918), the Court stated:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the property of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

See also, C. W. WRIGHT, LAW OF FEDERAL COURTS 46 (2d. ed. 1970). Justice Jackson addressed the Court's limited role in foreign relations in Chicago & S. Air Lines Inc. v. Waterman Corp., 333 U.S. 103, 111 (1948):

> Such decisions are wholly confided by our Constitution on the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

5. Baker v. Carr, 369 U.S. 186, 217 (1962).

as a check upon the misuse of the war powers by political branches, but more often have avoided such a role by invoking the political question doctrine. Fifth, the courts are, however, in an incomparably stronger position to perform independent constitutional review of one political branch's act under the war powers if the other political branch is in open and formal disagreement with that act. The Supreme Court in particular is then in a position to perform its historic and increasingly accepted role as the final arbiter of the constitutional jurisdictional lines separating the delegated functions of the three branches of government. When Congress openly challenges an executive act under the war powers and the courts proceed independently to review the merits of the case, the powerful textual constitutional base for congressional predominance should place the Congress in an exceedingly strong position. Finally, Congress has removed much of the force of the political question doctrine as an impediment to independent judicial review of executive war power acts by adopting the War Powers Resolution.[6]

THEORETICAL NATURE OF THE DOCTRINE

The Case Law Development.

English development of the political question doctrine began as early as the fifteenth century with the case of *The Duke of York's Claim to the Crown.*[7] The Duke of York sought to establish through the courts his right to the throne. In declining to adjudicate such a momentous issue, the judges declared that they "durst not enter into any communication thereof, for it perteyned to the Lordes of the King's blode." In 1793 *The Nabob of the Carnatic v. East India Company*[8] further elucidated the developing political question doctrine. The case contained elements of sovereign immunity intertwined with the political question issue. When the Nabob sued the Company for breach of contract, the court held that the Company, in contracting with the Nabob, was acting as agent of the sovereign. Such a case, involving the foreign relations of the sovereign, was considered to be beyond the competence of the courts.

The political question doctrine was brought to America as part of the common law. In *Marbury v. Madison*[9] and again in *United States v. Palmer*[10] Chief Justice Marshall used the term "political" to

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6. 50 U.S.C. §§ 1541-48 (1973).

7. 5 Rotuli Par. 375 (1460). An analysis of the history of the political question doctrine may be found in Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924). *See also*, C. POST, THE SUPREME COURT AND POLITICAL QUESTIONS (1969).

8. 1 Ves. Jr. 370 (1791), 2 Ves. Jr. 56 (1793).

9. 5 U.S. (1 Cranch) 137 (1803).

10. 16 U.S. (3 Wheat.) 610 (1818).

mean "discretionary." He noted that the Court would not "intrude into the cabinet" or "intermeddle with the prerogatives of the executive." [11] In delimiting the Court's proper boundaries, he stated in *Marbury*:

> The province of the court is, solely, to decide 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.[12]

Marshall observed the degree to which the Constitution committed great discretionary latitude to the political branches in matters of foreign policy. In *Palmer* he noted that "such questions are generally political rather than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise. . . ." [13] *Marbury* and *Palmer* thus illustrate that when a discretionary function of the President or Congress is sought to be adjudicated, the Court will, in most cases, refuse independent review because the nature of the issue is political and not juridical.[14]

An early case concerning the President's power over foreign affairs further reveals the underpinnings of the political question doctrine. In *Williams v. Suffolk Insurance Company* [15] the Company attempted to prove that Argentina exercised sovereign authority over certain islands even though the President had declared otherwise. The Court held that the executive's decision was conclusive upon the judiciary because the executive branch was charged by the Constitution with the conduct of foreign relations. The President's assumption of a fact in regard to sovereignty could not be questioned by the Courts.

> [I]t is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional func-

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11. 5 U.S. (1 Cranch) at 170.
12. *Id.*
13. 16 U.S. (3 Wheat.) at 633-34.
14. Similarly, in Decatur v. Pauling, 39 U.S. (14 Pet.) 496 (1840), the Court addressed the question of executive discretion. The case involved an attempt through mandamus to force the Secretary of the Navy to pay a pension. Chief Justice Taney stated:

> The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.

Id. at 516.
15. 38 U.S. (13 Pet.) 415 (1839).

> tions, he had decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.[16]

The reluctance of the judiciary to review the determination of a foreign affairs issue by a political department was also manifested in *Foster v. Neilson.*[17] Congress had determined that certain lands in the Mississippi River region were under the authority of the United States. Chief Justice Marshall held that the decision of the political branches bound the Court. He stated:

> A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature.[18]

Luther v. Borden[19] decided in 1849, is certainly the most celebrated of the early cases establishing the American doctrine of political question.[20] The *Luther* case arose out of Dorr's Rebellion in Rhode Island[21] when defendants entered Luther's dwelling in an attempt to arrest him. Luther brought an action of trespass *quare clausum fregit* against the defendants.[22] In defense it was asserted that entry was made pursuant to orders issued by the lawful government for the purpose of arresting Luther, who was suspected of aiding and abetting the insurrection. The plaintiff countered that the entry was illegal because the insurrectionary government represented the only "republican" government in Rhode Island, as guaranteed by the Constitution.[23] The case thus turned upon a determination of which of the two rival groups was entitled to recognition as the lawful government. The court declined to decide the question, holding that it was political in nature.[24] Since *Luther*, the Court generally has refused

16. *Id.* at 420.
17. 27 U.S. (2 Pet.) 253 (1829).
18. *Id.* at 308.
19. 48 U.S. (7 How.) 1 (1849).
20. Contrary to popular belief, however, *Luther* was not the first Supreme Court case to discuss the doctrine. In Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796), the Court declined to decide whether a treaty had been broken. In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Justice Marshall stated that questions in their nature political were for the political and not the judicial branch. In 1793 the Court declined to offer President Washington advice on matters of foreign policy. *See* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 110-11 (1922).
21. *See generally* 48 U.S. (7 How.) at 34-38; GETTLEMAN, THE DORR REBELLION (1973); W. WIECEK, THE GUARANTEE CLAUSE OF THE U. S. CONSTITUTION (1972).
22. 48 U.S. (7 How.) 1, 2 (1849).
23. R. I. CONST. art. III, § 4.
24. Justice Brennan, in Baker v. Carr, 369 U.S. 186, 223 (1962), stated that *Luther* held "that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." In *Luther*, Chief Justice Taney discussed the power of the

to overturn state [25] or congressional [26] action solely on the basis of the guaranty clause.[27]

Although the development of the political question doctrine in American constitutional jurisprudence has not by any means been smooth or uniform, it now occupies a firm place in our law. The doctrine is associated with numerous types of cases, notably cases dealing with the foreign relations of the nation.[28] More specifically, the determination of the length of military occupation,[29] the boundaries of a nation,[30] and the legitimate sovereign of a region,[31] are all political questions. Similarly, decisions relating to whether a party is a diplomatic agent to the United States,[32] whether a nation is entitled to status as a belligerent,[33] and certain decisions relating to treaties [34] also fall within the purview of the political question

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President under Article III, section 4 to come to the aid of an imperiled state government:

> It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide.

48 U.S. (7 How.) at 44.

25. Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Pacific States Tel. & T. Co. v. Oregon, 223 U.S. 118 (1911); Taylor & Marshall v. Beckham (No. 1), 178 U.S. 548 (1900).

26. Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867).

27. But in *Carr* an equal protection argument prevailed over dissenting positions that the Court's action merely presented a guaranty clause political question in the dress of equal protection. Baker v. Carr, 369 U.S. 186, 241-50 (1961) (Douglas, J., concurring). *See also*, Bonfield, Baker v. Carr: *New Light on the Constitutional Guarantee of Republican Government*, 50 CAL. L. REV. 245 (1962); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

28. *See, e.g.*, Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

29. Neely v. Henkel, 180 U.S. 109 (1901).

30. Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

31. Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 414 (1839).

32. *In re* Baiz, 135 U.S. 403 (1890).

33. United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).

34. Doe v. Braden, 57 U.S. (16 How.) 635 (1853). *See* Charlton v. Kelly, 229 U.S. 447 (1913); Terlinden v. Ames, 184 U.S. 270 (1902).

> [W]here a treaty confers private rights, such as are enforceable in a municipal court, on the citizens or subjects of the nations party to it, the courts look upon the treaty as a rule of decision and place their own interpretation upon it.
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> But, where public rights are involved in a treaty, the courts accept the interpretation of the political departments.

C. POST, *supra* note 7, at 81-82 (1969).

doctrine. Other factual and legal situations which sometimes trigger the doctrine are those in which the beginning and ending dates of hostilities are at issue;[35] questions concerning the degree of proof required to determine whether a statute has been properly enacted;[36] the status of Indian tribes;[37] some aspects of deportation of aliens;[38] and the efficacy of ratification by state legislatures of proposed federal constitutional amendments.[39]

Theoretical Formulations

The fundamental constitutional concept of separation of powers, which keeps the various branches balanced and in check, lies at the base of the political question doctrine.[40] This constitutional basis exists whether one believes, as does Herbert Wechsler, that the doctrine is properly invoked only in circumstances where the Constitution has delegated the resolution of the issue at hand to the political branches,[41]

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35. Prize Cases, 67 U.S. (2 Black) 635 (1862); Botiller v. Dominguez, 130 U.S. 238 (1889); Brown v. Hiatts, 82 U.S. (15 Wall.) 177 (1872); United States v. Anderson, 76 U.S. (9 Wall.) 56 (1869); Commercial Trust Co. v. Miller, 262 U.S. 51 (1923); Ludecke v. Watkins, 335 U.S. 160 (1948); Ross v. Jones, 89 U.S. (22 Wall.) 576 (1874); The Protector, 79 U.S. (12 Wall.) 700 (1871); Adger v. Alston, 82 U.S. (15 Wall.) 555 (1872); Raymond v. Thomas, 91 U.S. (1 Otto) 712 (1875). *But see* Hamilton v. Kentucky Distilleries Co., 251 U.S. 146 (1919); Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924).

36. Field v. Clark, 143 U.S. 649 (1892).

37. United States v. Old Settlers, 148 U.S. 427 (1893); Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1856).

38. Ludecke v. Watkins, 335 U.S. 160 (1948).

39. Coleman v. Miller, 307 U.S. 433, 450 (1939).

40. *See* Baker v. Carr, 369 U.S. 186, 217 (1962); Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 386 (1976).

41. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Professor Wechsler's landmark article was written partially in response to Judge Learned Hand's Oliver Wendell Holmes Lectures of 1958. Judge Hand argued that judicial review should be justified practically and shall not be inferred from the structure of the Constitution. This theory led him to the conclusion that the use of the judicial power was a matter of discretion rather than duty. Thus, for Judge Hand, the political question doctrine, with its largely undefined parameters, was an affirmation of his discretionary theory of judicial review. *See* L. HAND, THE BILL OF RIGHTS 15-16 (1958). Professor Wechsler disagreed with Judge Hand's conception of judicial review and political question. He argued that the doctrine of judicial review is anchored in the Constitution and is based on the duty of courts to decide the law in an appropriate case and controversy. For him, to grant discretion in the use of the political question doctrine is to compromise the validity of judicial review itself. He thus argues for a classical theory of the political question doctrine:

> I submit that . . . the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts. Difficult as it may be to make that judgement wisely, whatever factors may be rightly weighed in situations where the answer is not clear, what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretation process generally. That, I submit is *toto caelo* different from a broad discretion to abstain or intervene.

or whether more discretionary and pragmatic considerations of expediency,[42] prudential judgment,[43] and various functional strengths and weaknesses of the separate branches [44] point toward the resolution

Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959).

42. *See* C. POST, *supra* note 7. The basic premise of Profesor Post's book is that the use of the political question doctrine is a product of consideration of expediency. The political climate and facts behind a case do not go unnoticed by the Court. The author contends, for example, that the *Luther* Court placed the issue in that case in the category of "political questions" in order to explain the conclusion it had already reached; the concept of separation of powers merely provided "the legal bases for these practical considerations." *Id.* at 107.

See also P. STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION (1974). The primary hypothesis of Professor Strum's book is that the Court utilizes the doctrine in cases where there is a substantial possibility that a judgment, if rendered, would not be enforced. In Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344-45 (1923), the author concludes:

> What are these political questions? To what matters does the term apply? It applies to all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by the feeling that the matter is "too high" for the courts. But always there will be a weighing of considerations in the scale of political wisdom.

See also Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925).

43. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962). Professor Bickel rejects in part Wechsler's "classical" approach to the political question doctrine but also asserts that the doctrine is based on a considered judgment rather than sheer expediency or arbitrary discretion. *Id.* at 197. Professor Scharpf has correctly characterized Bickel's approach as a "normative" theory of political question because it is based on the view that extra-legal considerations—economic, political, military, international—*ought* to be allowed to guide the decisions of the political branches in given areas as much as constitutional principles. Scharpf, *Judicial Review and the Political Question—A Functional Analysis*, 75 YALE L. J. 517, 558-66 (1966). Bickel's view that the Court should occasionally abstain from reaching the merits, rather than use techniques of broad interpretation to uphold questionable acts by the political branches, is based on his belief that the Court exists primarily to uphold principle. Even if the Court determines that various considerations should prevent judicial intervention against acts of the political branches, the Court should not uphold such acts if it cannot do so in a principled way. Instead, Bickel would have the courts refrain from making an independent determination while praising the principles that the branches should consider. Professor Scharpf objects that this approach might provide grounds for expanded use of the doctrine and would ultimately undermine the effectiveness of the court, in both its function as arbiter of the Constitution and "teacher to the citizenry." *Id.* at 561-66.

44. In Coleman v. Miller, 307 U.S. 433, 453-54 (1939), Chief Justice Hughes wrote that the judiciary could not decide whether a proposed amendment to the federal Constitution had ceased to be viable through lapse of time. He stated:

> Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute. . . . [T]he question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within

of a particular issue by a particular branch. Commentators and some courts have noted that in certain situations the political question doctrine is particularly likely to be invoked. For example, courts are prone to defer judgment in cases where there is an absence of judicial standards or rules governing the resolution of the particular dispute; [45] an absence of sufficient information available through the limited judicial fact-finding techniques;[46] a fear of non-enforcement of an unpopular decision and consequent injury to the credibility of the judicial system; [47] an issue before the courts which, while justiciable, is part of a larger issue that is not justiciable; [48] or an issue which is simply so awesome in its consequences that ultimate resolution, to be legitimate, must necessarily rest with a political branch.[49]

> the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified.

The judiciary by its nature is not well suited for certain kinds of determinations demanding particular resources for fact-finding and policy determination, as are the political branches with their popular mandates and their supporting bureaucracies. Professor Scharpf has argued accordingly for a functional theory of the political question doctrine. Scharpf, *supra* note 43. Professor Scharpf's functional theory attempts to forge a middle ground between the classical and the discretionary theories. Although Scharpf maintains that political question cannot be explained in terms of "textual commitment" alone, he attempts to limit the scope of the doctrine by suggesting some guidelines designed to minimize the discretion used in its application. He notes that "much, if not all, of the Court's political question practice should, like the procedural and jurisdictional techniques of avoidance, be explained in functional terms, as the Court's acknowledgment of the limitations of the American judicial process." *Id.* at 566.

45. Scholars disagree on the weight to be accorded the problem of finding applicable rules as a factor in the judicial decision to invoke the political question doctrine. *Compare* Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 511-12 (1924), *with* Scharpf, *supra* note 43, at 555-56.

46. *See* FRANK, *Political Questions*, in SUPREME COURT AND SUPREME LAW 34, 38 (1968); Scharpf, *supra* note 43, at 566-67. In Commercial Trust Co. v. Miller, 262 U.S. 51 (1923), the Court stated with regard to the ending of war that "the power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time. . . ." *Id.* at 57.

47. Proponents of the prudential theory emphasize the Court's fear of non-enforcement as a major factor in the political question doctrine. In Duncan v. Kahanamoku, 327 U.S. 304 (1946), Justice Burton, in dissent, dealt with this issue. In his opinion the Court had improperly intruded into the sphere of the war powers reserved to the political branches and thus invited disregard of the judgment by the other branches. *Id.* at 343 (Burton, J., dissenting). *See generally* P. STRUM, *supra* note 42; Finkelstein, *supra* note 42. For an argument that the enforcement problem is overrated as a factor triggering use of the political question doctrine, *see* Scharpf, *supra* note 43, at 552-53.

48. *See, e.g.*, Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948).

49. A. BICKEL, *supra* note 43, at 184. Professor Bickel concluded his formulation of the doctrine by stating:

> Such is the foundation, in both intellect and instinct, of the political question doctrine: the Court's sense of lack of capacity, compounded

The doctrine may be considered not only as a term of art, but also as a descriptive phrase with some intrinsic meaning. Some issues may be inherently so "political" that they demand resolution by a popular body to insure legitimacy of decision. The term "political" in this context is employed in the same generic way as it was by Hamilton in his now famous description of the impeachment process:

> [Impeachment is appropriate for] those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.[50]

The question of judicial review of a Senate conviction in presidential impeachment would seem to present such an inherently "political" issue.[51] It can be argued that the Constitution commits to the Senate the final decision to remove a President, but the nature and purposes of the impeachment processes contend even more strongly against judicial review of the Senate's action. The impeachment process was intended to be therapeutic—a cleansing process, in which the Congress sits as a court of the nation, to reestablish and reaffirm executive legitimacy, or to symbolize its irretrievable loss. The prospect of review of such a decision by an appointed judiciary would severely undermine the purgative effects of the process. The impeachment proceedings are effective only if the accusers of the executive present their case to the people[52] and to the Senate at roughly the same time.[53] Only in this way can the impeachment process accomplish not only its purgative and prophylactic functions, but its healing and restorative functions as well. Judicial review of this process would rend the connection between the political branch and the people which is essential for the reestablishment of executive legitimacy.

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in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

50. THE FEDERALIST No. 65, at 423-24 (Modern Library College ed. 1937) (A. Hamilton) (emphasis in original).

51. Firmage & Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 DUKE L. J. 1023.

52. The legitimacy of a democratic government must be established in the minds of the people; it follows that the legitimacy of a new administration could only be assured by public recognition that the previous mandate had clearly expired. This is made possible through appropriate rules to allow media coverage of the proceedings.

53. *See* Firmage & Mangrum, *supra* note 51, at 1044-45.

A similar example of an inherently political issue inappropriate for judicial action is presented in *Coleman v. Miller*.[54] Members of the Kansas Senate who opposed ratification of the child labor amendment to the Federal Constitution alleged that "the amendment had lost its validity through lapse of time."[55] The Supreme Court affirmed the state court's denial of relief. The Court initially took note of the lack of judicial criteria by which to establish "reasonable time." More importantly, however, the Court described the issue as "political" in the generic sense in which it might be used to describe an impeachment proceeding. Because of the political nature of the dispute, only Congress could legitimately determine the continued validity of the proposed amendments. Since the child labor amendment was itself designed to overturn a constitutional interpretation by the Supreme Court,[56] a decision by the Court disallowing ultimate political definition of the Constitution through the amendment process would undermine not only the credibility of the Court but also the legitimacy of judicial constitutional interpretation.[57]

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54. 307 U.S. 433 (1939).

55. *Id.* at 451. In proposing amendments, Congress has often set a time limit for their ratification. In Dillon v. Gloss, 256 U.S. 368, 375 (1921), the Court intimated that there may be a time limit on ratification of proposed amendments. In *Coleman*, plaintiffs argued that the Court should set a "reasonable time" for the ratification of the proposed amendment.

56. Hammer v. Dagenhart, 247 U.S. 251 (1918).

57. *See* Scharpf, *supra* note 43, at 587-97. Perhaps Bickel was referring to such inherently political issues when he articulated as a part of the political question the idea that the Court wisely sensed that "inner vulnerability, that self-doubt of an institution which is electorally irresponsible and has no earth to draw from." A. BICKEL, *supra* note 43, at 184.

Professor Bickel later wrote the following concerning the role of the Court in policy decisions:

> The judicial process is too principal-prone and principal bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.

A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 175 (1970). Professor Barron took issue with Bickel's conception of the Court's deficiencies in the arena of political decisions.

> The difficulty with [Bickel's] approach is that it enormously decreases the role of the Supreme Court in American life. Bickel is really making a radical request: if the great political cases are incapable of principled resolution, then the Court ought to decline decision of such cases. But it is the great political cases which have made the Supreme Court, historically and now, a branch of government.

Barron, *The Ambiguity of Judicial Review: A Response to Professor Bickel*, 1970 DUKE L. J. 591, 595.

In *Baker v. Carr*,[58] the Supreme Court summarized the theoretical foundations of the political questions doctrine.[59] Justice Brennan articulated the concept of separation of powers as the touchstone for the determination of political questions:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[60]

That Brennan used the term "several formulations" and noted that only a slight variation might exist between his various descriptions of political question indicates that he recognized the substantial redundancy that existed among his criteria. All are connected to separation of powers. The first criterion, a "textually demonstrable constitutional commitment," represents the clearest statement of a classical or Wechslerian position. The political question doctrine is linked to a textual constitutional delegation to a political branch. This articulation avoids erosion of the legitimacy of judicial review which could result from recognizing discretion in political questions and hence in judicial review itself. The second, "judicially discoverable or manageable standards," is ambiguous enough to be interpreted either as simply the constitutionally mandated elements of "cases" and "controversies," concreteness and justiciability, or as including discretionary criteria related thereto but not necessarily demanded by the Constituiton. The third, involving issues the resolution of which demands discretionary policy determinations by the political

58. 369 U.S. 186 (1962).

59. *See* Wechsler, *supra* note 41. Justice Brennan, in *Baker*, wrote that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers." 369 U.S. at 210. He went on to state:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Id. at 211. *See also* Powell v. McCormack, 395 U.S. 486, 517 (1969).

60. 369 U.S. at 217.

branches, simply combines the first two criteria—i.e., the Court may find not only a broad textual grant to the political branches to formulate policy, but also a lack of specific limitations on the means of implementing that policy. The next formulation, the impossibility of independent judicial resolution without "expressing lack of respect" for the political branches, sounds much more discretionary or "prudential" in nature, but is no less tied to consequences stemming from the separation of powers. The same can be said for the final two formulations relating to adherence to an existing political decision and the necessity of the national government speaking with one voice under certain circumstances: prudential judgment may be inferred, and differing functional competence may be recognized, but the basis for the doctrine remains a division of responsibility, with powers to some degree separated and in check.[61]

Political Questions and Foreign Policy

Most issues of government policy generally, and foreign policy especially, do not present questions "arising under" the Constitution, federal law, or treaties. Few policy issues of government are presented in such a manner that the "cases" and "controversies" requirement of adverse parties possessing standing to present justiciable issues before a court are met. Most issues therefore must be resolved by agencies of government other than the judiciary. But it is also clear from the Constitution and from case law that "foreign policy" as a subject matter area is not entirely removed from judicial scrutiny. The Constitution specifically prescribes a judicial role in foreign affairs.[62]

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61. Gilligan v. Morgan, 413 U.S. 1 (1973), provides a recent example of the doctrine. Students at Kent State University brought suit seeking injunctive and declaratory relief against the Governor and the Ohio National Guard. The students argued that the Guard had violated their rights through the use of force to suppress campus demonstrations. The court of appeals ordered the district court to investigate the training, weaponry, and orders of the Guard. The Court held this order to be improper, stating that it was a clear example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. *Id.* at 10.

62. U.S. Const. art. III § 2.

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—. . . to Controversies . . . between a State, or the Citizens thereof, and foreign states, Citizens or Subjects.

In *Baker v. Carr*, Justice Brennan discussed the role of the judiciary in foreign relations. After noting prior judicial statements to the effect that all questions involving foreign relations are political questions, he went on to demonstrate that the Court will often independently decide many such cases. Nevertheless, he acknowledged that the major responsibilities in the foreign relations area were given to the political branches and pointed to several factors that would lead the Court to defer to those branches:

> Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its suspectibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.[63]

Although the judiciary has a role to play in foreign policy, the political question doctrine limits that role. This limitation is appropriate in light of the preponderant commitment of these issues by the Constitution to the political branches, particularly to Congress. The nature of modern government and technology have created a larger role for the executive than the founders anticipated, but the constitutional text should remain the starting point for analysis of the division of powers among the branches.

Article I, Section 8 of the Constitution empowers Congress to provide for the common defense and to create and regulate both land and naval forces. Congress also has authority to regulate foreign commerce, to define and punish piracy and other crimes on the high seas, and to provide for the summoning of the militia to repel insurrection or invasion. Most importantly, Congress has the power to make rules concerning captures, to grant letters of marque and reprisal, and to declare war. This broad scope of congressional power is reinforced by the necessary and proper clause.

By contrast, the President is the Commander-in-Chief of the armed forces and can receive ambassadors and other ministers.[64] In sum, he has the executive power.[65] Other powers, however, are granted jointly to the President and the Senate. For instance, the President, can negotiate treaties and appoint ambassadors, public ministers, and consuls with the advice and consent of the Senate.[66]

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

63. 369 U.S. at 211-13.
64. U.S. CONST. art. II § 2.
65. *Id.*, § 1.
66. *Id.*, § 2.

These constitutional grants of power suggest several points of analysis. First, the political branches have great discretionary powers over the conduct of foreign policy. As Chief Justice Marshall noted long ago, matters in their nature discretionary are for the political branches to decide.[67] Second, it was expected by the framers that there would be cooperation between the political branches in the conduct of foreign policy. The treaty power, viewed (inaccurately as it turned out) by the framers as the major means by which our foreign relations were to be conducted,[68] rests with the Senate and the President. Third, certain specified functions are granted to one political branch to the exclusion of the other. Congress, for example, has the exclusive power to declare war. Although the President may respond to insurrection or invasion, the Congress alone may declare the existence of war. Such powers cannot constitutionally be delegated by one branch to another.[69] Fourth, while violations of separation of powers in the conduct of foreign affairs have not usually led to independent judicial review, absent open disagreement between the political branches, alleged violations of individual rights have engendered such review.[70] Fifth, the courts will usually refrain from reviewing the exercise of discretion in the conduct of foreign relations by the political branches. This deference is particularly evident when the political departments act in cooperative effort. Perhaps less defensible is the courts' upholding of political branch's exercise of powers properly belonging to another branch by finding a ratification of the action by the branch whose power was usurped.[71] The courts do provide constitutional, though not fully independent, review on the merits, but generally find the executive or legislative act in question safely within the limits of legitimate discretionary power.[72]

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67. See text accompanying note 3 *supra*.

68. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 129 (1972).

69. See note 4 *supra*. The argument that Congress may not constitutionally delegate its war-making powers is not conclusive on the issue of war powers and political questions. Arguably the Senate may not "constitutionally" complete the impeachment process by convicting a President for something less than "high crimes and misdemeanors," yet the impeachment provision is one often cited as an example of a question textually committed to that branch. The Court should refuse to review an impeachment conviction. *See* Firmage & Mangrum, *supra* note 51, at 1078-85.

70. *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 359 U.S. 1 (1957).

71. See text accompanying notes 80-82 *infra*.

72. In Ludecke v. Watkins, 335 U.S. 160, 167-70 (1948), Justice Frankfurter upheld and found applicable the Alien Enemy Act of 1798 against an attack by a German alien threatened with deportation after the actual fighting had ceased.

> It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even

When the branch whose rights have been infringed has taken action to indicate a disavowal of the act in question, however, the case law suggests that the courts can undertake independent constitutional review of alleged violations of separation of power in foreign relations.[73] The War Powers Resolution of November 7, 1973,[74] is a contemporary example of an act by which one political branch asserts constitutional power against the other. Congress' assertion of power should provide both a basis for judicial review of certain executive acts and an example of what may be done in other areas of foreign policy. Once the judiciary is assured that it is not intermeddling in an area of vast discretionary powers granted the political branches, it can perform its traditional role as ultimate arbiter over the jurisdictional lines delineating the coordinate branches of government.

Political Questions and the War Powers

If foreign affairs constitute the core of political question cases, the war powers, as the most sensitive and critical manifestation of the exercise of foreign relations, are the nub of the core. Yet even here the courts have played a significant if limited role and, after the War Powers Resolution, they should perform still more actively.

The Constitution delegates the preponderance of the war powers to the Congress. The Executive is left ministerial war power prerogatives which he may exercise within parameters determined largely by Congress.[75] The Congressional power to "declare war" carries with it, but for one qualification, the exclusive power to initiate war, whether declared or undeclared.[76] The sole qualification upon Con-

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when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility.

73. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). When the President reported the seizure to Congress, that body took no action on the matter; however, "[w]hen the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency." *Id.* at 586. *See* Justice Frankfurter's concurring opinion, *id.* at 597-614.

74. U.S.C. § 1541 (Supp. IV, 1974). *See generally* Note, 1973 *War Powers Legislation: Congress Re-Asserts Its Warmaking Power,* 5 Loy. Chi. L.J. 83 (1974).

75. *See, e.g.,* Berger, *War-Making by the President,* 121 U. Pa. L. Rev. 29 (1972); Firmage, *Law and the Indo-China War: A Retrospective View,* 1974 Utah L. Rev. 1; Van Alstyne, *Congress, The President, and the Power to Declare War: A Requiem for Vietnam,* 121 U. Pa. L. Rev. 1 (1972); Wormuth, *The Nixon Theory of the War Power: A Critique,* 60 Calif. L. Rev. 623 (1972).

76. The Congress possesses all war-making powers of the United States. Those powers not specifically falling within the "declare war" provision most assuredly were residual in the "grant letters of marque and reprisal" clause. U.S. Const. art I, § 8, cl. 11. *See* Lofgren, *War-Making Under the Constitution: The Original Understanding,* 81 Yale L.J. 672, 696 (1972).

gress' exclusive power to initiate war is the presidential prerogative to use military force to repel sudden attack upon the United States[77] and, after the War Powers Resolution, upon its forces.[78] In addition to its power to "declare war," Congress' power extends to the circumstances constituting termination of war.[79]

Even though Congress is in the preeminent position to initiate war, it should also be recognized that there are substantial areas related to the initiation, conduct and termination of war granted jointly to the political branches. Moreover, there are substantial areas where responsibilities overlap and their interrelationship is ambiguous. Joint and overlapping responsibility impinging upon the decision to go to war can arise because of shared responsibility, such as the responsibility for treaties, including peace treaties, shared by the Executive and the Senate. An ambiguous interrelationship of the political branches can also arise because of executive control of critical functions such as negotiation with foreign governments; deployment of military forces; and dispersal of information relating to foreign relations and bearing upon the decision for war or peace. Further, the bounds of proper legislative delegation remains a question of ambiguity and debate. The political branches have jousted with each other from the first decades

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Thomas Jefferson, as Secretary of State, analyzed the "undeclared war" element of reprisal:

> [A] reprisal on a nation is a very serious thing . . . . [W]hen reprisal follows, it is considered an act of war, and never failed to produce it in the case of a nation able to make war; besides, if the case were important and ripe for that step, Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not with the Executive.

Quoted in 7 INTERNATIONAL LAW DIGEST § 1095, at 123 (J. Moore ed. 1906).

Statements from the Constitutional Convention and early cases decided by the Supreme Court leave little doubt about the power of Congress over both "declared" and "undeclared" war. *See* Fulbright, *Congress, the President and the War Power*, 25 ARK. L. REV. 71, 74 (1971). The word "war" was not confined to mean only general ("declared") war. Furthermore, the Supreme Court found that the President must abide by the limitations set by Congress. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 36 (1800).

77. The records of the constitutional convention show that it was the intent of the Framers to provide an exception to the congressional war powers enabling the President to repel sudden attacks upon the United States. "Mr. Madison and Mr. Gerry moved to insert 'declare,' striking out '*make*' war; leaving to the Executive the power to repeal sudden attacks." Van Alstyne, *supra* note 75, at 6, *quoting* 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, at 318-19 (M. Farrand ed. 1911).

78. 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 . . . (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

50 U.S.C. § 1541(c) (1973).

79. Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948).

of our experience under the Constitution over these issues. One suspects that at least part of this ambiguity was foreseen and planned by the framers as an informal level of check, balance, and accommodation by which the political branches were to make certain decisions in tandem or not at all. To recognize that presidents may have on occasion overstepped constitutional bounds in this process, however, is not to say that such precedents necessarily legitimate such acts. The secrecy with which some executive acts have been accomplished indicates that even the actors recognized the disparity between their acts and their legal obligations.

The judiciary has refused to scrutinize executive and congressional acts in the areas of foreign policy and the war powers in a host of factual situations.[80] The Court usually notes the discretionary latitude given the political branches and then looks toward an executive or congressional act or statement to provide the rule of decision for the case. In most cases Congress and the Executive have been in accord on the act in question.[81] As indicated earlier, when the political branches are in disagreement, the Court has been more inclined to exercise independent judgment.[82]

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80. Act of Feb. 28, 1975, ch. 36, 1 Stat. 424, § 1.

81. The Japanese-American war relocation cases demonstrate most pointedly and painfully the expansive limits of the joint, cooperative use of the war powers by the political branches. In *Hirabayashi v. United States,* 320 U.S. 81 (1943), an American citizen of Japanese ancestry was convicted on both counts of a two count indictment, with sentences to run concurrently. The first count charged a failure to report to the Civil Control Station within the designated area, "it appearing that appellant's required presence there was a preliminary step to exclusion from the area of persons of Japanese ancestry." *Id.* at 84. A review of the first count could well have necessitated a complete constitutional appraisal of the evacuation program. The Court avoided this inquiry by stating that "[s]ince the sentences . . . run concurrently, it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count . . . must be sustained." *Id.* at 85. The second count, a curfew violation, was affirmed. The curfew was upheld as being within the joint power of the Congress and the President. This being so, the Court was able to speak of "the war powers of the United States," rather than of the independent presidential war power.

One year following *Hirabayashi,* the Court decided Korematsu v. United States, 323 U.S. 214, 218 (1944), in which the Court was compelled to decide upon the constitutionality of the evacuation program. In upholding its constitutionality, the Court stated that it could not "reject as unfounded the judgment of the military authorities and of Congress" that the exclusion was necessitated by urgent needs of national defense. The Court deferred to the combined discretionary judgment of the political departments. Thus, during a time of war, even a classification based on race withstood constitutional attack since both political branches acted in cooperative effort under the "war powers of the United States."

82. With reference to Executive action inconsistent with congressional authority, the remarks of Justice Jackson, concurring in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952), are instructive:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional

The early case of *Martin v. Mott* [83] provides an example of the Court's approach to the discretionary exercise of the war power by the Executive. In *Martin*, the New York militia was summoned by the governor pursuant to orders of the President in the prosecution of the War of 1812. Jacob Mott refused to report for duty and was convicted and fined by court martial. A 1795 Act of Congress [84] authorized the President to call up the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe." [85] Justice Story for the Court found that the President was acting within the bounds of the discretion conferred upon him by the Act:

> We are all of the opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the Act of Congress.[86]

Story noted that "[w]henever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts." [87] Chief Justice Taney in *Luther v. Borden* [88] spoke in similar terms on the capacity of the Court to review independently an exercise of discretion by the President in calling out the militia.

The issue of judicial review of presidential discretion in the exercise of the war powers was again before the Court in the *Prize Cases*.[89] Certain ships had been seized pursuant to President Lincoln's blockade of southern ports. The Court, in a five to four decision, upheld the

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> powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

See Kent v. Dulles, 357 U.S. 116 (1958) (Secretary of State powerless to deny passports to American citizens who refused to submit affidavit concerning membership in Communist Party); Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936) (executive without power to extradite fugitive criminals in absence of authority from treaty or congressional act); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

83. 25 U.S. (12 Wheat.) 19 (1827).

84. Act of Feb. 28, 1975, ch. 36, 1 Stat. 424.

85. *Id.* § 1.

86. 25 U.S. (12 Wheat.) at 30.

87. *Id.* at 31-32.

88. 48 U.S. (7 How.) 1 (1849).

89. 67 U.S. (2 Black) 635 (1863). *See generally* S. BERNATH, SQUALL ACROSS THE ATLANTIC 18-33 (1970).

seizures. Justice Grier, writing for the majority, discussed the plenary power given the political branches, the congressional statutes granting power to the President to call out the militia, and the limited capacity of the Court to provide independent review over such discretionary acts by the political branches.[90] The Court held that although Congress could declare war, the President was empowered to respond to an act of war by the Confederacy without congressional authorization.[91] The Court was also willing to choose from among presidential or congressional proclamations or actions the date most appropriate in the particular case. Thus, the *Prize Cases* illustrate that although the question of the beginning and ending dates of hostilities is political, the answer is at least partially judicially determined.

Similar results were reached in other cases concerning the commencement and cessation of hostilities. In *United States v. Anderson*[92] the Court dealt with an act of Congress which allowed southerners who had remained loyal to the Union to be reimbursed the value of their land which had been sold by the advancing Union forces. Whether respondent could recover the value of his land was contingent upon the date the war ended. The Court examined the various pronouncements of the political branches and selected a date which made recovery permissible.[93]

In 1919, litigation was instituted by several distilleries attacking the War-Time Prohibition Act,[94] which was signed into law by the President on November 21, 1918. The Supreme Court, in *Hamilton v. Kentucky Distilleries Co.*,[95] upheld the constitutionality of the Act. The distilleries had argued, *inter alia*, that the Act "became void before [the] suits were brought by reason of the passing of the war emergency."[96] Both sides presented evidence consisting of presi-

90. 67 U.S. (2 Black) at 670 (emphasis in original).
91. *Id.* at 668-69.
92. 76 U.S. (9 Wall.) 56 (1869).
93. Justice Davis for the Court stated:
> In a foreign war, a treaty of peace would be the evidence of the time when it closed, but in a domestic war, like the late one, some public proclamation or legislation would seem to be required to inform those whose private rights were affected by it, of the time when it terminated, and we are of the opinion that Congress did not intend that the limitation in this act should begin to run until this was done. There are various acts of Congress and proclamations of the President bearing on the subject, but in the view we take of this case, it is only necessary to notice the proclamation of the President, of August 20th, 1866, and the act of Congress of the 2d of March, 1867. . . . As Congress, in its legislation for the army, has determined that the rebellion closed the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it.

Id. at 70-71.
94. Ch. 212, 40 Stat. 1045 (1918).
95. 251 U.S. 146 (1919).
96. *Id.* at 154.

dential documents, congressional acts, and political events which tended to prove the continuance or termination of hostilities.[97] The Court did not refuse to reach the merits, providing constitutional but not independent review. The Court weighed the evidence before it and concluded that the political branches had acted within the wide discretion afforded them in such matters. It is important to point out, however, that the Court left open the question whether a case dealing with the termination of war could be presented in which it would find the political branches to have been outside the bounds of their power.[98] Further, *Kentucky Distilleries* indicates that the Court might, in a proper case, decide that legislation passed pursuant to the war powers had ceased to be effective.[99]

Although many issues relating to the war powers present political questions, the Court has on occasion spoken independently to such issues. Perhaps the strongest statements of limitation upon executive action under the war powers are found in *Ex parte Milligan.*[100] There the Court held that article III, section 2 of the Constitution,[101] along with the fourth, fifth, and sixth amendments, prohibited a military commission from trying a civilian charged with disloyal acts committed far from a theatre of military operations when civil courts were also available. The Court was unanimous in its opinion that without Congressional authorization[102] the executive lacked the authority to try civilians in military courts outside the theatre of military operations.

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97. *Id.* at 159-60.

98. Conceding, then, for the purposes of the present case, that the question of the continued validity of the war prohibition act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued.

Id. at 163.

99. Other war powers cases invoking the political question doctrine involved issues concerning the length of time necessary to "pacify" a country by military occupation, Neely v. Henkel, 180 U.S. 109, 124 (1901); the determination of belligerency, The Three Friends, 166 U.S. 1, 63 (1897); the composition of courts martial, Kahn v. Anderson, 255 U.S. 1, 6 (1921); and the criteria for the commissioning of officers, Orloff v. Willoughby, 345 U.S. 83, 87-88 (1953).

100. 71 U.S. (4 Wall.) 2 (1866).

101. U. S Const. art. III, § 2 states in part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

102. The majority, in a five to four decision, also concluded that even Congress could not institute military trials of civilians outside the theatre of the military operations. The Court stated:

Duncan v. Kahanamoku [103] also involved military action affecting civilians. In *Duncan* a civilian in Hawaii had been convicted by a military tribunal established pursuant to a declaration of martial law. The Supreme Court held that the Hawaiian Organic Act which authorized the territorial governor to suspend the writ of habeas corpus and declare martial law did not allow the armed forces to substitute military for judicial trials of civilians not charged with violations of the laws of war. The Court avoided a decision on the constitutionality of the Organic Act by finding that Congress had not authorized petitioners' trials by military tribunal. The case demonstrates not only that the Court will be more inclined to act in favor of civil liberties and against the government after a war is over,[104] but also that the Court will be more likely to attempt an independent review of the challenged acts if it appears that the political branches have not acted in unison.

When the political branches do not act in unison in regard to a war powers issue, not only is the Court more likely to act in its role as constitutional arbiter in disputes between the coordinate branches, it is also more inclined to uphold the Congressional act due to the preponderant textual grant of war powers to Congress. The historic intrusion of the executive into this area during a time of congressional acquiescence is not likely to prevail as a legitimating factor for the continuation of such practices in a judicial proceeding when the practices are opposed by the potent combination of subsequent congressional action and constitutional text.[105]

> But it is said that jurisdiction is complete under the "laws and usages of war." It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

71 U.S. (4 Wall.) at 121-22.

103. 327 U.S. 304 (1946).

104. *Duncan* was decided after any threat of attack on Hawaii had ceased. *See also Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

105. The case most often cited to support the position that the executive is preeminent in the exercise of the war powers, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), may more properly be read as supporting the argument that the Court usually will grant broad discretion to actions taken jointly by the President and Congress. Justice Sutherland's sweeping dicta regarding the origins of national and executive power over foreign relations and

Illustrative of the Court's recognition of Congressional predominance is *Youngstown Sheet & Tube Co. v. Sawyer*,[106] decided during the Korean hostilities. In 1947 Congress rejected an amendment to the Taft-Hartley Act that would have authorized governmental seizure of major industries during a national emergency. In 1952 President Truman, by executive order,[107] seized most of the nation's steel mills[108] to avoid a work stoppage after a general strike had been called by the United Steelworkers of America. Justice Black, writing for the Court, denied any notion of extra-constitutional "executive power." No enlargement of the scope of constitutional power afforded the President as Commander-in-Chief or as the nation's executive could be claimed by virtue of an emergency of undeclared war.[109] The concurring opinions [110] of Justices Frankfurter, Douglas, Jackson, Burton, and Clark identify more clearly than did Justice Black the critical connection between congressional action and independent judicial review of presidential acts performed, arguably, under the war powers. Justice Burton stated:

> The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order of April 8 invaded the jurisdiction of Congress. It violated the essence of the principal of the separation of governmental powers.[111]

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the absence of constitutional prohibitions against legislative delegation in foreign affairs is now generally rejected. *See* Firmage, *supra* note 75, at 42; Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L. J. 1 (1973); Wormuth, *supra* note 75, at 694. The holding supported by the facts is simply that the President acted lawfully under a joint resolution of Congress which authorized him to prohibit the sale of "arms and munitions of war" to specified countries then engaged in hostilities if he determined that such prohibition would "contribute to the reestablishment of peace between those countries." 299 U.S. at 312. Such delegation would be considered constitutionally unobjectionable today without conjuring up different constitutional standards for the executive in the conduct of foreign and domestic policy.

106. 343 U.S. 579 (1952).

107. Exec. Order No. 10340, 8 C.F.R. 65 (Supp. 1952).

108. For a list of the mills seized, *see* 3 C.F.R. 66, 68 (Supp. 1952).

109. 343 U.S. at 587.

110. 343 U.S. at 593, 629, 634, 655, 660.

111. *Id.* at 660 (concurring opinion). Justice Clark agreed:

> I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because here, as in *Little v. Barreme*, Congress had pre-

Ultimately, then, the only potent check upon the abuse of the war powers by one political branch is rejection of its acts by the other. Without a Congressional check of executive warmaking, the Court is not likely to exercise independent constitutional review, nor is it likely to be effective if it does.

Political Questions and the Vietnam War

Protraction of the Indochina War [112] led to attempts to place legal constraints upon the Executive's control of the war. Initially, Congress was sufficiently enamored of our involvement in Vietnam to grant the executive branch *carte blanche* [113] power to wage war, without limitation as to the identity of the enemy, the length of hostilities, the nature of the weaponry employed, or the extent of our involvement. This Congressional abdication represented an unconstitutional delegation of congressional war powers to the President.[114]

As the war continued without resolution, popular support diminished. Legislative action of increasing intensity was undertaken to curtail and finally end our involvement in Indochina. Congress repented of its initial approval by repealing the Tonkin Gulf Resolution.[115] Following American incursions into Cambodia in 1970,

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scribed methods to be followed by the President in meeting the emergency at hand.

Id. at 662 (concurring opinion).

112. American involvement in Vietnam, Cambodia and Laos are considered jointly under the term Indochina War.

113. The Tonkin Gulf Resolution was approved August 10, 1964. Pub. L. No. 88-408, 78 Stat. 384. It reads in part as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress approves and suports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.
>
> Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.
>
> Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

114. *See* Firmage, *supra* note 75, at 41; Wormuth, *supra* note 75, at 692. *But see* note 69 *supra.*

115. The repeal was included within an act "To amend the Foreign Military Sales Act, and for other purposes." Pub. L. No. 91-672, 84 Stat. 2053, 2055 (1971). The repeal read:

Congress enacted the Fulbright Proviso [116] prohibiting the use of funds for military support of Cambodia. This prohibition was attached to every subsequent military appropriations act.[117] The Foreign Assistance Act of 1971 [118] contained a congressional prohibition against construing any American assistance to Cambodia as an American commitment to Cambodian defense. After the Eagleton Amendment,[119] which prohibited the use of any funds for military operations in Cambodia, was vetoed, an amendment to the Continuing Appropriations Resolution was passed and signed which forbade any "funds herein or heretofore appropriated" from being used to support combat activities by American forces in North or South Vietnam, Laos, or Cambodia "notwithstanding any other provision of law." [120] Finally, and most importantly, Congress through joint resolution passed, over presidential veto, the War Powers Resolution of 1973.[121]

Dialogue in the courts concerning the legality of our participation in the Indochina War evolved from an initial refusal under any circumstances to speak to the substance of the question to an increasingly fertile exchange on the nature of standing, political question, justiciability, and substantive issues of constitutional delegation of the war powers.[122] Many cases attempting to adjudicate the le-

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Sec. 12. The joint resolution entitled "Joint resolution to promote the maintenance of international peace and security in Southeast Asia" . . . is terminated effective upon the day that the second session of the Ninety-first Congress is last adjourned.

116. Appropriations Authorization—Military Procurement Act, 1971, Pub. L. No. 91-441, § 502, 84 Stat. 910 (1970).

117. *See, e.g.*, Department of Defense Appropriations Act, 1972, Pub. L. No. 92-204, § 738, 85 Stat. 716 (1971); Appropriations Authorization—Military Procurement Act, 1972, Pub. L. No. 92-156, § 501, 85 Stat. 423 (1971).

118. Pub. L. No. 92-226, § 514, 86 Stat. 20 (1972).

119. Eagleton amendment, H.R. Rep. No. 7447, 93rd Cong., 2nd Sess. (1973).

120. Resolution For Continuing Appropriations, 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973).

Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.

121. 50 U.S.C. §§ 1541 to 1543 (Supp. III, 1973). *See generally* Emerson, *The War Powers Resolution Tested the President's Independent Defense Power*, 51 NOTRE DAME LAW. 187 (1975); Glennon, *Strengthening the War Powers Resolutions: The Case for Purse Strings Restrictions*, 60 MINN L. REV. 1 (1975); Note, *1973 War Powers Legislation: Congress Re-Asserts Its War-making Power*, 5 LOY. CHI. L.J. 83 (1974); Note, *The Recapture of the SS Mayaguez: Failure of the Consultation Clause of the War Powers Resolution*, 8 N.Y.U.J. INT'L. L. & POL. 457 (1976).

122. The initial conclusion drawn from the earlier cases brought in the federal courts challenging American involvement in Southeast Asia is that the judiciary erected an impenetrable wall against all challenges to the legality of the War. As time went on, however, the judges fell into disharmony regarding various aspects of standing and political question.

gality of our involvement in Vietnam and Cambodia were dismissed for lack of standing to sue.[123] Citizens,[124] taxpayers,[125] congressmen,[126] and military personnel[127] were, with a few exceptions,[128] routinely denied standing. Even when the plaintiff was found to possess standing, the courts refused to address the merits of the case. Some courts disposed of the matter through use of the doctrine of sovereign immunity.[129] The Supreme Court, however, sub-

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A forceful statement, characteristic of early cases, concerning the political nature of challenges to the Vietnam War is found in Luftig v. McNamara, 373 F.2d 664, 665 (D.C. Cir. 1967) (per curiam). In holding that the issue was nonjustificable the court stated: "[T]hese propositions are so clear that no discussion or citation of authority is needed. The only purpose to be accomplished by saying this much on the subject is to make it clear to others comparably situated and similarly inclined that resort to the courts is futile . . . ."

In 1973 the wall was temporarily pierced—a litigant convinced a federal district court judge in New York that circumstances had so changed in Southeast Asia that executive-ordered bombing of Cambodia was indeed illegal. Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D. N.Y.), *rev'd,* 484 F.2d 1307 (2d Cir. 1973), *cert. denied,* 416 U.S. 936 (1974). Judge Orrin G. Judd issued an injuction against the continuation of bombing. In the flurry of judicial action which followed, the injuction was stayed and finally vacated. Schlesinger v. Holtzman, 414 U.S. 1321 (1973).

123. *See, e.g,.* Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied,* 416 U.S. 936 (1974); Mottola v. Nixon, 464 F.2d 178 (9th Cir. 1972); Pietsch v. President of the United States, 434 F.2d 861 (2d Cir. 1970), *cert. denied,* 403 U.S. 920 (1971); Kalish v. United States, 411 F.2d 606 (9th Cir. 1969); United States v. Battaglia, 410 F.2d 279 (7th Cir.), *cert. denied,* 396 U.S. 848 (1969); Ashton v. United States, 404 F.2d 95 (8th Cir. 1968), *cert. denied,* 394 U.S. 960 (1969); Meyers v. Nixon, 339 F. Supp. 1388 (S.D. N.Y. 1972); Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968), *aff'd sub nom.* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied,* 396 U.S. 1042 (1970); Campen v. Nixon, 56 F.R.D. 404 (N.D. Cal. 1972).

124. Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Meyers v. Nixon, 339 F. Supp. 1388 (S.D. N.Y. 1972).

125. *Id.*

126. Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

127. Not all military personnel were denied standing to sue. Among persons denied standing were military reservists, not then called up for active duty, and persons eligible for the draft but not in the military. *See, e.g.,* Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971).

128. *See, e.g.,* Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973) (Congresspersons had standing to sue); Holtzman v. Richardson, 361 F. Supp. 544 (E.D. N.Y.), *rev'd sub nom,* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir.), *cert. denied,* 416 U.S. 951 (1973) (Congresswoman found to have standing by trial court); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971) (military personnel serving in Vietnam had standing); Atlee v. Laird, 339 F. Supp. 1347 (E.D. Pa. 1972) (citizens had standing to challenge expenditures to finance the war).

129. In Mitchell v. Laird, 488 F.2d 611 (1st Cir. 1973); Gravel v. Laird, 347 F. Supp. 7 (D.D.C. 1972); and Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968), *aff'd sub nom,* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied,* 396 U.S. 1042 (1970), the courts accepted the government's sovereign immunity argument.

sequently rejected this defense.[130] In those other cases in which plaintiffs were found to possess standing, the political question doctrine precluded review.[131]

Most cases attacking the legality of the Vietnam War were disposed of on political question grounds.[132] Illustrative of the approach taken in these cases is *Atlee v. Laird*,[133] a decision by a three-judge court in a class action challenging the constitutionality of the war. The court was faced with these issues:

> (1) whether our military participation in Southeast Asia ought to be classified as a "war"; (2) whether, assuming a formal declaration of war is for some reason unnecessary, Congress has taken sufficient action to authorize the "war"; and (3) whether the President, under his war powers and regardless of congressional action, has the authority to keep American forces in that area.[134]

In holding that the issues presented nonjusticiable political questions, the court relied heavily upon *Baker v. Carr* and Justice Brennan's formulations of the doctrine, stating that matters of foreign relations and war were for the political branches in the exercise of their discretionary powers. Review was denied, in part, because the courts lacked "judicially manageable standards to apply" in order to reach an appropriate conclusion.[135] The court found that in such

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130. In Berk v. Laird, 429 F.2d 302, 306 (2d Cir. 1970), *cert. denied*, 404 U.S. 869 (1971), the court stated: "[S]overeign immunity is no bar to this action, since the complaint alleges that agents of the Government have exceeded their constitutional authority while purporting to act in the name of the sovereign."

131. *See, e.g.*, Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

132. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir.), *cert. denied*, 416 U.S. 951 (1973); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973) (question whether mining of ports and harbors of North Vietnam and continuing air strikes were legal was a political question); Sarnoff v. Connally, 457 F.2d 809 (9th Cir. 1972); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Simmons v. United States, 406 F.2d 456 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969); United States v. Watson, 373 F. Supp. 1119 (E.D. Wis. 1974); Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973) (action by members of House of Representatives and Air Force seeking declaration that aerial combat in Cambodia was illegal, held: political question); Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd*, 411 U.S. 911 (1973); Gravel v. Laird, 347 F. Supp. 7 (D.C.C. 1972); Head v. Nixon, 342 F. Supp. 521 (E.D. La.), *aff'd*, 468 F.2d 951 (5th Cir. 1972); Massachusetts v. Laird, 327 F. Supp. 378 (D. Mass.), *aff'd on other grounds*, 451 F.2d 26 (1st Cir. 1971); United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968); Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968), *cert. denied*, 396 U.S. 1042 (1970).

133. 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge court), *aff'd*, 411 U.S. 911 (1973).

134. *Id.* at 703.

135. *Id.* at 705. But in his dissenting opinion, Chief District Judge Joseph S. Lord argued that adequate standards existed for the court to decide the questions. He contended that Vietnam was clearly at "war" as the term is used in

cases there was a "demonstrable constitutional commitment" of the issues to the political branches.[136] The court concluded that federal courts were beginning to confront an increasing number of cases in sensitive areas of public affairs. In order to avoid entering political arenas outside the court's competence and concern, it was imperative that federal courts exercise judicial self-restraint.[137]

The Court of Appeals for the Second Circuit developed a different approach to cases challenging the War. In *Orlando v. Laird*[138] servicemen attacked the authority of the Executive to wage war in Vietnam. The court stated that

> the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine. . . . As we see it, the test is whether there is any action by the Congress sufficient to authorize or ratify the military activity in question.[139]

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the Constitution. *Id.* at 711. *See also* Note, *Congress, the President, and the Power to Commit Forces to Combat,* 81 HARV. L. REV. 1771, 1803 (1968); Wormuth, *supra* note 75, at 682. The second issue, whether various acts of Congress "provide sufficient congressional authorization under the war making clause," was also clearly justiciable according to Judge Lord. 347 F. Supp. at 712. Finally, he argued that there were sufficient standards based on historical evidence to find that the President had no independent authority to keep American forces in Vietnam. Professor Wormuth, *supra* note 75, at 680, also responded to the "standards" issue: There are no standards for going to war, and therefore the war power was given to Congress. No suitor may complain because Congress has declared war; and the courts may not take an action that resembles an act of war. But the standards to determine whether Congress has exercised its war power are simple and easy to apply. Similarly, in *Marbury v. Madison,* Chief Justice Marshall said that deciding whom to appoint was a political question, but whether an appointment had been made was a justiciable question. The legality of the Vietnam War is a justiciable question. [footnotes omitted]

136. 347 F. Supp. at 705. Despite the use of "constitutional commitment" language, the court had earlier described the political question doctrine as "a rule born of pragmatic considerations, based on the separation of powers concept and our system of checks and balances." *Id.* at 701. Moreover, although the Court relied upon the *Baker v. Carr* formulations of "textual commitment" and "manageable standards," it seemed especially concerned about the practical implications of its decision on present American foreign policy interests and on future options for the political branches in the foreign policy area. *Id.* at 707. Indeed, the Court seemed to be applying the "normative" approach to the political question doctrine, the view that extra legal considerations *ought* to govern here. The *Atlee* court, as well as others facing the question, may well have been moved by the "sheer momentousness" of the question, the feeling that it is simply beyond the competence of the courts to declare illegal a massive military effort of the United States Government.

137. 347 F. Supp. at 708-09.

138. 443 F.2d 1039 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971).

139. *Id.* at 1042.

This approach has become known as the ratification theory. The importance of the theory was that although it retained the political question methodology, it utilized it at a different analytical stage of the case than those decisions declaring the entire issue nonjusticiable. Rather than mandating outright dismissal of the action as a political question, the theory permitted the court to reach the merits and determine whether there had been *some* mutual participation between the Congress and the President.[140] If the court found participation amounting to a ratification of the acts of the Executive, the acts subject to attack were upheld. The political question involved was the form of the "mutual participation." Conceivably, if a plaintiff could prove that there had been no mutual participation, he could prevail on the merits and avoid the political question doctrine altogether. In *Orlando,* however, the court found satisfactory evidence of "mutual participation" amounting to ratification.[141]

In the early 1970's, a number of judicial opinions agreed that presidential initiation of the use of military force, other than in response to attack or insurrection, required the approval of the Congress.[142] In addition, courts increasingly held that the existence of congressional approval of executive use of military forces was a justiciable question. The courts were not precluded from addressing the issue by the doctrine of political questions. The war was not declared unconstitutional, however. Rather, these courts found that Congress had given its approval to American participation in the Indochina war from the beginning, as manifested by the SEATO Treaty, the Gulf of Tonkin Resolution, military appropriations, extensions of the draft, and by other supportive legislative acts. The accord between the political branches, coupled with the great discretion constitutionally delegated to Congress in regard to its expression of approval of the use of military force, precluded independent judicial review of the constitutional adequacy of that choice.[143] The

140. Beyond determining that there has been *some* mutual participation between the Congress and the President, which unquestionably exists here, with action by the Congress sufficient to authorize or ratify the military activity at issue, it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question. The form which congressional authorization should take is one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions.

Id. at 1043 (emphasis in original).

141. *Id.* at 1043-44.

142. *See, e.g.,* DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied,* 404 U.S. 869 (1971); Berk v. Laird, 317 F. Supp. 715 (E.D. N.Y. 1970).

143. This approach, of course, has not been without its opponents. Professor Wormuth attacked a similar approach employed by Judge Wyzanski in

dominant theme of these cases was that Congress had supported and ratified executive war in Indochina.

The cases challenging the war thus fell into two groups. In the majority of the decisions the issue of the legality of America's involvement in Indochina was declared to be a political question. The court did not reach the merits but dismissed for lack of a justiciable controversy. In a smaller number of cases, the courts moved their political question formulation to a different stage of the analysis. They held that although "Congress [had] a duty of mutual participation in the prosecution of war," [144] the form that such participation had to take was a political question.

In both groups of cases, it was apparent that the courts had found that the executive and legislative branches were acting in cooperative effort. Had that mutually supportive cooperation been lacking, the courts might have decided differently.[145] Implicit within the reasoning of the above cases is the possibility that without accord between the political branches—if Congress were to oppose executive action in the use of the war powers—independent judicial review would be warranted.

Mitchell v. Laird,[146] decided in 1973, represented a judicial step toward reinterpreting the legitimating basis of congressional approval of executive direction of American armed forces into hostilities. Judges Wyzanski and Bazelon were willing to restrict the confines of the political question doctrine further than any prior decisions. The opinion reaffirmed the principal that Congressional

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United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968). Judge Wyzanski asserted that "cooperative action" by the political branches in foreign policy "is the very essence of what is meant by a political question." *Id.* at 515. According to Wormuth: "Thus, the unconstitutionality of the action becomes the reason for not inquiring into its constitutionality." Wormuth, *supra* note 75, at 686. This deference to the political branches, however, is rooted in a judicial concern that Congress and the President not be unduly restricted in their joint responses to international crisis and a judgment that a too narrowly fashioned rule might create dangerous inflexibility in American foreign policy. *See, e.g.*, 294 F. Supp. at 515. These kinds of policy concerns about the consequences of judicial rulings will, like others, probably disappear if the courts confront a direct clash between Congress and the President.

144. Orlando v. Laird, 443 F.2d at 1042.

145. In the words of Judge Coffin:

> [I]n a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached. The war in Vietnam is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view.

Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971).

146. 488 F.2d 611 (D.C. Cir. 1973).

consent could be manifested other than by formal declaration of war and reiterated the view that it was a discretionary matter for Congress to determine the form of that manifestation.[147] The court then broke new ground in the application of the ratification theory. First, although Congress had discretion to choose from among several means of expressing approval of the use of military forces in war, whether it had in fact indicated such approval in the various legislative acts was a justiciable rather than a political question. Second, whereas most authority held that the appropriation, draft extension, and cognate laws constituted Congressional assent,[148] Judges Wyzanski and Bazelon rejected that precedent as unsound.

> This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men 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. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continue them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent.[149]

Thus, the court concluded that Congress had not validly assented to the Vietnam War.

The *Mitchell* case is demonstrative of the rift that came to separate members of the federal judiciary on the Indochina issue.[150] As

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147. *Id.* at 615.

148. *Id.*

149. *Id.* Nevertheless, the court in Mitchell found a political question that precluded a decision on the merits, based on the discretion that a president must have in ending a war. In Note, *War in Cambodia—Political Question?*, 38 ALB. L. REV. 245, 261 (1974), it is contended that

> the finding of a political question in *Mitchell* was based on the practical considerations of expediency which characterize the prudential considerations outlined by Bickel. The Court was saying that despite the fact that under the Constitution Congress must authorize these military activities, and despite the fact that Congress had not done so, the Court would not determine the issue. The Court avoided a decision because considerations of expediency would make a principled decision imprudent in light of the practical political environment in which the issue was enmeshed and in light of the Court's ignorance as to the immediate ramifications of such a decision.

Mitchell might also be described as an application of Bickel's suggestion that the courts should praise principle even if they must bow to considerations of expediency. See note 43 *supra*. The two judges must have felt it important, if only for another day, that it be established that congressional ratification of executive war should involve more than mere acquiescence.

150. The rift between judges over the sensitive issue of Indochina is apparent from the statements of Judge MacKinnon in his argument in favor of

the conflict tore at the domestic tranquility, so it was reflected in disagreement on the bench.

By the time the War closed, a district court judge in *Holzman v. Schlesinger*[151] had gone so far as to issue an injunction against continued bombing in Cambodia. Congressional opposition to military activity in Cambodia was predominant. After the failure to override the President's veto of the Eagleton Amendment, a compromise measure was passed which prohibited the use of appropriated funds in Cambodia after August 15, 1973. In *Holtzman* the district court used the ratification theory analysis and concluded that the President had not been authorized by Congress to bomb in Cambodia and therefore was acting beyond his legal authority. In a real sense, the bombing of Cambodia was as much out of harmony with a majority in Congress—against the "implied will" of Congress, to use Justice Jackson's phrase—as was President Truman's seizure of the steel mills.[152] The district court reasoned that not only had Congress expressed opposition to the bombing, but also that the "forced" compromise amendment could hardly represent an authorization of continued bombing until August 15, 1973. Nevertheless the circuit court of appeals reversed.[153] *Holtzman*, then, raises perhaps the most serious challenge to the thesis that the courts will independently review war powers acts of the Executive when those acts are out of harmony with congressional will.

Several factors must be considered, however, to understand the reversal by the circuit court. First, the Cambodia bombing represented final stages in a protracted conflict which the courts had

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granting a rehearing en banc to review the panel decision in *Mitchell*. 488 F.2d at 618. He disagreed vehemently with Judges Wyzanski and Bazelon on the issue of congressional assent to the war.

> The primary error in the panel opinion is that it confuses the expressed *intent* of Congress with what is completely court-created speculation as to *motive*. Intent and motive are not the same. Even if courts possessed authority and jurisdiction to inquire into the motives of Congress, which they do not, the panel opinion only asserts a possible *speculative* motive, *i.e.*, what "A Congressman [not even a majority of either House of Congress] . . . *might* vote." (Emphasis added.) This irrational and illusory base has no support in the record and is not proper support for a responsible judicial decision. I would thus excise the heretofore quoted portion of the opinion . . . . In view of the now complete removal of United States ground forces, the quoted language of the opinion is nothing more than a court-created *post hoc* rationalization, devoid of any support in the record, which is obviously so untimely, illogical and political that it should not form any part of a judicial opinion.

Id.

151. 361 F. Supp. 553 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir.), *cert. denied*, 416 U.S. 936 (1973). See note 122 *supra*.

152. See text accompanying notes 106-11 *supra*.

153. 484 F.2d 1307 (2d Cir. 1973).

systematically refused to find unconstitutional. The appellate court undoubtedly recognized the practical distinction between the relative ease of initiating war as opposed to the difficulty of ending it. The circuit court in *Holtzman* was convinced that the judiciary was incompetent to draw the line between tactical decisions which the President might make as Commander-in-Chief without congressional approval and those for which he needs new congressional authorization. The circuit court was also unwilling to go behind the face of the compromise amendment and find that Congress did not intend to authorize a temporary continuation of the bombing. The court was hesitant to interpose itself in accommodations being worked out between the branches. This hesitancy may suggest that the more sensitive the area of the war power involved, the more direct must be the clash between the branches to bring about judicial intervention. As helpful a precedent as the *Youngstown* case may be, it should be remembered that the Court's position was strengthened because it was a labor case as well as a war powers case. Finally, there were extra-legal factors in *Holtzman* which probably motivated the Court of Appeals, particularly, an affidavit by Secretary of State Rogers to the effect that a holding against the administration would do "irreparable harm" to the conduct of American foreign relations. Such considerations undoubtedly would have been less persuasive if congressional opposition had been clear, formal and unequivocal.

The War Powers Resolution [154]

The War Powers Resolution is a strong congressional restatement of the constitutional moorings of the war powers.[155] Presidential power to introduce American forces into hostilities, according to the Resolution, exists only in response to attack or upon authorization by congressional statute or declaration of war.[156] Consultation with Congress is required "in every possible instance" before introducing American forces into hostilities or situations where imminent involvement in hostilities is likely.[157] The President must report to Congress the "circumstances necessitating the introduction" and the "constitutional and legislative authority" for the introduction.[158]

154. 50 U.S.C. §§ 1541-48 (1973).
155. *Id.* § 1541(a), states:
> It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

156. *Id.* § 1541(c).
157. *Id.* § 1542.
158. *Id.* § 1543(a)(3).

Within sixty days of the submission of a report, the President must terminate the use of American armed forces, unless Congress "has declared war or has enacted a specific authorization for such use . . . ," or extended the sixty day period. An exception is provided if Congress is unable to meet because of armed attack upon the country.[159] Notwithstanding the sixty day provision, the President must remove American forces from hostilities outside the "United States, its possessions and territories" if there has been no declaration of war or statutory authorization for the use of the armed forces in hostilities if "Congress so directs by concurrent resolution." [160]

The War Powers Resolution provides a significant definition of political questions and the exercise of the war powers for the courts. Specifically, congressional authorization for the introduction of American armed forces into "hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred from any provision of law . . . including any provision contained in any appropriation Act, unless such provision specifically authorizes" [161] such introduction. Nor shall said inference be drawn from "any treaty . . . unless said treaty is implemented by legislation specifically authorizing the introduction" of armed forces into hostilities or into situations likely to result in hostilities.[162] The War Powers Resolution thus brings congressional interpretation of its own acts of authorization or ratification of executive actions under the war powers very close to the position taken by Judges Bazelon and Wyzanski in *Mitchell.*

Congress has, through the War Powers Resolution, provided the Executive and the courts with an interpretation of part of the war powers: a declaration of war or specific statutory authorization is necessary before the Commander-in-Chief may introduce United States forces into hostilities for any substantial length of time. The criteria often cited by the courts as indicating congressional assent to executive use of the war powers—appropriation acts and the SEATO treaty for instance—do not, by themselves, constitute congressional authorization. The War Powers Resolution's requirement of specificity in congressional authorization disowns any past congressional delegation of its war powers and warns the Executive and the courts not to rely upon such techniques in the future.[163]

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159. *Id.* § 1544(b).
160. *Id.* § 1544(c).
161. *Id.* § 1547(a)(1).
162. *Id.* § 1547(a)(2).
163. The War Powers Resolution should be a sufficiently strong statement of congressional will and intent to invoke the precedents for judicial review in the area of war powers, especially Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

CONCLUSION

When the executive and legislative branches are in open disagreement over the employment of the war powers, most of the criteria of political question noted in *Baker v. Carr* point toward independent judicial review. The question of the constitutional delegation is simply which of the political branches should prevail. The national government is not speaking with one voice and may be able to do so only after judicial determination of constitutional competence. The embarrassment of "multifarious pronouncements" has occurred, not by judicial intrusion, but as a result of disputes between the political branches.

Both political branches possess weapons that may be used against the other if judicial review is not accomplished. The Executive, acting beyond its constitutional mandate, could exercise power over the armed forces, to some degree in defiance of congressional will. Congress could hamstring executive spending in the conduct of foreign policy and in unrelated areas as well. Congress could use its impeachment weapon to reassert its ultimate control over the direction of foreign policy and its interpretation of the war powers. But the Supreme Court has traditionally spoken on the question of constitutional competence in disputes between the coordinate branches,[164] as it has between the national government and the states.[165] Judicial review, though appropriate perhaps in a narrower range of cases involving the coordinate branches of government than in the more obviously mandated[166] area of disputes between the states and the federal government, is nevertheless a more appropriate means of establishing constitutional competence than is guerrilla warfare between the political branches. Although the Court has traditionally been more sensitive to violations of individual rights[167] than to violations of separation of powers, recent cases not related

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164. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Train v. City of New York, 420 U.S. 35 (1975); United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Kendall v. United States, 37 U.S. (12 Pet.) 527 (1838); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

165. U.S. Const. art. VI. "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." O. W. HOLMES, *Law and the Court*, in COLLECTED LEGAL PAPERS 291, 295-96 (1920).

166. National League of Cities v. Usery, 426 U.S. 833 (1976); Cooper v. Aaron, 358 U.S. 1 (1958); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

167. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957).

to the war powers do indicate an increased sensitivity by the Court to the latter concept.[168]

Ultimately, the real check upon executive abuse of the war powers, as for most other executive misuse of power, must come from congressional action. When Congress expresses its view of the war powers as it did in the War Powers Resolution, in opposition to presidential acts, the judiciary is substantially free from the limitations of the doctrine of political questions. Accordingly, the judiciary could then perform its function of independent review of the constitutional delegation to the political branches.

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168. Buckley v. Valeo, 424 U.S. 1 (1976); National League of Cities v. Usery, 426 U.S. 833 (1976); Train v. City of New York, 420 U.S. 35 (1975); United States v. Nixon, 418 U.S. 683 (1974).