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2019-0154-F

in602

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: "LEXIS ("LEXIS /NEXIS Print Delivery" <lexis-nexis@prod.lexis-nexis.com> (R) (R) [UNKNOWN])

CREATION DATE/TIME:11-OCT-2000 11:24:18.00

SUBJECT: LEXIS(R)-NEXIS(R) Email Request (711:0:15025014)

TO: Peter I. Belk (CN=Peter I. Belk/OU=WHO/O=EOP [WHO])

READ:UNKNOWN

TEXT:

100297

Print Request: Current Document: 46

Time of Request: October 11, 2000 11:16 am EST

Number of Lines: 1405

Job Number: 711:0:15025014

Client ID/Project Name:

Research Information:

Law Reviews, Combined
(LEXIS-NEXIS Provided Search)

Note:

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PAGE 1

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University of Pennsylvania

May, 2000

148 U. Pa. L. Rev. 1637

LENGTH: 15247 words

POINT/COUNTERPOINT: UNCHECKED PRESIDENTIAL WARS

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ELECTION 2000: POINT / COUNTERPOINT SERIES

Each issue of Volume 148 had included two essays on a subject related to law and the American political system in the form of a point/counterpoint debate. We developed this series in an effort to raise the level of civic discourse during an election cycle critical to our nation's future. Issues 1-4 featured debates about law professors and political advocacy; public financing of political campaigns; urban sprawl; and public financing of political campaigns; urban sprawl; and regulation guns as consumer products.

The election season has slipped into its pre-convention lull, yet the underlying issues remain vibrant. We now offer the final exchange in our series: the proper constitutional role of the president in initiating military actions. In the past eight years, President Clinton has undertaken significant military actions against Panama, Somalia, Haiti, Bosnia, Yugoslavia, Afghanistan, and Sudan, without a single declaration of war from Congress. The participants in this discussion address whether presidential war powers today are defensible under the Constitution.

Louis Fisher, Senior Specialist in Separation of Powers for the Congressional Research Service of the Library of Congress, argues that presidential powers in committing the nation to war have grown far beyond the checks and balances the Framers intended. John C. Yoo, Professor of Law at the University of California at Berkely School of Law (Boalt Hall), responds that the Constitution allows the President to exercise significant initiative in war matters and goes on to

examine the constitutional implications of the increasing participation of American forces in multilateral military actions. We hope you enjoy this final exchange in our point/counterpoint series.

TEXT:
[*1637]

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With studied care and deliberation, the Framers of the Constitution created a structure to prevent presidential wars. They specifically rejected the British model that allowed the monarch to take the country to war and to exercise exclusive control over foreign policy. Making fundamental judgments about representative government, popular control, and human nature, they placed the power of war and peace with the legislative branch and divided foreign policy between the President and Congress. For the most part, the Framers' model prevailed from 1789 to 1950.

That constitutional system is in tatters. Because of presidential initiatives after World War II - aggravated by congressional acquiescence and judicial passivity - there is no effective check on presidential wars. Presidents claim they can go to war wherever they like, for whatever reason, without seeking authority from Congress. What the Framers feared and tried to avoid we now have: unilateral presidential warmaking.

President Truman's decision to go to war against North Korea in 1950 represented a subversion of the Framers' design. For the first time, a president had involved the nation in a major war without seeking a declaration or authorization from Congress. Over the last decade, Congress has stayed on the sidelines watching Presidents George Bush and Bill Clinton engage militarily against Panama, Somalia, Haiti, Bosnia, Yugoslavia, Afghanistan, and Sudan. Congress did authorize war against Iraq in 1991, but since that time the scope of [*1638] military operations against that country has been dictated by presidents, not Congress.

Political developments over this past half century do little to support the Framers' expectation that each branch of government would protect itself by fighting off usurpations and transgressions by other branches. The contemporary

Congress has abdicated war powers that had been entrusted to the legislative branch - the people's representatives. The legislative check has been reduced to possibly taking some future action to deny funds for an unpopular war started by the President. The judicial check, for the most part, does not exist.

Part I of this Article addresses the Framers' design for the American government, focusing on what they had learned from the colonial governments and the delegate debates over the use of checks and balances. Part II discusses the Framers' intent in giving Congress the power to initiate war. Part III provides a brief description of the Framers' model in practice while describing instances, even before 1950, where presidents initiated the use of force without congressional approval. In Part IV, I analyze Professor John Yoo's argument that the Framers' intent was to give the President the initiative in war. Part V focuses on the application of the War Powers doctrine to Kosovo and presidential reliance on U.N. Security Council resolutions and NATO decisions as "authority."

I. The Framers' Design

The Framers believed that a powerful dynamic of institutional self-defense would safeguard the structure of separation of powers and give life and energy to the system of checks and balances. They expected Congress to be especially vigilant in protecting the power to go to war. Their model worked for about 160 years, but the record since 1950 reveals an alarming decline in congressional confidence and institutional self-esteem. Lawmakers regularly deride the capacity of Congress to exercise its war and spending prerogatives. n2
What

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the Framers had in mind clearly is not working today. Citizens need to understand what has happened, and why, and debate whether the original constitutional principles are worth preserving.

James Madison argued in Federalist No. 51 that

the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each

[*1639]

department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. n3

The core principle: each branch would defend its prerogatives. Madison asked how the partition of power among the three branches would be maintained. Acknowledging that other systems had been inadequate, he stated that "the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." n4

The Framers depended on a written constitution, representative government, and democratic pressures, but they wanted more. Madison agreed that a "dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." n5 The auxiliary precautions: separation of powers, checks and balances, and each branch intent on safeguarding its institutional interests.

We have it from Woodrow Wilson that the makers of the Constitution "followed the scheme as they found it expounded in Montesquieu, followed it with genuine scientific enthusiasm." n6 James Bryce argued that the Framers "had for their oracle of political philosophy the treatise of Montesquieu on the Spirit of Laws.... No general principle of politics laid such hold on the constitution -makers and statesmen of America as the dogma that the separation of these three functions is essential to freedom." n7 Montesquieu was indeed frequently cited at the Federal Convention and the state ratifying conventions, and Madison praised him as "the celebrated Montesquieu" and the "oracle" who was always consulted on the separation doctrine. n8

The American Framers did not borrow the separation doctrine [*1640] from Montesquieu, who presented a tidy, uncomplicated model of separate branches,

free of partisan battles and the evolving cabinet system in England. Montesquieu promoted an idealized form of government, corresponding more to his conceptions - or misconceptions - than to the reality of British politics. n9 Justice Holmes spoke bluntly of this contrivance: "His England - the England of the three-fold division of power into legislative, executive and judicial - was a fiction invented by him, a fiction which misled Blackstone and Delolme." n10

For the most part, Montesquieu adhered to a strict separation of powers. He maintained that the legislative body should not impeach the executive, for the "moment he is accused or tried there is an end of liberty." n11 He gave his "senate" (the house of nobles) the power to reject bills relating to supplies (funding), but no authority to amend them. n12 He allowed the executive a veto

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to reject legislation but opposed any other participation in the legislative process. n13 On all those points, and others, the Framers rejected Montesquieu. Yet they agreed on his fundamental premise that power must check power: "il faut que, par la disposition des choses, le pouvoir arrete le pouvoir." n14

A. Lessons Learned at Home

Colonial governments in America accumulated their own insights into the problem of checks and balances. During this period, complaints about institutional encroachments were common. After achieving their independence from England, many of the states wrote into their constitutions explicit guarantees for a separation between the branches of government, but the meaning of separation varied [*1641] from state to state and became a source of continual misunderstanding. For example, despite the strong language in the Massachusetts Constitution forbidding one department from exercising the powers of another, the executive possessed a qualified veto over the legislature; the senate acted as a court of impeachment; members of the judiciary were appointed by the governor; and the legislature appointed the major generals of the militia, an advisory council for the governor, and several officers of the

administration.
n15

Other state constitutions announced separation in strict terms but departed from the maxim when necessary. New Hampshire, the last of the thirteen states to form a constitution, prudently acknowledged the gap between a literal interpretation of separated powers and the demands of workable government. The three departments were to be kept "as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity." n16

In the months just before the Philadelphia Convention, Madison identified for Thomas Jefferson the essential elements of the new national government, including a reorganization to provide for separate branches. Madison's interest in three branches was drawn more from administrative necessities than from the writings of Montesquieu. The Continental Congress had mismanaged its power under the Articles of Confederation, he told Jefferson, and administrative duties under the new government would be even more demanding. n17 At the convention, Madison reminded the delegates that experience with the states had proved "a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent." n18 The separation set up in the state constitutions had turned out to be a matter of mere "parchment barriers" incapable of preventing legislatures from drawing [*1642] other branches into their orbit.
n19

After the convention had adjourned, Madison confided to Jefferson that the boundaries between the executive, legislative, and judicial powers, "though in general so strongly marked in themselves, consist in many instances of mere shades of difference." n20 He set out in The Federalist Papers to contrast the overlapping of powers in the Constitution with the abstract and impracticable partitioning of powers advocated by some of the critics.

The bulk of Madison's analysis of the separation doctrine appears in Federalist No. 47. He upheld the basic principle of the maxim that tyranny

results whenever three branches are concentrated in the same hands, but he charged that the maxim had "been totally misconceived and misapplied."

ⁿ²¹ Montesquieu, he said, could not possibly have meant that the three powers of the British government were actually kept separate. The executive magistrate formed a part of the legislative power by making treaties with foreign sovereigns, and he had a share in the judicial power by appointing the members of the judiciary, as well as by having the power to remove them. Moreover, one house of the legislature formed a constitutional council for the executive, had judicial power in the impeachment process, and was invested with the supreme appellate jurisdiction in all other cases. The judges could not vote in legislative actions, but were permitted to participate in the deliberations. ⁿ²²

Madison then turned to the state constitutions for further guidance, pointing out that in no instance were the departments of power in the states kept absolutely separate and distinct. The intent of Montesquieu, Madison concluded, could be no more than this: "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." ⁿ²³

[*1643]

B. Checks and Balances

By the late 1780s, the concept of checks and balances had gained dominance over the doctrine of separated powers, which one contemporary pamphleteer called a "hackneyed principle" and a "trite maxim." ⁿ²⁴ Yet several delegates at the state ratifying conventions expressed shock at the degree to which the Constitution had mingled the departments.

One delegate at the Virginia ratifying convention cried, "How is the executive? Contrary to the opinion of all the best writers, blended with the legislative. We have asked for bread, and they have given us a stone." ⁿ²⁵ The draft Constitution was attacked at the North Carolina ratifying convention for violating the maxim whereby the three branches "ought to be forever separate and

distinct from each other." n26 Overlapping of departments also provoked criticism in Pennsylvania. Opponents of the Constitution insisted that the Senate's judicial power in impeachment, as well as the executive's power in making treaties, constituted an "undue and dangerous mixture of the powers of government." n27 A lengthy quotation from Montesquieu was introduced to demonstrate the dependence of freedom and liberty on a separation of powers. n28

These three states recommended the addition of a separation clause to the national bill of rights. Virginia offered draft language: "legislative, executive, and judiciary powers of Government should be separate [sic] and distinct." n29 North Carolina and Pennsylvania submitted their own versions of a separation clause. n30 Congress compiled a tentative list of restrictions on the national government, among [*1644] which was the following:

The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive

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Departments. n31

This language was among seventeen constitutional amendments sent to the Senate, which struck it from the list. A substitute amendment (to make the three departments "separate and distinct," and to ensure that the legislative and executive departments would be restrained from oppression by "feeling and participating the public burthens" through regular elections) was also voted down. n32 The Senate whittled the list of seventeen amendments down to twelve. Among the deleted amendments was the separation clause.

The Framers did not object to a sharing or partial intermixture of powers. They were not doctrinaire advocates of a pure separation of powers between branches. Some overlapping was necessary to assure a vigorous system of checks and balances. They knew that the "danger of tyranny or injustice lurks in unchecked power, not in blended power." n33

II. The War Prerogative

The Framers were particularly intent on vesting the power of initiating war in the Congress, as the people's representative. They were well aware of the efforts of English kings to rely on extra-parliamentary sources of revenue for their military expeditions and other activities. Some of the extra-parliamentary revenue came from foreign governments; some came from private citizens. Because of these transgressions and encroachments of legislative prerogatives, England lurched into a bloody civil war and Charles I lost both his head and his office. n34

[*1645]

A. Republican Principles

Joseph Story, who served on the Supreme Court from 1811 to 1845, wrote about the essential republican principle of vesting the decision to go to war in the representative branch:

The power of declaring war is not only the highest sovereign prerogative;...it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nations. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead.... It should therefore be difficult in a republic to declare war; but not to make peace.... The co-operation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation n35

The Framers deliberately divided government by making the President the commander-in-chief and reserving to Congress the power to finance military

expeditions. The Framers rejected a government in which a single branch could

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both make war and fund it.

In Federalist No. 69, Alexander Hamilton argued that the American President was far less threatening than the King of England. He explained that the power of the king "extends to the declaring of war and to the raising and regulating of fleets and armies." n36 In contrast, the Constitution placed those powers expressly with Congress. Jefferson praised this transfer of the war power "from the executive to the Legislative body, from those who are to spend to those who are to pay." n37 Madison warned against placing the power of commander-in-chief in the same hands as the power to go to war:

Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the [*1646] power of executing from the power of enacting laws. n38

George Mason advised his colleagues at the Philadelphia Convention in 1787 that the "purse & the sword ought never to get into the same hands <whether Legislative or Executive.>" n39

B. Rejecting the British Models

The Framers were aware that British models placed the power to initiate war with the monarch. John Locke's Second Treatise on Civil Government spoke of three branches of government: legislative, executive, and "federative." n40 The last consisted of "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth." n41 The federative power (or what we would call foreign policy today) was "always almost united" with the executive. n42

Similarly, Sir William Blackstone, the great eighteenth-century jurist,

vested foreign policy and the war power exclusively with the monarch. In his Commentaries, he defined the King's prerogative broadly to include the right to send and receive ambassadors, to make war or peace, to make treaties, to issue letters of marque and reprisal (authorizing private citizens to undertake military actions), and to raise and regulate fleets and armies. n43

Steeped in these models and theories, the Framers nonetheless vested in Congress many of Locke's federative powers and Blackstone's royal prerogatives. At the Philadelphia Convention, Charles Pinckney said he supported "a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit [sic] an elective one." n44 James Wilson supported a single [*1647] executive but "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c." n45

Edmund Randolph worried about executive power, calling it "the foetus of monarchy." n46 The delegates to the Philadelphia Convention, he said, had "no motive to be governed by the British Governmt. [sic] as our prototype." n47 Wilson agreed that the British model "was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that

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nothing but a great confederated Republic would do for it." n48 Drafts allocated the powers over foreign affairs and war that Locke and Blackstone had given to the monarch either exclusively to Congress or shared between the President and the Senate (as with the treaty and appointment powers). n49

The one exception to this pattern of legislative control was the discretion left to the President to repel sudden attacks. An early draft empowered Congress to "make war." n50 Charles Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency since he expected Congress to meet but once a year. n51 Madison and Elbridge Gerry moved to insert "declare" for "make," leaving the President with "the power to repel

sudden attacks." n52 Their motion carried. n53 The duty to repel sudden attacks represented an emergency measure that permits the President to take actions necessary to resist sudden attacks against the United States. This discretionary authority did not extend to taking the country into full-scale war or to mounting an offensive attack against other nations. As John Bassett Moore, a noted scholar of international law, remarked:

There can hardly be room for doubt that the Framers of the constitution, [*1648] when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace. n54

Responses to the Madison-Gerry amendment reinforce the narrow grant of authority to the President. Pierce Butler wanted to give the President the power to make war, but other delegates strongly objected. As demonstrated by the debate below, these objecting delegates supported "clogging rather than facilitating war." n55 When it was necessary to engage in war, that decision would be made by Congress, not the President:

Mr [Pierce] Butler.... He was for vesting the [war] power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it....

Mr Sharmen [Sherman] thought it stood very well. The Executive shd. be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much.

Mr Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.

Mr. Ellsworth [Ellsworth]. there is a material difference between the cases of making war, and making peace. It shd. be more easy to get out of war, than into it....

Mr. Mason was agst giving the power of war to the Executive, because not
<safely> to be trusted with it; or to the Senate, because not so
constructed as
to be entitled to it. He was for clogging rather than facilitating war;
but for
facilitating peace.... n56

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At the Pennsylvania ratifying convention, James Wilson expressed the
prevailing sentiment that the system of checks and balances

will not hurry us into war; it is calculated to guard against it. It
will
not be in the power of a single man, or a single body of men, to involve
us in
such distress; for the important power of declaring war is vested in the
[*1649] legislature at large. n57

Similar comments were made by delegates to the North Carolina and South
Carolina ratifying conventions. n58

C. Associated War Powers

Through the granting of letters of marque and reprisal, sovereigns were
able to
authorize private citizens to wage war on other countries. By turning to
citizens (or privateers), nations could augment their armies and navies and
respond more swiftly and with greater force to emergencies and threats.
Privately owned vessels were authorized to prey on foreign vessels and take
plunder, or "prizes." The phrase "letters of marque and reprisal" came to
refer
to any use of force short of a declared war.

Unlike Blackstone, who recognized that the king had the power to issue
letters of marque and reprisal, the Framers transferred that responsibility
solely to Congress and associated it with the power to declare war. The
Constitution grants Congress the power "to declare war, grant letters of
Marque
and Reprisal, and make rules concerning Captures on Land and Water." n59
Any
initiation of war, whether by declaration or by marque and reprisal, was
reserved to Congress. Thus, both general and limited wars were left to the
decision of the representative branch. In 1793, Secretary of State Thomas
Jefferson related marque and reprisal to the power to wage war. The making
of a
reprisal on a nation, he said, "is a very serious thing.... When reprisal
follows it is considered as an act of war, & never yet failed to produce

it in
the case of a nation able to make war." n60 If it became necessary to
invoke
this power, "Congress must be called on to take it; the right of reprisal
being
expressly lodged with them by the constitution, & not with the
executive." n61

During the Quasi War against France, from 1798 to 1800, Congress
authorized
private citizens to provide vessels and other military assistance.
Alexander
Hamilton, always protective of executive power, recognized that the
Constitution
vested in Congress exclusive power [*1650] over reprisals. In the midst
of
hostilities, the President could repel force by force, but any actions
beyond
those measures "must fall under the idea of reprisals & requires the
sanction of
that Department which is to declare or make war." n62 Congress also
authorized
letters of marque during the War of 1812, but has not done so since that
time.
Signatories to the Declaration of Paris, after the Crimean War in 1856,
renounced the use of letters of marque.

Seven clauses within Article I of the Constitution vest war powers in
Congress. Clause 11 empowers Congress to declare war, grant letters of
marque
and reprisal, and make rules concerning captures on land and water.
Clauses 12
and 13 empower Congress to raise and support armies and provide and
maintain a

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navy. Clauses 14, 15, and 16 authorize Congress to make rules for the
government
and regulations of the land and naval forces, to call forth the militia,
and to
provide for the organizing, arming, and disciplining of the militia. At
the top
of the list stands Clause 10, which empowers Congress "to define and punish
Piracies and Felonies committed on the high Seas, and Offences against the
Law
of Nations." n63

This cluster of powers broke with prevailing theories that placed war
powers,
foreign affairs, and judgments on the law of nations with the Executive.
Blackstone, for example, regarded the law of nations as part of the king's
power. The law of nations consisted of "mutual compacts, treaties,
leagues, and

agreements" between various countries. n64 It was the king's prerogative to make treaties, leagues, and alliances with foreign states.

At the Philadelphia Convention, Madison emphasized the importance of drafting a constitution that would "prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars." n65 One of the early statutes passed by Congress was legislation in 1790, setting forth punishments for certain crimes against the United States. n66 One provision established fines and imprisonment for any person who attempted to prosecute or bring legal action against an ambassador or other public minister [*1651] from another country. n67 Persons who took such actions were deemed "violators of the laws of nations" who "infract the law of nations." n68 Actions against ambassadors and public ministers "tend[] to provoke the resentment of the sovereign whom the ambassador represents, and to bring upon the state the calamities of war." n69

The Neutrality Act of 1794 n70 gave the Washington administration the legal footing it needed to fine and imprison American citizens whose actions might have embroiled the United States in the war between France and England. Almost two centuries later a district judge noted that one of the major purposes of the Neutrality Act "was to protect the constitutional power of Congress to declare war or authorize private reprisal against foreign states." n71

D. Presidential Fame

The Framers gave Congress the power to initiate war because they believed that presidents, in their search for fame and personal glory, would have an appetite for war. n72 John Jay warned in Federalist No. 4 that

absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often

lead him to engage in wars not sanctified by justice or the voice and interests of his people. n73

Writing in 1793 under the name "Helvidius," Madison called war

the true nurse of executive aggrandizement.... In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage

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under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. [*1652] The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace. n74

Jay and Madison reflected Enlightenment libertarian principles that looked with suspicion upon the monarchical appetite for initiating war to satisfy fame and personal glory. n75 A republican government relying on the consent of the people would embark on war with much greater caution and circumspection. Madison insisted that war should only be declared "by the authority of the people, whose toil and treasure are to support its burdens." n76

III. The Framers' Model in Practice

The Framers' model for constitutional government and democratic control worked well for about 160 years. Of course, the balance of power between Congress and the President fluctuated from decade to decade, depending on who served in the White House and what kind of political conditions temporarily upset the distribution of power. But Congress was fairly consistent in protecting its war power. There was no wholesale delegation or abdication.

A. To Declare or Authorize

For all of the major military actions, Congress either declared war or

authorized it. A declaration of war was used for the War of 1812 against England, the War of 1846 against Mexico, the Spanish-American War of 1898, World War I, and World War II. n77 There were two declarations for World War I (Germany and Austria-Hungary) and six separate declarations for World War II (Japan, Germany, Italy, Bulgaria, Hungary, and Rumania). n78 On other occasions, Congress used the statutory process to authorize war, as with the "Quasi-War" with France from 1798 to 1800 and the Barbary wars during the Jefferson [*1653] and Madison administrations. n79 Similarly, Congress passed legislation authorizing military action in the Indian wars and the Whiskey Rebellion. n80

During these early decades, presidents and executive officials uniformly acknowledged the need to come to Congress for authority to support anything other than purely defensive operations. President George Washington understood that existing statutory authority, giving him access to the militia to protect inhabitants of the frontiers, permitted only defensive actions against hostile Indian forces. Any step beyond defensive actions required authorization from Congress. n81 Secretary of War Henry Knox told territorial governors that until Congress decided otherwise, military operations were to be confined to "defensive measures." n82 The direction of offensive operations had to await the decision of Congress, which was "solely...vested with the powers of War." n83 Knox said that Congress was "alone...competent to decide upon an offensive war" n84

In proposing military action against France in the Quasi-War, President John Adams never argued that he could act unilaterally. He knew that he was required to seek authority from Congress which had enacted several dozen statutes increasing the size of the military and [*1654] reinforcing the defense of ports and harbors. n85 President Jefferson was willing to take certain

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defensive actions against the Barbary pirates but told Congress that he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense." n86 He believed that it was up to Congress to authorize "measures of offence also." n87 In at least ten statutes, Congress

authorized
Presidents Jefferson and Madison to take military actions against the
Barbary
powers. n88

No doubt Jefferson's message to Congress omitted many details of what
happened in the Mediterranean. n89 The essential legal point is that he
went
to Congress to seek statutory authority. He did not claim an independent
and
exclusive power to go to war. In 1805, when conflicts arose between the
United
States and Spain, Jefferson spoke plainly about constitutional principles:
"
Congress alone is constitutionally invested with the power of changing our
condition from peace to war...." n90

Certainly presidential powers expanded in ways unexpected by the
Framers,
particularly after presidents had a standing army and could move troops
into
disputed areas to provoke war, as President Polk did with Mexico. Polk was
intent on gaining from Mexico the territories known as Upper California
and New
Mexico. Through a series of diplomatic and military initiatives, he was
able to
bring about a military clash between American and Mexican troops and tell
Congress that "war exists." n91 Although some legislators objected to
Polk's
tactics, Congress declared war based on the recognition that "a state of
war
exists." n92 Polk never pretended that he could go to war against another
[*1655] country without asking Congress for authority.

Even during the crisis period of the Civil War, when President Lincoln
exercised extraordinary power while Congress was in recess, he recognized
that
some of his actions (particularly suspending the writ of habeas corpus)
were
probably in excess of his constitutional authority. Lincoln operated under
what
John Locke called the "prerogative": the executive power to act "according
to
discretion for the public good, without the prescription of the law and
sometimes even against it." n93 In the hands of an indiscriminate and
unprincipled executive this formula can lead to autocracy, but Lincoln was
not
inclined to be a dictator.

When Congress returned he explained that his actions, "whether strictly
legal
or not, were ventured upon under what appeared to be a popular demand and a
public necessity, trusting then, as now, that Congress would readily ratify
them." n94 He conceded that he had acted not only under his Article II

powers
but under the Article I powers of Congress as well. He believed that
suspending
the writ of habeas corpus was not "beyond the constitutional competency of
Congress." n95 Congress debated at length his request for retroactive
authority. Legislators ended up supporting the President, but argued for an
assumption that his actions were illegal. n96 Legislation was passed
approving, legalizing, and making valid "all the acts, proclamations, and
orders
of the President...as if they had been issued and done under the previous
express authority and direction of the Congress of the United States."
n97

B. Unauthorized Presidential Actions

From 1789 to 1950, presidents used military force unilaterally numerous
times
without seeking or obtaining the authority of Congress. Those ventures,
however,
were relatively modest in scope and limited in duration. As Edward S.
Corwin
noted, these presidential initiatives consisted largely of "fights with
pirates,

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landings of small naval [*1656] contingents on barbarous or
semi-barbarous
coasts, the dispatch of small bodies of troops to chase bandits or cattle
rustlers across the Mexican border, and the like." n98 They are,
however, in
no sense a precedent for the single-handed presidential actions taken after
World War II, such as Truman's war against North Korea, Bush's claim in
1990
that he could go to war against Iraq without congressional authority, and
Clinton's repeated use of military force in Bosnia, Yugoslavia, Iraq,
Haiti,
Sudan, and Afghanistan without ever seeking authority from Congress.

Lists have been compiled to show that presidents have resorted to force
against other countries hundreds of times with Congress neither declaring
war
nor authorizing military action. n99 Many of these operations were
minor, such
as American forces building a fort on the Marquesas Islands in 1813-1814 to
protect three prize ships captured from the British; brief landings in
Cuba in
1823 in pursuit of pirates; an 1840 landing on the Fiji Islands to punish
natives for attacking American exploring and surveying parties; a display
of
naval force in Japan in 1853-1854; another display of naval force off of
Turkey
in 1858-1859; the landing of a naval party in Buenos Aires in 1890 to

protect
the U.S. consulate and legation; the landing of U.S. forces in Beirut in
1903 to
protect the American consulate; and the sending of troops to Panama in
1912 to
supervise elections outside the Canal Zone. n100 Additionally, many of
those
actions were initiated by military commanders, not by presidents. n101

Some of the military interventions were much more significant but would
hardly serve as a model for U.S. policy today. For example, in 1854 an
American
ship was ordered to the Nicaraguan port of Greytown (now San Juan del
Norte) to
compel local authorities to make appropriate amends for an affront to an
American diplomat. When U.S. officials deemed the offered apology
inadequate,
the ship bombarded the town and forces were sent ashore to destroy by fire
[*1657] whatever remained. n102 A number of other military operations,
including the occupation and bombardment of Veracruz in 1914; the
intervention
and occupation of Haiti from 1915 to 1934; an eight-year occupation of the
Dominican Republic, beginning in 1916; and repeated interventions in
Nicaragua
from 1909 to 1933 would be condemned, both under the non-intervention
policy of
the Organization of American States ("OAS") n103 and the U.N. Charter,
which
proscribes "the threat or use of force against the territorial integrity or
political independence of any state." n104

IV. Scholarly Analysis

Questions about the Framers' intent invariably cause scholars to scatter
and
divide. Not so with the war power. There is remarkable agreement among war
power
experts that the Framers broke with available monarchical precedents and
vested
in Congress the sole power to initiate hostilities against other nations.

A. Consensus Among Scholars

The majority of scholars agree on the interpretation of the war power.
Taylor
Reveley writes that if you could ask a man in the state of nature to read
the
war power provisions in the Constitution and compare them to war power
practices
after 1789, "he would marvel at how much Presidents have spun out of so
little.
On its face, the text tilts decisively toward Congress." n105 Charles
Lofgren
agrees with Reveley finding that the grants of power to Congress to

declare war
and to issue letters of marque and reprisal "likely convinced
contemporaries
even further that the new Congress would have nearly complete authority
over the

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commencement of war." n106 He concludes that events in the years
following
ratification of the Constitution reinforced [*1658] the view that
Americans
"originally understood Congress to have at least a coordinate, and
probably the dominant, role in initiating all but the most obviously defensive wars,
whether
declared or not." n107

John Hart Ely notes that when academics try to divine the "original
understanding" of the Constitution, the results can be "obscure to the
point of
inscrutability." n108 When the focus turns on the war power, however, the
issue is not that complicated. All wars, big or small, declared or
undeclared,
"had to be legislatively authorized." n109 David Gray Adler writes that
the
Constitution "makes Congress the sole and exclusive repository of the
ultimate
foreign relations power - the authority to initiate war." n110

Michael Glennon says that it "is clear that the Constitution's textual
grants
of war-making power to the President are paltry in comparison with, and are
subordinate to, its grants to Congress." n111 He further notes that
there "is
no evidence that the Framers intended to confer upon the President any
independent authority to commit the armed forces to combat, except in
order to
repel "sudden attacks." n112 Harold Koh writes in a similar fashion
noting
that "the first three articles of the Constitution expressly divided
foreign
affairs powers among the three branches of government, with Congress, not
the
president, being granted the dominant role." n113 The Framers "pointedly
denied" the President other grants of power, such as the power to declare
war,
"thereby rejecting the English model of a king who possessed both the
power to
declare war and the authority to command troops." n114

B. John Yoo's Work

The major exception to these studies is an article written in 1996 by

John Yoo,
who argues that the Framers designed a system to "encourage [*1659]
presidential initiative in war." n115 Yoo argues that not only would the
executive "play the leading role in initiating...war" but also that "the
Constitution gives the President the initiative in war." n116 Yet at
times Yoo
backs away from that position by saying the Declare War Clause "made clear
that
the President could not unilaterally take the nation into a total war."
n117
Also, he claims that Madison "quite presciently wanted to prevent the
President
from using his war power to enhance his overall power and importance
vis-a-vis
Congress and the People." n118

1. Defensive-Offensive

Yoo does not carefully distinguish between the exercise of the President's
defensive powers and the initiation of offensive actions against another
country. n119 Taking the United States from a state of peace to a state
of war
was a prerogative assigned exclusively to Congress. He makes no mention of
the
understanding by President Washington, Secretary of War Knox, President
Jefferson, and other executive leaders of that time that the President's
powers
over war were restricted to defensive operations.

In The Prize Cases of 1863, n120 the Supreme Court spoke clearly
about the
President's authority to conduct defensive but not offensive actions.
Justice
Grier said that President Lincoln had authority to take military action in
a
civil war "without waiting for Congress to baptize it with a name" n121
but
carefully stated that the President "has no power to initiate or declare a
war

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either against a foreign nation or a domestic State." n122 The executive
branch took exactly the same position in that case. During oral argument
Richard
Henry Dana Jr., representing the United States, said that Lincoln's action
in
responding to the Civil War had nothing to do with "the right to initiate
a war,
as a voluntary act [*1660] of sovereignty. That is vested only in
Congress."
n123

Yoo never mentions Chief Justice Marshall's remark in *Talbot v. Seeman* that "the whole powers of war" are vested in Congress. n124 Nor does Yoo discuss *United States v. Smith*, an 1806 circuit court case, which asked and answered its own question: "Does [the President] possess the power of making war? That power is exclusively vested in congress....[It is] the exclusive province of congress to change a state of peace into a state of war." n125 Harold Koh makes this comment about *Smith*: "the crucial point is that even during America's infancy, the time of its greatest national insecurity, foreign affairs were not treated as exempt from the ordinary constitutional system of checks and balances." n126

2. Declare War Clause

Yoo concludes that the Declare War Clause is of legislative-judicial, not legislative-executive, interest. Thus, the Framers "understood the Declare War Clause as a judicial power vested in Congress, just as the Constitution gave the Senate judicial authority in the trial of impeachments. In these areas, the Constitution places Congress in the position of the court of last resort." n127 The Declare War Clause, Yoo argues,

does not add to Congress' store of war powers at the expense of the President. Rather, the Clause gives Congress a judicial role in declaring that a state of war exists between the United States and another nation, which bears significant legal ramifications concerning the rights and duties of American citizens. Congress' power to declare war also has the additional effect of ousting the courts from war powers disputes n128

By reading the Declare War Clause as not affecting presidential power, Yoo ignores concerns raised at the Philadelphia Convention and the ratification conventions. The issue, as James Wilson defined it, was about keeping the power of war out of the hands of "a single man." n129 Yoo does not address Wilson's comment in the text of his article. Instead, it is relegated to a long footnote, n130 and Wilson becomes [*1661] "exceptional rather than typical." n131 Yoo dilutes Wilson's views by saying they "appear[] to refer to the formal aspects of a declaration of war, rather than to the

authorizing
process for the commencement of hostilities." n132 Nothing in Wilson's
address
at the Pennsylvania ratifying convention would suggest such a narrow
construction. Wilson wanted a political system that "will not hurry us
into war."
" n133 He advocated legislative deliberation, not quick executive
action. His
remarks support full legislative debate, whether that leads to a formal
declaration or authorization. Although Yoo attempts to confine Wilson's
comments
about "a single man" to total war, he concedes that later in his life
Wilson
continued to believe that Congress "should play the paramount role in war."
n134

Yoo attempts to weaken the meaning of the Declare War Clause by saying
it was

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intended to clarify that "the declaration of war was a power of the
national
government, not the state governments." n135 If that were the purpose,
why not
(following British precedents) give the power to declare war to the
President?
That would solve the federalism issue.

Relying on Madison's Federalist No. 41, Yoo states that "the [Declare
War]
Clause was designed to allow the national government to provide "security
against foreign danger."" n136 Responding to foreign threats and attacks
is
part of the President's duty to act in a defensive manner and is unrelated
to
initiating war or taking the country from a state of peace to a state of
war.
Similarly, Yoo states that "a declaration of war was unnecessary when a
nation
was under attack[, providing] further evidence that declarations of war
were
legally formal, or even ceremonial, in purpose," and that understanding was
"consistent with the theory of international law that a declaration of war
was
unnecessary for a nation under attack." n137 Yoo's discussion relates to
defensive, not offensive, actions. Yoo refers to Hamilton's statement in
Federalist No. 23 about the need for the national government to be able to
"respond to unpredictable events and foreign dangers." n138 Notice that
Hamilton is talking about the necessity of the national government's,
[*1662]
not merely the President's, ability to respond to foreign attacks rather
than

initiate war. Hamilton's comments, therefore, also relate to defensive operations. Yoo quotes from Madison's Federalist No. 41: "It is in vain to oppose constitutional barriers to the impulse of self-preservation."

n139 Once

again, the discussion relates to defensive, as opposed to offensive, activity.

3. Judicial Review

Yoo argues that the Declare War Clause had the effect of "ousting the courts from war powers disputes." n140 "Having placed war powers in the arena of politics, the Framers would have viewed inter-branch disputes in the area as unsuitable for judicial resolution." n141 The courts, however, did not shy away from war powers disputes. Decisions by the Supreme Court in 1800 and 1801, and by the circuit court in 1806, demonstrate a willingness to decide war power issues, n142 even though they were not "inter-branch disputes" because they did not involve direct clashes between Congress and the President.

In *Little v. Barreme*, however, Chief Justice Marshall, writing for the Court, concluded that a congressional statute superceded a presidential proclamation. n143 In a footnote, Yoo states that the Court in *Little* "did not really...pass judgment on the exercise of war powers, and thus did not present a political question." n144 In fact, the Court did pass judgment on the war power by holding that a statute trumps a presidential proclamation. Yoo further writes: "Little never reached questions concerning the justiciability of inter-branch war powers disputes, or the President's inherent authority to order captures going beyond [*1663] Congress's commands." n145 The Court did address an inter-branch dispute, however, and it dismissed any notion that President Adams had some kind of inherent authority that was superior to a congressional statute. At best, Chief Justice Marshall concedes that Adams might have taken certain measures in the absence of a congressional statute. n146

Yoo writes that "no provision [of the Constitution] explicitly authorizes the federal courts to intervene directly in war powers questions." n147 Of course, the same could be said about the Commerce Clause, the Taxing Power, and other

constitutional provisions. The Court's jurisdiction does not depend on subject matter, except regarding disputes concerning treaties, ambassadors, "other

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public Ministers and Consuls," admiralty, and disputes between states, states and citizens, and states and foreign states. n148 The Court's jurisdiction reaches beyond these subject areas to embrace all "cases" and "controversies."

4. Declaration and Authorization

Yoo focuses almost exclusively on Congress's power to declare war, rarely recognizing the power of Congress to authorize war. He begins by pointing out that "Congress has issued a declaration of war only five times in its history" and that the post-1945 era includes "a litany of undeclared wars." n149 Counting the multiple declarations in the two world wars, there have actually been eleven declarations of war. Later Yoo recognizes that "for much of the nineteenth and early twentieth centuries, Congress assented to presidential uses of force abroad," n150 but does not explain that Congress's "assent" came in the form of authorizing statutes.

For example, Yoo states that "even though no declaration of war had issued against the Indians, George Washington exclaimed, "But, we are involved in actual war!" n151 Washington was operating on statutory authority, not inherent executive power. In 1789, 1790, and 1791, Congress passed legislation "for the purpose of protecting the [*1664] inhabitants of the frontiers of the United States from the hostile incursions of the Indians." n152 In 1793, Washington said that any offensive operation against the Creek Nation must await congressional action: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure." n153

Yoo does refer to the Quasi-War against France and the "full-scale battles" that occurred despite the lack of a declaration of war. n154 There were, however, about two dozen statutes authorizing Adams to act as he did during that

war. n155 Yoo argues that "Congress' failure to declare war against France also demonstrates the limited nature of the conflict." n156 There was no "failure" on the part of Congress. It chose to authorize, not declare, war, and it was the nature of this authorization (supporting naval but not land forces) that kept the war limited.

Yoo states that the Framers "were not excessively worried by the prospect of unilateral executive action. The President was seen as the protector and representative of the People." n157 This statement ignores what Jay, in Federalist No. 4, and Madison, as "Helvidius," said about executives being prone to war; they initiate war not because it is in the interest of the people but because war furthers their ambitions and satisfies their thirst for fame and glory. n158 None of these concerns appear in Yoo's article.

5. British Precedents

According to Yoo, "the Constitution's provisions did not break [*1665] with the tradition of their English, state, and revolutionary predecessors, but instead followed in their footsteps." n159 He devotes twenty-two pages to the British legacy, including descriptions of the goals of Locke, Blackstone, Montesquieu, and others advocating for the independent and exclusive executive power over war and peace, the treaty power, declaration of war, raising armies, issuing letters of marque and reprisal, and other powers. He concludes that "the war powers provisions of the Constitution are best understood as an adoption,

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rather than a rejection, of the traditional British approach to war powers." n160 The statements by James Wilson and others at the Philadelphia Convention overwhelmingly refute Yoo's position. n161

It is impossible to compare what Locke and Blackstone advocated to what the Framers provided in Articles I and II without concluding that the Framers repudiated the British model on war powers. It is not even necessary to examine the Framers' intent. It is enough to look at the text of the Constitution. Yoo

states correctly that the English system "gave the executive leadership in the initiation and conduct of war, while the legislature was relegated primarily to funding the wars and impeaching ministers." n162 But he utterly fails to equate that model with what the Framers conceived. However much he strains to make this work, the express language of the Constitution stands in his way. If the Framers had adopted "the traditional British approach to war powers," they would have written Article II to give the President the power to declare war, to issue letters of marque and reprisal, and to raise armies, along with all the other powers that were vested expressly in Congress.

Hamilton, more enamoured with the British model than the other Framers, never advocated the British model for war powers or foreign affairs. In Federalist No. 75, he wrote of the treaty power:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States. n163

[*1666]

6. Funding As Congress's Primary Power

For Yoo, whenever the President initiates war, "Congress could express its opposition...only by exercising its powers over funding and impeachment." n164 He draws an analogy to European precedents: "legislatures of the eighteenth century controlled executive actions leading to war by using their appropriations power." n165 Noting that scholars argue that the power of the purse is a "permissible means" for Congress to participate in foreign affairs, Yoo "suggests that the spending power may be the only means for legislative control over war." n166 In establishing a framework for the exercise of war power, Yoo says that the Framers "intended to adopt the traditional system they knew - executive initiative in war combined with a legislative role via the

spending power." n167

First, it cannot be the case that the President may exercise powers that are not granted by the Constitution until Congress successfully exercises its spending power to block him. If that were the case, after President Clinton in 1994 had failed to convince Congress of the merits of his health plan, he could simply have issued it as a proclamation and waited to see if Congress passed legislation to deny him the funds to implement the proclamation. Such a procedure would reverse the constitutional order. The burden is on the President to come through the front door and seek authorization from Congress for his legislative proposals. The same principle applies to taking the nation from a

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state of peace to a state of war. The framers expected the President to submit his proposal to Congress and await authorization from the legislative body.

Second, if Congress were forced to use the power of the purse to stop presidential war initiatives, it would have to place restrictive language in a bill presented to the President. Instead of the President having to muster a majority in each House to support his policy, each House would need a majority to stop the President. Moreover, when the bill reached the President, he could exercise his veto. Congress would then need an extraordinary majority - a two-thirds majority - in each House to override the veto and enforce the spending limitation. As long as the President could maintain a margin of one-third plus one in a single chamber, his veto would be upheld, even if the other [*1667] chamber voted unanimously for the override.

This kind of impasse occurred during the Vietnam War. In 1973, Congress assembled a majority in each House to vote for a funds cutoff to stop the war.

When President Nixon vetoed the measure, Congress was unable to find the two-thirds margin in each House for an override. n168 The two branches eventually reached a compromise, allowing President Nixon to bomb Cambodia for another forty-five days. n169

The political settlement affected litigation that had been progressing in the federal courts. In one lawsuit, a federal judge held that Congress had not authorized the bombing of Cambodia. n170 The judge said that the

inability of
Congress to override the veto and its subsequent adoption of the compromise
language could not be taken as an affirmative grant of authority:

It cannot be the rule that the President needs a vote of only
one-third plus
one of either House in order to conduct a war, but this would be the
consequence
of holding that Congress must override a Presidential veto in order to
terminate
hostilities which it has not authorized. n171

Because the two branches had agreed to compromise language, appellate
courts
granted a stay on the district court's decision. n172

Third, Yoo argues that when President Bush mounted an offensive war
against
Iraq, all Congress had to do to check him through the appropriations power
"was
nothing." n173 This statement ignores the amount of money available to
the
President in the money pipeline: billions of dollars in previously
appropriated
funds that had yet to be obligated or expended. The President may also
exercise
statutory authority to transfer funds from one appropriations account to
another
and invoke emergency authority, such as the Feed and Forage [*1668] Act,
to
incur obligations in advance of an appropriations. n174 A war initiated
by the
President can proceed for quite a period of time, independent of fresh
appropriations granted by Congress.

Lastly, Yoo claims that when President Clinton decided to send 20,000
American troops to Bosnia in 1995, he "already had received funding for the
Bosnia operation in the 1996 Defense Department appropriations." n175 In
fact,
Congress had appropriated nothing for Bosnia. Clinton's military
commitment was
financed not by funds specifically appropriated by Congress but rather by
siphoning several billion dollars from other appropriations accounts
without
congressional deliberation or support. Approval for this prestigation
came

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from a few legislative leaders, not from Congress nor statutory
language. n176

VI. War Powers Doctrine in Kosovo

On March 11, 1999, with President Clinton close to unleashing air strikes against Serbia, the House voted on a resolution to support U.S. armed forces as part of a NATO peacekeeping operation. The resolution purporting to "authorize" Clinton to deploy U.S. forces to implement a peace agreement passed, 219 to 191.¹⁷⁷ However, legislators were voting on a concurrent resolution (House Concurrent Resolution 42); Congress cannot authorize anything in a concurrent resolution because it is not legally binding. Authorization requires a bill or joint resolution, both of which are presented to the President for his signature or veto. A concurrent resolution passes both chambers but is not presented. A second point: by supporting a NATO peacekeeping operation, members of the House clearly anticipated a peace agreement between Serbs and Kosovars. The House was not supporting military action. The Kosovars eventually accepted the plan, but the Serbs did not. Therefore, the House vote cannot be taken as support for the bombing operation that would begin within two weeks.

[*1669] By the time the Senate voted on March 23, 1999, negotiations had collapsed and air strikes were imminent. The Senate voted fifty-eight to forty-one in support of military air operations and missile strikes against the Federal Republic of Yugoslavia (Serbia and Montenegro).¹⁷⁸ Like the House, the Senate made the mistake of using the word "authorize" in a concurrent resolution (Senate Concurrent Resolution 21¹⁷⁹). The war against Yugoslavia began on March 24.

Following these votes in the House and the Senate and the outbreak of war, Congressman Jim Leach (R-Ohio) wrote an op-ed piece that said, correctly, that the War Powers Resolution "stands as a declaration that war is too profound a business to be left to a single individual."¹⁸⁰ That value was indeed uppermost in the minds of the Framers. And yet Leach claimed that Clinton was "on solid legal ground for the military steps he has taken."¹⁸¹ Neither the House nor the Senate vote provided legal support for Clinton. He operated against the Constitution and without any statutory support. There was no

legal
or constitutional ground for his actions.

On April 28, 1999, after the first month of bombing, the House took a series of votes on the war in Yugoslavia. It voted 249 to 180 to prohibit the use of appropriated funds for the deployment of U.S. ground forces unless first authorized by Congress. A motion to direct the removal of U.S. armed forces from Yugoslavia failed, 290 to 139. A resolution to declare a state of war between the United States and Yugoslavia fell, 427 to two. A fourth vote, to authorize air operations and missile strikes, lost on a tie vote, 213 to 213. n182

Newspaper editorials and commentators derided the House for these multiple and supposedly conflicting votes, n183 but the House articulated some basic values. It insisted that Congress authorize the introduction of ground troops and it refused to grant authority for the air strikes. Lawmakers pointed to the irony of President Clinton seeking the approval of eighteen NATO nations but not the approval of Congress. Congressman Ernest Istook (R-Okla.) remarked: "President Clinton asked many nations to agree to attack Yugoslavia, but he [*1670] failed to get permission from one crucial country, America." n184

Although President Clinton claimed to be operating under the "authority" of

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NATO decisions, the NATO treaty of 1949 did not transfer the war power from Congress to a regional military alliance. There is nothing in the text or legislative history of NATO, or any other mutual defense pact, to support such a transfer. n185 Mutual security treaties do not - they cannot - alter the constitutional allocation of the war power. It would be impermissible for the Senate and the President to use the treaty process to deny the House of Representatives its Article I powers in determining whether the nation should commit itself to war. n186 Senator Walter George said this about SEATO: "The treaty does not call for automatic action; it calls for consultation. If any course of action shall be agreed upon or decided upon, then that course of action must have the approval of Congress, because the constitutional process is

provided for." n187

This same reasoning applies to resolutions passed by the U.N. Security Council to "authorize" military action. Although President Truman relied on those resolutions in taking the nation to war against North Korea, and President Bush threatened to take military action against Iraq on the basis of a Security Council resolution, n188 U.N. resolutions are not a source of authority and do not supplant the need for obtaining authority from the only branch capable of giving it: Congress. Just as Congress did not transfer its war power to mutual security pacts, neither did it transfer its war power to the U.N. n189 In 1994, after the Security Council passed a resolution "inviting" all states to use "all necessary means" to remove military leaders from Haiti, the Senate responded with a nonbinding resolution stating that the Security Council resolution "does not constitute authorization for the deployment of United States Armed Forces in Haiti under the Constitution of the United States or pursuant to the War Powers Resolution [*1671] (Public Law 93-148)." n190 The Senate language passed by a vote of 100 to zero. n191

Conclusions

For more than a century and a half, from 1789 to 1945, Congress and the President followed the general constitutional principle that the initiation of war against foreign nations lay with the representative branch, Congress. That understanding was recognized in several court decisions, some of them authored by Chief Justice Marshall. A number of presidential military initiatives were taken during this period, but those actions were relatively modest in scope and limited in time. During this period, no president claimed the right to take the country to war without first seeking the authority of Congress. President Polk's initiatives led to hostilities between the United States and Mexico, but Polk came to Congress for authority to declare war. In the one major military conflict where the president acted first - Lincoln in the Civil War - the dispute was domestic, not foreign. Even here Lincoln acknowledged that he lacked full constitutional authority for what he had done, and asked Congress to enact legislation to provide the necessary legitimacy.

In warning about the possibility of Congress's "pushing the country into war

too hastily," Yoo invokes this language from Federalist No. 70 : ""In the legislature, promptitude of decision is oftener an evil than a benefit." n192

Supposedly the value here is avoiding hasty, and possibly misguided, action. Yet

on the same page Yoo turns the principle on its head by describing the President's ability to "act quickly," "swiftly and with decisiveness." n193

The Framers did not want cautious, deliberative action by Congress and unilateral, precipitate action by the President, other than when repelling sudden attacks. The deliberative model applies to both branches, acting jointly.

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For the initiation of war, the Framers wanted both branches to act with deliberation and full debate through the regular legislative process to determine whether hostilities were in the national interest. When James Wilson

said it would not be in the power "of a single man" to involve the nation in

war, he believed that by relying on the [*1672] deliberative process in Congress "nothing but our national interest can draw us into war." n194

The

Framers knew, as we should, that when presidents unleash the war power, "promptitude of decision is oftener an evil than a benefit."

FOOTNOTES:

n1. See Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89

Am. J. Int'l L. 21, 21-22 (1995) (discussing whether Truman acted contrary to the Constitution).

n2. See generally Louis Fisher, *Congressional Abdication on War and Spending* (forthcoming 2000).

n3. *The Federalist* No. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).

n4. *Id.* at 355.

n5. *Id.* at 356.

n6. Woodrow Wilson, *Constitutional Government in the United States* 56 (1908).

n7. 1 James Bryce, *The American Commonwealth* 29-30 (MacMillan 3d ed. 1908)(1893).

n8. *The Federalist* No. 47, at 337 (James Madison) (Benjamin Fletcher Wright ed., 1961).

n9. See Louis Fisher, *President and Congress* 243-51 (1972) (arguing that Montesquieu based his model for separated powers on the British Constitution but was heavily criticized because the branches of the British government have been consistently linked).

n10. Oliver Wendell Holmes, *Collected Legal Papers* 263 (1920).

n11. 1 Baron de Montesquieu, *The Spirit of the Laws* 158 (Thomas Nugent trans., 1949).

n12. See *id.* at 156 (arguing that members of the legislative body should only be allowed to reject, and not resolve, legislation so that the interests of the people are not forgotten).

n13. See *id.* at 159-60 ("If the prince (executive) were to have a part in the legislature by the power of resolving, liberty would be lost.").

n14. "It is necessary that, by the nature of things, power check power." The French is taken from Montesquieu's collected works, 2 Montesquieu, *Oeuvres*

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Complètes 395 (1951).

n15. See 3 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 1893, 1897, 1902, 1904, 1905 (Francis Newton Thorpe ed., 1909)[hereinafter Thorpe] (citing clauses from the Massachusetts Constitution concerning the separation among the branches of state government).

n16. 4 Thorpe, *supra* note 15, at 2457 (quoting Article XXXVII of the New Hampshire Bill of Rights).

n17. See 2 *The Writings of James Madison* 328 (Gaillard Hunt ed., 1901) ("The limited powers now vested in Congress are frequently mismanaged from the want of such a distribution of them. What would be the case under an enlargement not only of the powers, but the number of federal Representatives?").

n18. 2 The Records of the Federal Convention of 1787, at 35 (Max Farrand ed., 1911) [hereinafter Farrand].

n19. See The Federalist No. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961) (arguing that an "adequate defense" is necessary to protect less powerful members of the government because the securities in the state constitutions are "greatly overrated").

n20. 5 The Writings of James Madison 26 (Gaillard Hunt ed., 1904).

n21. The Federalist No. 47, at 336-37 (James Madison) (Benjamin Fletcher Wright ed., 1961).

n22. See id. at 337.

n23. Id. at 338.

n24. M.J.C. Vile, Constitutionalism and the Separation of Powers 153 (1967).

n25. 3 The Debates in the Several State Conventions: On the Adoption of the Federal Constitution 280 (Jonathan Elliot ed., Phila., Lippincott 1836) [hereinafter Elliot].

n26. 4 id. at 116.

n27. Pennsylvania and the Federal Constitution, 1787-1788, at 475 (John Bach McMaster & Federal D. Stone eds., Lancaster, Pa., Inquirer 1888).

n28. See id. at 476-77 ("There is no liberty, if the power of judging be not separated from the legislative and executive powers.... There would be an end of everything, were the same man, or the same body of the nobles, or of the people, to exercise those three powers"(internal quotations omitted)).

n29. Edward Dumbauld, The Bill of Rights and What It Means Today 183 (1957) (quoting Amendments Proposed by Virginia Convention, June 27, 1788).

n30. See id. at 174-75, 199 (citing Pennsylvania's proposed amendments that "the legislative, executive and judicial powers be kept separate;" citing North Carolina's proposed amendments that "the legislative executive and judiciary powers of government should be separate and distinct").

n31. 1 Annals of Cong. 435-36 (Joseph Gales ed., 1789).

n32. 1 Senate Journals, 1788-1794, at 64, 73-74 (1820).

n33. Kenneth Culp Davis, *Administrative Law and Government* 36 (2d ed. 1975).

n34. See Paul Einzig, *The Control of the Purse* 57-62, 100-06 (1959) (discussing the events leading to Charles I's execution and, more generally, the monarchy's insistence on its divine right to levy taxation and the use of extra-parliamentary revenues, often at the objection of the Parliament).

n35. Joseph Story, *Commentaries on the Constitution of the United States* 570, at 410-11-61 (Carolina Academic Press, 1987) (1833).

n36. *The Federalist* No. 69, at 446 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

n37. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 5 *The Writings of Thomas Jefferson* 123 (Paul Leicester Ford ed., 1895).

n38. James Madison, *Letters of Helvidius*, No. 1, *Gazette of the United States*, Aug. 24, 1793, reprinted in 6 *The Writings of James Madison* 138, 148 (Gaillard Hunt ed., 1906).

n39. 1 Farrand, *supra* note 18, at 139-40 (statement of George Mason in the Committee of the Whole on June 6, 1787).

n40. John Locke, *Two Treatises of Civil Government* 146-47, at 190 (London, J.M. Dent & Sons 1962) (1690) (listing the three branches of commonwealth government).

n41. *Id.* 146, at 191.

n42. *Id.*

n43. See 1 William Blackstone, *Commentaries* *245-46, *249-52, *254-55, *257-58, *261-62 (discussing each of the royal prerogatives).

n44. 1 Farrand, *supra* note 18, at 64-65 (statement of Charles Pinckney in the Committee of the Whole on June 1, 1787).

n45. Id. at 65-66 (statement of James Wilson in the Committee of the Whole on June 1, 1787).

n46. Id. at 66 (statement of Edmund Randolph in the Committee of the Whole on June 1, 1787).

n47. Id.

n48. Id. (statement of James Wilson).

n49. See 2 Farrand, *supra* note 18, at 594 (8), 599 (2(a)).

n50. Id. at 143 (Draft for Committee of Detail, IV).

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n51. Id. at 318 (statement of Charles Pinckney in Convention on Aug. 17, 1787).

n52. Id. (statement of James Madison and Elbridge Gerry in Convention on Aug. 17, 1787).

n53. See *id.* at 319 (noting the passage of the motion to change "make" to "declare" war by a vote of seven to two with one abstention).

n54. 5 The Collected Papers of John Bassett Moore 196 (1944).

n55. 2 Farrand, *supra* note 18, at 319 (statement of George Mason in opposition to Pierce Butler made in Convention on Aug. 17, 1787).

n56. Id. at 318-19 (statements of various named delegates in Proceedings in Committee of the Whole on Aug. 17, 1787).

n57. 2 Elliot, *supra* note 25, at 528.

n58. See 4 *id.* at 107, 287 (containing statements by James Iredell and Charles Pinckney echoing Wilson's reliance on checks and balances to guard against war).

n59. U.S. Const. art. I, § 8, cl. 11.

n60. Thomas Jefferson, Opinion on "The Little Sarah" (May 16, 1793), in 6 The Writings of Thomas Jefferson, *supra* note 37, at 257, 259.

n61. Id.

n62. Letter from Alexander Hamilton to James McHenry (May 17, 1798), in
21
The Papers of Alexander Hamilton 461-62 (Harold C. Syrett ed., 1974).

n63. U.S. Const. art. I, 8, cl. 10.

n64. 1 William Blackstone, Commentaries *43.

n65. 1 Farrand, *supra* note 18, at 316 (statement of James Madison in
Committee of the Whole on the Propositions of Mr. Patterson on June 19,
1787).

n66. See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.

n67. See *id.* 25-26.

n68. *Id.* 26, 28.

n69. 1 James Kent, Commentaries on American Law 170 (1826).

n70. Act of May 22, 1794, ch. 33, 1 Stat. 369.

n71. *Dellums v. Smith*, 577 F. Supp. 1449, 1453 (N.D. Cal. 1984)
(regarding a
mandamus action brought by private plaintiffs to compel the Attorney
General to
investigate whether the President and other federal executive officers
violated
the Neutrality Act vis-a-vis Nicaragua).

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n72. See William Michael Treanor, *Fame, the Founding, and the Power to
Declare War*, 82 Cornell L. Rev. 695, 695-701 (1997) (discussing the
significance
of vesting in Congress the power to declare war and grant letters of
marque and
reprisal).

n73. *The Federalist* No. 4, at 101 (John Jay) (Benjamin Fletcher Wright
ed.,
1961).

n74. 6 *The Writings of James Madison* 174 (Gaillard Hunt ed., 1906).

n75. See Jeffrey A. Smith, *War and Press Freedom: The Problem of
Prerogative
Power* 3, 5-6, 31 (1999) (explaining the Enlightenment aversion to warfare
and
preference for transparent and republican, versus monarchical, rule).

n76. Id. at 4.

n77. See Act of June 18, 1812, ch. 102, 2 Stat. 755; Act of May 13, 1846, ch. 16, 9 Stat. 9; Act of Apr. 25, 1898, ch. 189, 30 Stat. 364; Act of Apr. 6, 1917, ch. 1, 40 Stat. 1; Act of Dec. 8, 1941, ch. 561, 55 Stat. 795.

n78. See Act of Apr. 6, 1917, ch. 1, 40 Stat. 1; Act of Dec. 17, 1917, ch. 1, 40 Stat. 429; Act of Dec. 8, 1941, ch. 561, 55 Stat. 795; Act of Dec. 11, 1941, ch. 564, 55 Stat. 796; Act of Dec. 11, 1941, ch. 564, 55 Stat. 797; Act of June 5, 1942, ch. 323-25, 56 Stat. 307.

n79. See Louis Fisher, *Presidential War Power* 17-18, 26 (1995) (discussing statutes enacted to authorize military operations against France and the Barbary powers).

n80. See id. at 13-17 (discussing war power precedents from 1789 to 1800).

n81. See Letter from George Washington to Governor William Moultrie (Aug. 28, 1793), in 33 *The Writings of George Washington 1745-1799*, at 73 (John C. Fitzpatrick ed., 1940) ("The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure."). In one of his messages on Indian affairs, Washington referred to military operations "offensive or defensive," but the full text of his message is designed to avoid any initiative in warmaking and to limit military actions to defensive measures. The President approved military operations only in response to Indian attacks and pursuant to authorization by Congress to "call forth the militia ... for the protection of the frontiers from the incursions of the hostile Indians." See Instructions from the President of the United States to the Governor of the Western Territory (Oct. 6, 1789), in 1 *American State Papers: Indian Affairs*, Class II, 96, 96-97 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

n82. Letter from Henry Knox to Governor Blount (Oct. 9, 1792), in 4 *The Territorial Papers of the United States* 195 (Clarence Edwin Carter ed.,

1936)
[hereinafter Territorial Papers].

n83. Letter from Henry Knox, Secretary of War, to Governor Blount (Nov. 26, 1792), in Territorial Papers, *supra* note 82, at 221.

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n84. Letter from Henry Knox, Secretary of War, to Governor Blount (Mar. 23, 1795), in Territorial Papers, *supra* note 82, at 389.

n85. See, e.g., Act of Mar. 27, 1798, ch. 23, 1 Stat. 547; Act of Apr. 27, 1798, ch. 31, 1 Stat. 552; Act of May 3, 1798, ch. 37, 1 Stat. 554; Act of May 28, 1798, ch. 47-48, 1 Stat. 558; Act of July 11, 1798, ch. 72, 1 Stat. 594; Act of July 16, 1798, ch. 76, 1 Stat. 604 (establishing appropriations for armament; regiments of artillery; defense of ports and harbors; the raising of a provisional army; protection of the coasts of the country; the organizations of a Marine Corps; and augmentation of the Army).

n86. Thomas Jefferson, First Annual Message (Dec. 8, 1801), in 1 A Compilation of the Messages and Papers of the Presidents 315 (James D. Richardson ed., Bureau of National Literature, Inc., New York 1897) [hereinafter Richardson].

n87. *Id.*

n88. See Fisher, *supra* note 79, at 26 (noting congressional authorization of military action during the presidencies of Jefferson and Madison).

n89. See Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins 209-14 (1976) (detailing the events of the 1801 expedition to the Mediterranean).

n90. 15 Annals of Cong. 19 (1805).

n91. Fisher, *supra* note 79, at 32.

n92. Act of May 13, 1846, ch. 16, 9 Stat. 9; see also Fisher, *supra* note 79, at 29-34 (detailing Polk's actions in the disputed territory and the congressional reaction).

n93. John Locke, *The Second Treatise on Civil Government* 89 (Prometheus Books 1986) (1690).

n94. Abraham Lincoln, Special Session Message (July 4, 1861), in 7 Richardson, *supra* note 86, at 3221, 3225.

n95. *Id.*

n96. See Cong. Globe, 37th Cong., 1st Sess. 393 (1861) (reporting Senator Howe's statement that he would vote to support the President's actions "upon the assumption that the different acts of the Administration...were illegal").

n97. Act of Aug. 6, 1861, ch. 63, 12 Stat. 326.

n98. Edward S. Corwin, *The President's Power*, *New Republic*, Jan. 29, 1951, at 15, 16.

n99. See Richard F. Grimmett, Congressional Research Service, Report No. RL 30172, *Instances of Use of United States Armed Forces Abroad, 1798-1999* (1999) (reviewing "hundreds of instances in which the United States has utilized military forces abroad in situations of military conflict or potential conflict to protect U.S. citizens or promote U.S. interests").

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n100. See *id.* at 2-12 (providing a brief description of various U.S. military actions abroad).

n101. See *id.* at 1-12 ("In some instances a military officer acted without authorization")

n102. See Fisher, *supra* note 79, at 35-37 (recounting the bombardment of Greytown and its effects).

n103. Article 20 of the OAS provides that the territory of a nation is inviolable and it "may not be the object, even temporarily, of military occupation or of any other measures of force taken by another State, directly or indirectly, on any grounds whatever." Charter for the Organization of American States (as revised) art. 20.

n104. U.N. Charter art. 2, para. 4.

n105. W. Taylor Reveley III, War Powers of the President and Congress:
Who
Holds the Arrows and Olive Branch? 29 (1981).

n106. Charles A. Lofgren, War-Making Under the Constitution: The
Original
Understanding, in "Government from Reflection and Choice": Constitutional
Essays
on War, Foreign Relations, and Federalism 3, 36 (1986).

n107. Id. at 38.

n108. John Hart Ely, War and Responsibility: Constitutional Lessons of
Vietnam and Its Aftermath 3 (1993).

n109. Id.

n110. David Gray Adler, Court, Constitution, and Foreign Affairs, in The
Constitution and the Conduct of American Foreign Policy 19, 19 (David Gray
Adler
& Larry N. George eds., 1996).

n111. Michael J. Glennon, Constitutional Diplomacy 72 (1990).

n112. Id. at 81.

n113. Harold Hongju Koh, The National Security Constitution: Sharing
Power
After the Iran-Contra Affair 75 (1990).

n114. Id. at 76.

n115. John C. Yoo, The Continuation of Politics by Other Means: The
Original
Understanding of War Powers, 84 Cal. L. Rev. 167, 174 (1996).

n116. Id. at 268, 295.

n117. Id. at 264.

n118. Id. at 266.

n119. See id. at 174 (explaining instead that "the Constitution
established a

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war-making process that can vary with the circumstances and with the
relative
political power of the President and Congress").

n120. 67 U.S. (2 Black) 635, 668 (1863) (noting that "if a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force").

n121. *Id.* at 668.

n122. *Id.* at 669.

n123. *Id.* at 660.

n124. 5 U.S. (1 Cranch) 1, 28 (1801).

N125. 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

n126. Koh, *supra* note 113, at 83.

n127. Yoo, *supra* note 115, at 288.

n128. *Id.* at 295.

n129. *Id.* at 286 n.547.

n130. See *id.* (discussing Wilson's doubts about adopting a system in which war powers are vested in the executive, rather than the legislature).

n131. *Id.*

n132. *Id.*

n133. *Id.*

n134. *Id.*

n135. *Id.* at 242.

n136. *Id.* at 243.

n137. *Id.* at 247.

n138. *Id.* at 270.

n139. *Id.* at 271.

n140. *Id.* at 295.

n141. *Id.* at 288.

n142. See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 1 (1801) (allowing salvage to a United States ship of war that captured a neutral owned ship from the French); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (holding that the act of

Congress of March 2, 1799, applied to an American ship captured by a French privateer because France and the United States were involved in a public war

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and, therefore, considered "enemies" for the purpose of the statute);
United
States v. Smith, 27 F. Cas. 1192, 1229-30 (C.C.D. N.Y. 1806) (No. 16,342)
(noting that the President does not have the "authority to set on foot a
military expedition against a nation with which the United States are
[sic] at
peace").

n143. 6 U.S. (2 Cranch) 170, 179 (1804) (holding that Congress's act of
February 9, 1799, did not authorize the seizure of ships sailing from
French
ports, and that the President's order to seize such ships can not
exonerate an
American commander where he seized such a ship).

n144. Yoo, *supra* note 115, at 295 n.584.

n145. *Id.*

n146. See *id.*

n147. *Id.* at 176.

n148. See U.S. Const. art. III, 2 (describing the breadth of the
judicial
power).

n149. Yoo, *supra* note 115, at 172.

n150. *Id.* at 177.

n151. *Id.* at 290-91 (quoting Richard H. Kohn, *Eagle and Sword: The
Federalists and the Creation of the Military Establishment in America,
1783-1802*, at 107 (1975)).

n152. Act of Sept. 29, 1789, ch. 27, 5, 1 Stat. 95; see also Act of
Apr. 30,
1790, ch. 10, 16, 1 Stat. 119, 121 (authorizing the President to call out
the
militia for "the purpose of aiding the troops now in service, or to be
raised by
this act, in protecting the inhabitants of the frontiers of the United
States");
Act of Mar. 3, 1791, ch. 28, 1 Stat. 222 (raising and adding another
regiment to
the United States military and providing further protection of the
frontiers).

n153. Letter from George Washington to Governor William Moultrie, *supra* note 81, at 73.

n154. Yoo, *supra* note 115, at 291 (noting the occurrence of raids on merchant commerce, full scale battles, and the creation of a regular army during the Quasi-War between the United States and France).

n155. See Fisher, *supra* note 79, at 17-18 (discussing several ways in which Congress supported military action by the President, and noting that "Congress had acted to authorize war").

n156. Yoo, *supra* note 115, at 292.

n157. *Id.* at 174.

n158. See *supra* text accompanying notes 72-76.

n159. Yoo, *supra* note 115, at 197.

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n160. *Id.* at 242.

n161. See *supra* text accompanying notes 44-48.

n162. Yoo, *supra* note 115, at 198.

n163. The Federalist No. 75, at 477 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

n164. Yoo, *supra* note 115, at 174.

n165. *Id.* at 197.

n166. *Id.* at 197 n.158.

n167. *Id.* at 241.

n168. See 1973 Public Papers of the Presidents, 621-22 (vetoing the bill and noting that the veto was not overridden by the House); 119 Cong. Rec. 21778 (1973) (sustaining the veto).

n169. See Second Supplemental Appropriations Act of 1973, 307, 87 Stat. 129 (prohibiting use of any appropriated funds "to support directly or

indirectly
combat activities in or over Cambodia, Laos, North Vietnam and South
Vietnam"
after the expiration of 45 days).

n170. See *Holtzman v. Schlesinger*, 361 F. Supp. 553, 565 (E.D.N.Y. 1973).

n171. *Id.*

n172. See *Holtzman v. Schlesinger*, 414 U.S. 1304, 1310, 1316, 1321 (1973)
(granting an application for a stay of the district court order); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1313-14 (2d Cir. 1973) (finding the argument that the President only required a vote of "one-third plus one" unpersuasive in light of the compromise language).

n173. Yoo, *supra* note 115, at 297.

n174. See Louis Fisher, *Presidential Spending Power* 110-18, 238-47 (1975)
(discussing Nixon's use of transfer authority to fund the war in Cambodia, and the open-ended authority of the Department of Defense to commit funds under the Feed and Forage Act).

n175. Yoo, *supra* note 115, at 298.

n176. See Louis Fisher, *The Bosnia Commitment*, *Legal Times*, Mar. 11, 1996, at 22 (noting that some legislators deferred to Clinton's decision to send troops but asserting that there was not adequate process because there was no action or authorization by the entire Congress).

n177. 145 Cong. Rec. H1249-50 (daily ed. Mar. 11, 1999).

n178. See 145 Cong. Rec. S3118 (daily ed. Mar. 23, 1999).

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n179. *Id.* at S3110.

n180. James A. Leach, *A War Vote*, *Wash. Post*, Apr. 15, 1999, at A31.

n181. *Id.*

n182. See 145 Cong. Rec. H2376-452 (daily ed. Apr. 28, 1999).

n183. See, e.g., Julie Malone, Mixed Signals for the House Get Tangled Interpretations, Times-Picayune (New Orleans), Apr. 30, 1999, at A12; Editorial, No-confidence Vote for a Waffling House, Baltimore Sun, Apr. 30, 1999, at 26A; Editorial, War Waffling in House, L.A. Times, Apr. 30, 1999, at B6.

n184. 145 Cong. Rec. H2419 (daily ed. Apr. 28, 1999).

n185. See Fisher, *supra* note 79, at 92-97 (arguing that mutual security treaties "do not empower the President to use armed force abroad without congressional consent").

n186. See Michael J. Glennon, United States Mutual Security Treaties: The Commitment Myth, 24 Colum. J. Transnat'l L. 509 (1986) (arguing that without legislative approval presidential action predicated upon a mutual security treaty is constitutionally unauthorized).

n187. 101 Cong. Rec. 1051 (1955).

n188. See Fisher, *supra* note 79, at 84-86, 148-51 (noting the reliance by both Truman and Bush on U.N. resolutions as authorization for their actions).

n189. See *id.* at 72-84 (arguing that the U.N. Charter and the U.N. Participation Act of 1945 did not alter the constitutional framework by allowing the President to take military action without obtaining congressional approval).

n190. 140 Cong. Rec. 19324 (1994).

n191. See *id.*

n192. Yoo, *supra* note 115, at 304 (quoting The Federalist No. 70, at 475 (Alexander Hamilton) (Jacob E. Cooke ed., 1982)).

n193. *Id.*

n194. 2 Elliot, *supra* note 25, at 528.

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December, 1989

78 Geo. L.J. 415

LENGTH: 21598 words

NOTE: Self Defense or Presidential Pretext? The Constitutionality of

Unilateral Preemptive Military Action.

Mark J. Yost

SUMMARY:

... The Constitution explicitly grants warmaking authority to both the legislative and executive branches, but it often leaves the scope of their respective powers ambiguous. ... The commander in chief clause provides: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States. . . ." At a minimum, the Framers intended this clause to confer upon the Executive the unitary authority to direct the military after Congress has authorized military action. ... These debates have influenced and been influenced by executive practice, judicial interpretation, public opinion, and even international law. ... Although production of chemical weapons is not a direct threat, the United States feared that because of Libya's terrorist affiliations, production was the functional equivalent of use. ... The threat would exist only if the Libyan plant produced chemical weapons, if the plant provided those chemical weapons to terrorists, and if the terrorists used the weapons to attack United States interests. ... The threat against United States interests must be so imminent as to preclude congressional consultation and to "leave no time for deliberation." ... The consultation mechanism proposed below promotes congressional involvement and permits Congress to check executive overreaching. ...

TEXT:

[*415] The boundary between the warmaking powers of congress and the President defies clear definition. n1 The Constitution explicitly grants warmaking authority to both the legislative and executive branches, but it often leaves the scope of their respective powers ambiguous. This ambiguity has created what one commentator has described as "constitutional gaps" n2 in the allocation of war powers -- areas of interest to both branches but exclusively within the purview of neither. The confusion caused by these gaps is aggravated by a general overlap in war powers -- an overlap that sometimes causes both branches to claim authority over a given issue. n3 Principled attempts to

resolve these disputes are complicated by a separation of powers scheme that relies on interbranch tension for sound war powers decisionmaking. n4 This [*416] interbranch tension fuels the political debates that ultimately decide what the war powers mean. n5

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The Framers envisioned war powers decisionmaking as a joint process between the President and Congress. n6 Today, however, the balance of power has shifted decidedly in favor of the President. n7 This shift has undermined Congress' ability to perform its dual role as a guardian of the war powers and a check upon executive overreaching. This diminished protection against presidential abuse of the war powers is particularly alarming in a nuclear age, in which the misuse of military power could be devastating. n8 The proliferation of international terrorism also complicates the war powers equation, n9 because it seems to justify calls for an even stronger Executive.

This note explores the limits of the President's war powers authority. Specifically, it analyzes whether the President, consistent with his constitutional grant of war powers, can order preemptive military action without congressional consultation. The preemptive air strike that President Reagan planned, but did not order, against the chemical weapons factory at Rabta, Libya provides the context for this discussion. Part I outlines the history of United States-Libyan relations and tracks the construction of the chemical weapons plant at Rabta. Part II discusses the various types of war that may [*417] be waged under the Constitution. It argues that the Constitution provides for only three types of warmaking: (1) acts of war pursuant to a congressional declaration of war, n10 (2) acts of war authorized by statute, n11 and (3) acts of war pursuant to the President's self-defense power under the commander in chief clause and the executive power clause of article II. This Part then analyzes the factual circumstances attending the Rabta chemical weapons factory and concludes that because there was no congressional declaration of war and because no legislation authorized a preemptive military strike, the President

constitutionally could have ordered a strike only under his self-defense power.

It concludes by tracing the development of this presidential authority and analyzing the factors that have determined its scope.

Part III proposes an analytical model for determining the constitutionality of preemptive military action when the President acts unilaterally -- purportedly under the authority of his self-defense power. This model is designed to ferret out pretext by ensuring that presidents not act without congressional input unless their justifications are consistent with the separation of powers scheme. Specifically, it permits the President to invoke military action unilaterally only when the predicted threat is reasonably certain, requires an immediate response, and endangers compelling United States interests. If the threat fails to satisfy any of the three elements of this model, the President's reliance upon his exclusive powers is misplaced and, perhaps, even pretextual. In this situation, the military response falls within an area of shared power, and the President must consult with Congress before deploying military forces. In contrast, if the threat satisfies the model, it falls within the President's exclusive war powers and the President may defer consulting with Congress until after he has taken the military action.

The constitutionally mandated consultation that this model envisions need not consist of ratification by Congress as a body. Rather, Part IV argues that an alternative form of consultation is sufficient, and perhaps even necessary to respect the President's need for secrecy and efficiency. The alternative proposed in this note respects those interests while ensuring the majoritarian participation in war powers decisions upon which the Framers insisted.

[*418] I. LIBYAN TERRORISM AND CHEMICAL WEAPONS: A RECIPE FOR PREEMPTIVE MILITARY ACTION

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United States relations with Libya have grown increasingly strained since Muammar el-Qaddafi seized power in 1969. n12 Qaddafi has pursued a policy of terrorism as a means to end Western influence in the Middle East. n13 As

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result, he has directed many terrorist acts against United States interests at home and abroad. n14 On March 24, 1986, Libya attacked United States naval forces lawfully engaged in a navigation exercise in the international waters of the Gulf of Sidra. n15 Although the United States Navy sank two Libyan vessels, the United States forces sustained no casualties. n16 Shortly thereafter, United States intelligence linked Libya to the April 6, 1986, bombing of a West Berlin nightclub that wounded approximately fifty United States military personnel and killed one. n17

On April 14, 1986, in response to the West Berlin bombing, President Reagan ordered an air strike against selected Libyan military installations. n18 He notified congressional leaders of the air strike only three hours before the aircraft arrived over Libya. n19 President Reagan justified the air strike as an [*419] act of self defense under article 51 of the United Nations Charter n20 and as an attempt to deter future Libyan attacks against United States interests. n21

In January 1989, just prior to the opening of the Paris Conference on Chemical Weapons, n22 the United States announced that it possessed evidence which proved that Libya was on the verge of producing chemical weapons at the Rabta facility. n23 The United States based its claim on the facility's specialized design and equipment and on the excessive security measures for [*420] what Qaddafi asserted was merely a pharmaceutical factory. n24 The plant, located forty miles south of Tripoli, was in the middle of a desert, was well removed from any population centers, and was surrounded with earthen embankments and surface-to-air missile sites. n25 It reportedly was designed to produce approximately 80,000 pounds of mustard gas or nerve gas daily -- eight times more than Iraq, the largest producer of nerve gas in the Middle East at that time. n26 United States concern that Libya would use these chemical weapons was fueled by Libya's well-documented terrorist affiliations and by reports that Libya was training its personnel in mid-air refueling, a technique that would enable Libyan aircraft to reach Israel. n27

The United States had little difficulty convincing most of its allies that the facility's purpose was to produce chemical weapons. n28 By the end of the

Paris Conference, senior officials in foreign governments expected that President Reagan would order an air strike against Rabta before he left office on January 20, 1989. n29 Because President Reagan had not consulted Congress prior to ordering the 1986 air strike against Libya, Congress had no reason to believe that he intended to do so in 1989. n30

[*421] President Reagan never ordered the air strike, but the potential for such unilateral preemptive military action raises profound questions about the warmaking roles of the President and Congress. It also raises questions about when, if ever, it may be constitutional for the President to order preemptive military action without congressional participation.

II. PREEMPTIVE MILITARY STRIKES AND THE CONSTITUTION

A unilateral preemptive military strike against the Rabta chemical factory would have been constitutional only if it fell within one of three categories.

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First, the strike would have been constitutional if Congress had declared a general war. n31 Second, it would have been constitutional if Congress had granted the President limited statutory authorization to conduct a strike. n32 Finally, the strike would have been constitutional if the President had been defending compelling United States interests that were threatened by imminent harm. n33

[*422] A. CONGRESSIONAL AUTHORIZATION OF PREEMPTIVE MILITARY ACTION

1. Declared War (Perfect War)

The Constitution explicitly confers upon Congress the power to "Declare war."
" n34 But, even though the Framers intended that Congress retain ultimate authority over whether armed forces should be involved in hostilities, they recognized that the President must have "supreme command . . . of the military and naval forces." n35 The tension created by these competing grants has led to a constant struggle between efficiency and democracy. This is because increased congressional participation is often incompatible with quick,

easy
decisions.

The scope of presidential warmaking power is at its broadest when Congress declares war. Once Congress acts, the Constitution recognizes that the President has exclusive power to make tactical wartime decisions. n36 These powers are difficult to define, but at a minimum they seem to include decisions to deploy and use United States military forces. n37 Because these powers are exclusively the President's, Congress cannot restrict them. n38

Analysis of a preemptive strike against the Rabta facility under a declared war rationale is relatively simple. At the time of the Rabta crisis, Congress had not formally declared war against Libya. Thus, the President could not [*423] have justified a preemptive strike against the Rabta plant as a tactical decision during a perfect war. n39

2. War Under Statutory Authorization (Imperfect War)

An "imperfect" war is commonly defined as a statutorily authorized military action against hostile forces. n40 The Framers expressly allocated this limited warmaking power to Congress by granting it the power to "issue Letters of Marque and reprisal." n41 Today, Congress may authorize an imperfect war through ordinary legislation. n42

When the President takes military action pursuant to statutory authority, he is limited to the scope of the statutory license. n43 Therefore, whether the [*424] President could have unilaterally ordered a preemptive strike in the Rabta scenario, depends upon the statutory context. Two statutes, the War Powers Resolution of 1973 n44 and the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Antiterrorism Act), n45 provided arguable sources of this authority.

Section 2(c) of the War Powers Resolution authorizes the President to introduce United States armed forces into hostilities under three circumstances: "pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack upon the United States, its territories, or possessions, or its armed forces." n46 None of these provisions authorized the President to order a preemptive military strike

against the Rabta facility.

Because Congress had not declared war on Libya when President Reagan considered ordering the preemptive military strike, n47 the President could not have relied upon section 2(c)(1). Section 2(c)(3) would have authorized a strike only if the statutory language "national emergency created by an attack" includes potential attacks upon United States interests. Although Congress could have authorized a military response to a potential attack, the plain language of the War Powers Resolution requires an actual attack. n48

Unlike sections 2(c)(1) and 2(c)(3), which authorize the President to commit forces to hostilities upon the occurrence of specific events, section 2(c)(2) provides no such authority. This section merely asserts that congressional enactments external to the War Powers Resolution may grant warmaking [*425] authority to the President. In short, section 2(c)(2)'s applicability turns on the existence of additional statutory authority.

The only statute that might have authorized an imperfect war under section 2(c)(2) was the Antiterrorism Act. n49 The original bill, submitted to the House on April 17, 1986, would have authorized the President "to undertake actions to protect United States persons against terrorists and terrorist activity through the use of all such antiterrorism and counterterrorism measures as he deems necessary." n50 This broad language easily could have permitted a unilateral preemptive strike against a perceived terrorist threat. n51 Congress, however, deleted this broad language when it enacted the final bill. n52 Some legislators were concerned that the broader original language would have given the President a "blank check" to authorize preemptive as well as punitive strikes against terrorists or governments supporting terrorism. n53 By considering and rejecting such a broad grant of warmaking power, Congress intended not to confer such authority. Thus, the Antiterrorism Act could not have authorized a preemptive military strike pursuant to section 2(c)(2) of the War Powers Resolution.

Neither the War Powers Resolution nor any other statute authorized a

unilateral preemptive military strike. Therefore, the President could not have justified a strike on the Rabta facility as an action conducted during an imperfect war.

B. PREEMPTIVE MILITARY ACTION UNDER THE PRESIDENT'S SELF-DEFENSE POWER

Because Congress had neither declared a perfect war nor authorized an imperfect war at the time of the Rabta controversy, the President could have justified unilateral preemptive military action only by relying upon his exclusive warmaking powers. ⁿ⁵⁴ To some extent, this would have required him to [*426] rely upon his power of self defense. To understand the nature and extent of the President's self-defense power -- and the tyranny that pretextual reliance upon this power could allow -- we must consider the source of this power and how our interpretation of it has evolved.

1. The Constitutional Roots of the Self-Defense Power

The President's power to repel invasions or to act in defense of United States interests is not mentioned in article II. ⁿ⁵⁵ In fact, the Constitution's only explicit references to a self-defense power pertain to Congress. ⁿ⁵⁶ Despite the Constitution's apparent silence on this issue, the

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commander in chief clause ⁿ⁵⁷ and executive power clause ⁿ⁵⁸ have been interpreted to authorize the President to respond to national crises.

The commander in chief clause provides: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States.

..
." ⁿ⁵⁹ At a minimum, the Framers intended this clause to confer upon the Executive the unitary authority to direct the military after Congress has authorized military action. ⁿ⁶⁰ But the juxtaposition of this clause with other grants of power suggests that the Framers intended more. First, article

[*427] IV, section 4 guarantees the states protection from invasion.

ⁿ⁶¹ The

commander in chief clause suggests that the Framers intended the President, and

not Congress, to coordinate any military response necessary to protect the states. ⁿ⁶² Second, during the drafting stage, the Framers changed the language of article I, section 8 to give Congress the power to "declare" rather

than to "make" war. ⁿ⁶³ They probably intended this change to allow the President to respond to sudden attacks without a congressional declaration

of
war. n64 Despite these seemingly broad grants of authority, the Framers
feared
that a strong "President would overstep constitutional restraints." n65
Thus,
they viewed the commander in chief clause as granting the President
warmaking
authority only within the limited realm of declared (perfect) wars,
undeclared
(imperfect) conflicts, and responses to sudden attacks. n66

[*428] The Framers' apparent consensus regarding the commander in
chief
clause sharply diverged from their contradictory views on the meaning of
the
executive power clause. The latter clause provides that "[t]he executive
Power
shall be vested in a President of the United States of America." n67 How
the
Framers interpreted the scope of this clause turned upon whether they
viewed it
as a "simple designation of office" or as the "fountainhead of all the
President's powers." n68 Alexander Hamilton took the broad approach,
noting
that article I's grant of powers to Congress refers to "[a]ll legislative
Powers
herein granted," n69 but article II's grant of authority to the
President does
not contain similar limiting language. n70 Thus, Hamilton contended, the
"different modes of expression . . . confirm the inference that the
authority
vested in the President is not limited to the specific cases of executive
power
delineated in Article II." n71 In contrast, James Madison interpreted the
executive power clause narrowly. He argued that Congress is the major
policymaking body, and that the executive power clause only authorizes the
President to implement congressional policy. n72

The executive power and commander in chief clauses, frequently combined
in
war powers analysis, have evolved into two of the "most highly charged
provisions" of the Constitution. n73 During the past two hundred years,
the
meaning of these clauses has been shaped by political debates. These
debates
have influenced and been influenced by executive practice, judicial
interpretation, public opinion, and even international law. The
President's
[*429] self-defense power often has been the vehicle by which we have
expanded
the scope of these clauses.

2. The Self-Defense Power: A Constitutional Morass.

An invasion or other imminent harm against American citizens or property triggers the President's power of self defense. n74 In 1842, Daniel Webster argued that self defense was justified only in the event of an imminent threat "leaving no choice of means, no moment for deliberation." n75 In the past, the

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interests that implicated the self-defense power were predominantly regional. Today, however, they are primarily international. This change has caused us to redefine the interests that deserve protection and the means by which the President can protect us. We can only achieve this redefinition if we understand how the President's self-defense power has evolved.

a. Executive Practice. Executive practice has heavily influenced the politically charged evolution of the self-defense power. Throughout history, presidents have relied upon the self-defense power to support military action absent congressional authorization. n76

An early military venture by Thomas Jefferson did not foreshadow the extent to which this power would soon be stretched. Jefferson was the first president to rely exclusively on the self-defense power to justify his use of the armed forces. In 1801, he ordered naval frigates to the Barbary Coast to protect United States merchant ships from pirates. n77 Jefferson construed his authority to be narrowly circumscribed to defensive actions unless and until [*430] Congress authorized offensive action. n78 Contemporaries sharply disagreed with his view. Alexander Hamilton, a proponent of broad presidential prerogative, argued that once United States ships were attacked, the President could respond with the full force of a general war. n79

President Polk adopted Hamilton's broad view of the self-defense power when he ordered the army to occupy disputed territory between Texas and Mexico. n80 He authorized General Taylor to consider any crossing of the Rio Grande an invasion and instructed him "to attack first in defense and even enter Mexican territory in pursuit of the invaders." n81 Congress initially contested Polk's assertion that the self-defense power authorized this use of force, but it eventually acquiesced. n82 Because Polk's motives were likely

imperialistic
rather than protective, his reliance on the self-defense power was probably
pretextual. n83

During the Civil War, President Lincoln ordered military action that
further
expanded the scope of the self-defense power. n84 Lincoln routinely
ignored
constitutional and statutory constraints n85 to accomplish what he
believed
was necessary to save the nation. n86 His illegal acts included
suspending the
writ of habeas corpus, ordering the arrest of persons "involved in
'disloyal'
practices," expanding the military, and spending federal money without
congressional authorization. n87 Lincoln "constitutionaliz[ed] the law of
necessity" and established the principle that the President possesses
flexible
emergency war powers. n88

[*431] President William McKinley enlarged the scope of the
self-defense
power to include the deployment of military forces overseas when he ordered
United States troops to China during the Boxer Rebellion. n89 Although
McKinley claimed that this action was necessary to protect United States
interests and the lives and property of citizens, commentators argue that
his
motives were more political than protective. n90 Significantly, McKinley
never
sought congressional authorization even though time permitted consultation.
n91 Even more significantly, Congress never objected. n92

Congress attempted to reassert itself in the war powers equation
between 1919
and 1939. n93 The executive accretion of warmaking power withstood this
effort. The scope of the President's amorphous self-defense power reached
new
heights during the World War II years, as President Franklin D. Roosevelt

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quietly used his constitutional and statutory powers to expand one another.
n94 President Truman's impact was not so subtle. Truman's decision to send
United States military forces to Korea in 1950 "dramatically and
dangerously
enlarged the power of future Presidents to lead the nation into a major
war."
n95 Although Truman had both the time to consult and the congressional
support
to garner approval, he decided to intervene without consulting Congress.
n96
Truman, who may have been initially unsure about [*432] the exact source
of

his authority, was intentionally vague. n97 Later presidents, including Kennedy, n98 Johnson, n99 Nixon, n100 and Reagan, n101 have capitalized upon the successes of their predecessors to further expand the self-defense power.

In taking military action, these presidents have relied upon their powers under the commander in chief and executive power clauses. Because the self-defense power is subsumed within the war powers clauses, it often has been difficult to discern the role self defense has played in executive justifications. This lack of clarity has been magnified because presidents have often felt that it was in their interests to be ambiguous about their source of authority. As Congress, the courts, and the public have permitted the Executive to push the presidential war powers to new extremes, the meaning of the self-defense power has changed.

b. Judicial Interpretation. The Supreme Court has responded to executive overtures in the war powers arena by generally endorsing the gradual accretion of presidential authority. n102 In the Prize Cases, n103 the Court [*433] adopted an expansive view of the commander in chief clause's self-defense power by validating President Lincoln's blockade of southern ports during the Civil War. n104 The Court held that not only was the President authorized to "resist force by force" to suppress domestic insurrection or foreign invasion of United States territory, but that he was obligated to do so. n105 Moreover, the Court explained that the President, in fulfilling his duties under the commander in chief clause, was the only person who could determine the degree of force necessary to suppress an insurrection or to repel an invasion. n106

Justice Nelson, in his capacity as Circuit Justice, gave a similarly broad construction to the executive power clause. In *Durand v. Hollins*, n107 the President had ordered the Navy to bombard Greytown, Nicaragua because the local authorities had refused to pay reparations after a local mob attacked United States citizens and their property. n108 A Greytown property owner sued the commanding officer of one of the bombarding ships for trespass. n109 The defendant pleaded that he had merely followed the lawful orders of the

President, who had ordered the strike against an insurrectionist government not recognized by the United States. n110 Justice Nelson, in upholding this defense, interpreted the executive power clause broadly:

As the executive head of the nation, the president is made the only legitimate organ of the general government. . . . It is to him [that] the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. n111

The Durand decision, despite being criticized as "unauthorized warmaking," n112 [*434] has provided executive warmaking with judicial legitimacy. Arguably, Durand was not a self-defense case because no imminent threat existed and it was not clear that a military response was even necessary. n113

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Nevertheless, Durand is frequently cited as authority for the proposition that the President may introduce military forces within the borders of another nation if necessary to protect United States citizens or their property. n114 Presidents sometimes use this case to justify presidential warmaking that is, at best, pretextual. President Nixon, for example, arguing through Assistant Attorney General William Rehnquist, relied in part on Durand as authority to introduce military forces into Cambodia -- a neutral country that posed at most a potential threat to the United States. n115 Rehnquist's arguments could not have survived the model proposed in Part III for evaluating the constitutionality of presidential assertions of the self-defense power.

The Supreme Court limited its broad view of the executive power and commander in chief clauses in *Youngstown Sheet & Tube Co. v. Sawyer*. n116 Its holding suggests that similar constraints apply to the self-defense powers. In *Youngstown*, the President attempted to seize domestic steel mills during the Korean War because he feared that a threatened strike would halt steel production and endanger national security. He argued that the Court should infer a broad inherent power to seize the mills from "the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States." n117 Explicitly rejecting this argument, the Court held that it could not justify the seizure merely "because of the several constitutional provisions that grant executive power to the

President." n118 Although this holding is subject to several interpretations, n119 it is best viewed as only a minor setback to the expansion of presidential [*435] power. The Court basically accepted the "gloss" that history had placed upon the war powers clauses n120 but noted that those powers were not without some limits.

Courts influence the war powers not only by ratifying presidential actions, but also by what they do not do. The judiciary can, and often does, avoid war powers disputes by labeling them "political questions" and dismissing them without reaching the merits. n121 Judicial restraint is effectively the same as acquiescence to executive arrogation. Further, by refusing to hear these cases, the courts contribute to keeping the war powers in the political arena.

c. Public Opinion. Public opinion has also had a long-term effect on constitutional interpretation -- particularly with the politically sensitive war powers. Widespread dissatisfaction with executive inaction has fueled political debates about the flaws of a democracy that has at times appeared paralyzed. Calls for a strong Executive have prompted the President to act forcefully, n122 have encouraged legislators to acquiesce, n123 and have led courts to uphold executive actions. n124 Presidential successes and failures have affected our expectations of the President's war-making role and, in turn, our expectations have influenced our interpretation of the constitutional war-making provisions.

Presidents, as political actors sensitive to public attitudes, have been aware that their actions must be perceived as legitimate if they are to retain credibility. n125 Their political sensitivity has been especially acute regarding the war powers because it is in this area that executive overreaching could jeopardize the lives of United States citizens. Even though many citizens have [*436] called for a strong President, many still expect that unless he is responding to an imminent threat, the President must consult with Congress before introducing military forces into hostilities. n126 Presidents have been unable to ignore this national mood.

Public sentiment in favor of constraining the President was particularly pronounced during the Vietnam War. Congress, which is also sensitive to public opinion, reflected the electorate's discontent by enacting the War Powers Resolution. n127 This statute was Congress' attempt to curb the rapid growth of the executive war powers and to reassert itself in the war powers equation. n128

although scholars often consider the judiciary to be politically insulated, n129 even the courts are influenced by politics. n130 As Chief Justice Rehnquist recently stated:

Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs. And if a judge on coming to the bench were to decide to hermetically seal himself off from all manifestations of public opinion, he would accomplish very little; he would not be influenced by [*437] current public opinion, but instead by the state of public opinion at the time that he came onto the bench. n131

The effect of politics on constitutional decisionmakers is particularly pronounced in the war powers arena, because the contending branches are openly political. Just as politics influences the decisionmakers, the decisionmakers' actions shape the political debate. In this way, these forces enter into the constantly evolving interpretation of the President's war powers.

d. International Law. Although international law is seldom a direct constraint upon presidential warmaking, n132 it has helped to define the self-defense power. n133 International law has influenced the constitutional war powers in at least two ways. First, absent a treaty or statute limiting its applicability, international law has been incorporated into United States law. n134 Because the President has a constitutional obligation to "take care" to enforce United States law, n135 he may have a constitutional duty to enforce and comply with international law.

Second, international law may influence public opinion. To the extent

that military intervention has received widespread international and national attention, assertions that presidential actions have violated international law have led many United States citizens to conclude that the President's actions were unconstitutional. n136 This conclusion has inevitably affected the views of [*438] courts and politicians who are responsible for constitutional decisionmaking. International law, although rarely dispositive, has helped to bridge constitutional gaps in the war powers. n137

3. Preemptive Military Action as an Extension of the Modern Self-Defense Power

The political debate that has altered our understanding of the self-defense power has focused on defining an "imminent" threat. This definition has critical implications for the constitutionality of unilateral preemptive strikes. Advocates of broad presidential prerogative have argued that the President need not "wait until Hannibal and his elephants are at the gates of the city" to respond with military force. n138 Other commentators have countered that the President often has time for congressional consultation and that no threat can be considered imminent if time exists to consult. n139

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Despite the debate over the meaning of an "imminent threat," modern presidents have often acted as if their authority to conduct unilateral preemptive strikes is clear. For example, President Reagan claimed that the invasion of Grenada was justified in part because of a threat to the safety of United States citizens there. n140 His preemptive actions could not have been [*439] justified as self defense, however, because the threat was not imminent. n141

The self-defense power provides presidents with a convenient vehicle for accomplishing controversial policy objectives. Although preemptive strikes may be necessary to protect United States citizens and their property throughout the world, the potential for executive abuse is alarming. Absent some analytical framework with which to identify pretextual reliance on the self-defense power, there is no way to distinguish legitimate preemptive actions from

unconstitutional overreaching.

III. A MODEL TO EVALUATE THE CONSTITUTIONALITY OF PREEMPTIVE MILITARY ACTION UNDER THE SELF-DEFENSE POWER

This Part proposes a three-element model to gauge the constitutionality of preemptive military action taken in the absence of prior consultation with Congress. Under this model, the expected threat must be: (1) reasonably certain, (2) of such short notice as to "leave no moment for deliberation" n142 or congressional consultation, and (3) a danger to a compelling United States interest. If all three elements of the model are satisfied, the action is within the President's exclusive self-defense power and he need not consult with Congress prior to ordering preemptive military action. If one or more elements of the model are not satisfied, the President may not constitutionally introduce military forces unless he first consults with Congress. Applying this model to the facts of the Rabta chemical weapons factory indicates that President Reagan had time to deliberate about whether and how to respond to the threat. Therefore, he could not constitutionally have ordered a preemptive air strike absent congressional participation in the decision.

The first element of the model requires the President to be reasonably certain that an attack will occur. In the Rabta plant scenario, the United States insisted that the purpose of the plant was to produce chemical weapons. n143 Although production of chemical weapons is not a direct threat, the United States feared that because of Libya's terrorist affiliations, production was the functional equivalent of use. n144 The threat posed by use was not reasonably [*440] certain, however, because it required the President to follow an attenuated causal chain. The threat would exist only if the Libyan plant produced chemical weapons, if the plant provided those chemical weapons to terrorists, and if the terrorists used the weapons to attack United States interests. n145

To consider any threat concrete enough to rise to the level of "reasonable certainty," the President must rely upon predictive data. What type of information should and will he use to satisfy the "reasonably certain" standard? How accurate must this information be? Perhaps most importantly, who evaluates the quality and quantity of such information? Because the President has exclusive access to information of this type, the critical issues for preemptive strike analysis are the extent to which Congress can (or must) play a role

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the President's decision and the extent to which it can review the President's background information.

In ordering a preemptive strike, the President will likely rely upon the record of a country's conduct and upon current intelligence data. Both sources of information possess certain flaws. The record of a country's past conduct does not guarantee that predictions of future conduct will be accurate. Intelligence-gathering capabilities may also be inadequate -- especially with respect to terrorist groups, which are difficult to penetrate. n146 Moreover, reduced funding and increased oversight of intelligence operations have crippled the intelligence community. n147

Assuming that predictive data are available and accurate, who decides whether the President has gathered sufficient information before ordering a preemptive strike? Only the President can make the initial determination, because an emergency might preclude immediate congressional consultation. n148 Certainly, [*441] a bootstrapping problem exists. The President has exclusive access to the data that he alone will use to determine the reasonable certainty of a threat to United States interests. Abraham Lincoln recognized the danger inherent in this scheme:

Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion . . . and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect. . . . If today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, "I see no probability of the British invading us," but he will say to you, "Be silent; I see it, if you don't." n149

Although the danger that Lincoln noted is unavoidable in the self-defense context, the model proposed in this note minimizes the threat. By requiring congressional consultation after the fact when prior consultation is not

feasible, the model reduces the risk of unjustifiable exercises of presidential warmaking power.

The second element of the model is the time criterion. The threat against United States interests must be so imminent as to preclude congressional consultation and to "leave no time for deliberation." n150 Determining whether this element is satisfied is not always easy, and therefore good faith may be particularly relevant. A clear example of a situation that would not qualify as an imminent threat is one in which the President consciously observes a situation developing that will soon reach threat proportions, fails to consult with Congress, and then orders preemptive military action. It appears that this is what would have happened had the President ordered an air strike at Rabta.

The Rabta plant was identified in its construction stage, before it could produce chemical weapons, and the President apparently had ample time to consult with Congress. n151 A preemptive strike under these circumstances could not have been justified under the President's self-defense power. A different case would have been presented, however, if the President had known that the Rabta plant was already secretly operating. Another difficult [*442] case would have existed if the factory had been discovered just days prior to completion. Prior congressional consultation would have been required if there had been time to consult, but may not have been required if the proximity of the threat had demanded an immediate military response.

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The third element of the model requires that the imminent harm endanger compelling United States interests. Because the self-defense power authorizes the President to defend United States interests both at home and abroad, the definition of "United States interests" has expanded over time. In 1794, President Washington relied upon a narrow interpretation of the self-defense power when he authorized the use of force against British troops who were

unlawfully inside United States borders. n152 In 1962, however, President Kennedy ordered a blockade of Cuba to "preserve the balance of power in the Western hemisphere" n153 even though the Cuban missiles at issue had not yet been assembled. n154 In 1989, President Reagan pointed to Rabta as a United States concern even though the facility was still under construction and could not produce chemical weapons.

In the nuclear age, it is difficult to imagine a circumstance in which the United States could not find a legitimate interest that is subject to a potential threat. Nevertheless, we must distinguish compelling interests, which warrant protection prior to consultation, from other interests, which may warrant some protection but only after consultation. Failure to draw this line would turn the self-defense power into an offensive weapon. n155

One factor that the President must consider when determining whether an interest is compelling is the gravity of the threat. n156 The more severe the consequences, the more likely they warrant preemptive response. A continuum model best describes this analysis. On one extreme, representing a threat of minimal harm, is the protection of residential property owned by a United States citizen but located in a foreign country. On the other extreme is a threat such as the hijacking of a commercial airliner, which endangers the lives of United States citizens.

The President's determination that an interest is sufficiently compelling to warrant preemptive action before consultation would be subject to post hoc congressional scrutiny. By knowing in advance that he would have to justify to Congress his evaluation of the threat, the President would be more reluctant [*443] to rely pretextually on his self-defense power. Additionally, the consultation mechanism proposed below would create a dialogue between the two branches and help to define which interests are compelling and why. This dialogue would offer normative guidelines for future self-defense analysis. Most importantly, it would promote majoritarian participation in war powers decisionmaking.

IV. CONGRESSIONAL CONSULTATION FOR A PREEMPTIVE STRIKE IS CONSTITUTIONALLY COMPELLED

A. THE CONSTITUTIONAL SOURCE OF THE CONSULTATION REQUIREMENT

The Framers intended Congress, and not the President, to determine the extent of our military involvement. n157 As a result, the Constitution grants Congress the vast majority of enumerated powers dealing with the military and warmaking. n158 Further, the Framers explicitly stated that the President neither should nor could declare war. n159 The Framers sought to avoid the British model of executive power, in which the monarch could both declare and make war, and they intended their textual grants to constrain the President. n160 They would be surprised to learn that the vagueness of their grants has led to a decisive accretion of executive power.

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The shift away from congressional control of the warmaking process has offended the Framers' majoritarian principles. The Constitution and comity require that the President involve Congress in any exercise of the war powers. n161 Professor Reveley has argued that "[t]he way in which Congress [will be] involved may well vary . . . but not the necessity that Congress be involved." n162 The [*444] consultation mechanism proposed below promotes congressional involvement and permits Congress to check executive overreaching. At the same time, it encourages both executive efficiency and sound war powers decisionmaking.

B. A MECHANISM FOR CONSULTATION

Commentators disagree about which consultation mechanism the Constitution requires. n163 To be consistent with the constitutional scheme, Congress' role must be more than post hoc ratification or silent approval of presidential action. n164 However, it need not rise to the level of enabling legislation. n165 This note proposes a middle ground in which the President must meet with the House and Senate leadership to discuss policy options, solicit advice, and inform them of his selected course of action. n166

Consultation with congressional leadership would constrain the President because it would force him to justify his war powers decisions. It would have [*445] this chilling effect whether consultation takes place before

military
forces are deployed, as required when the President's actions fail the test described in Part III, or after military forces are deployed, as permitted when his actions pass the test.

To protect the secrecy necessary for many military operations, the President need only consult with a small joint committee of senior members of Congress.
n167 In addition, the President would not need to disclose the specific parameters of the military operation as long as he presents the general problem and policy options to the committee.

An alternative to consultation, endorsed by at least one prominent public figure, would require the President to document the reasons for his war powers decisions. n168 The documents would not be immediately available for public scrutiny but would be released after a set period of time. n169 Theoretically, this procedure would constrain the President by revealing the justifications, or lack thereof, behind specific decisions. But this mechanism is flawed. First, records maintained by presidential aides may not be reliable. Second, fear of historical scrutiny may not influence a President during times of crisis. Third, because of executive privilege n170 and statutory exemptions, n171 certain aspects of the record may be protected and not subject to disclosure. Most importantly, this alternative fails to satisfy the constitutional requirement for congressional input into war powers decisions. For this reason alone, it is inferior to consultation as a means to reconcile the accretion of executive warmaking power with the majoritarian principles underlying the Constitution.

The consultation mechanism raises practical questions regarding enforcement. Should the President resist consultation and the courts refuse to intervene, Congress would have two options. The first would be impeachment. n172 But [*446] impeachment is rarely used. n173 The second option would be publicly opposing the President. Specifically, Congress could withhold any endorsement

of the President's action and could even condemn the action. As a final and perhaps drastic matter, Congress could use its appropriations power to deny funding for the activity at issue.

The war powers cannot, and perhaps should not, be removed from the political arena. If Congress and the President are to have political parity, politics may be one of the most effective constraints on presidential warmaking. But this is true only if Congress is willing to assert itself. A mechanism for consultation would provide an important step toward achieving the political equilibrium necessary for sound decisionmaking in matters of war and peace.

V. CONCLUSION

The war powers of Congress and the President are products of politics. Since 1789, the President has gradually assumed the dominant warmaking role. By virtue of congressional and judicial acquiescence in forceful executive actions, the President now enjoys an extreme advantage in the political arena. To restore the political balance that the Framers envisioned, Congress must reassert itself in warmaking decisions. This is particularly important for preemptive military actions, which offer the President an opportunity to seize even more warmaking authority.

This note has argued that the President is constitutionally obligated to consult with Congress when he orders preemptive military strikes. The proposed three-element model identifies the legitimacy of the President's authority in a given war powers scenario, thereby determining whether the President must consult prior to taking preemptive action or whether he may delay consultation until after the event.

Finally, this note has proposed a mechanism for consultation. The mechanism is designed to ensure majoritarian participation in war powers decisions while promoting efficiency and executive accountability. By facilitating congressional participation in war powers decisionmaking, the mechanism moves Congress toward political parity with the President. Such parity is necessary for Congress to compete and cooperate better with the powerful modern Presidency.

FOOTNOTES:

n1 See Ratner, The Co-ordinated Warmaking Power -- Legislative, Executive and Judicial Roles, 44 S. CAL. L. REV. 461, 462 (1971) (vague boundaries between the authority granted to Congress and the Executive in formulating military policy make distinctions between the authority of each branch "illusory"); cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1951) (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.").

n2 See Wallace, The War-Making Powers: A Constitutional Flaw?, 57 CORNELL L. REV. 719, 728 (1972) ("There are great gaps in the Constitution as written."); see also A. SCHLESINGER, THE IMPERIAL PRESIDENCY 38 (1973) (presidential treaty power creates a constitutional gap regarding the war powers). But see Velvel, Commentary, 10 VA. J. INT'L L. 65, 67 (1969) (there is "no real gap in the Constitution" -- the Framers knew exactly what they were doing by subordinating the President to Congress).

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n3 The overlap of the war powers, as with all shared powers, was designed to promote rational decisionmaking and to provide a system of checks and balances to curb the potential for abuse and tyranny. See W. REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCHES? 62-63 (1981) [hereinafter W. REVELEY, WAR POWERS] (discussing the Framers' reasoning for involving both branches in areas such as the war powers and treaty-making); Reveley, Commentary, 10 VA. J. INT'L L. 58, 60 (1969) ("By so involving both Congress and the President, the Framers hoped to avoid both hasty, ill-conceived wars and wars devoid of the requisite national backing. . . ."); see also E. CORWIN, TOTAL WAR AND THE CONSTITUTION 13 (1947) (discussing Hamilton's recognition of the overlap between presidential and congressional warmaking powers); A. SCHLESINGER, *supra* note 2, at 7, 19, 35 (Framers' division of war powers between Congress and the President was intentional). For a general discussion about the powers shared between Congress and the President, see

L.
TRIBE, CONSTITUTIONAL LAW @ 2-2, at 15, @ 4-1, at 157 (1978).

n4 Interbranch tension arises from political jousting between the two branches as they attempt to draw boundary lines that cannot be drawn. This tension helps define the issues, which in turn encourages cooperation, sound decisions, and coherent policy. See W. REVELEY, WAR POWERS, supra note 3, at 49 (Congress and the President "must cooperate if any sustained venture for war and peace is to succeed"); Rogers, Congress, The President, and War Powers, 59 CALIF. L. REV. 1194, 1198 (1971) (war powers decisions are most sound if they are a product of a joint process between Congress and the President). But see Abrams, Panama: How America Lost Its Will to Act, Wash. Post, Oct. 15, 1989, at B1, col. 4 (recognizing that interbranch "rivalry" is a component of the constitutional scheme, but arguing that the rivalry has eroded to a "nasty, sometimes vicious brawl" that has paralyzed the government).

n5 Wallace, supra note 2, at 727 (war powers issues are inherently political).

n6 See E. CORWIN, supra note 3, at 13 (Framers intended the war powers overlap to promote cooperation in decisionmaking); A. SCHLESINGER, supra note 2, at 7 (Framers intended "interwoven responsibilities and competing opportunities" to make war powers decisionmaking a joint process); Rogers, supra note 4, at 1198 (same).

n7 See Biden & Ritch, The War Power at a Constitutional Impasse: A "Joint Decision" Solution, 77 GEO. L.J. 367, 374-85 (1988) (describing the accretion of presidential power); see also E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 208 (1958) (same); L. TRIBE, supra note 3, @ 2-4, at 19 (same).

n8 See W. REVELEY, WAR POWERS, supra note 3, at 12 (constitutional war powers issues take on entirely new dimensions as the "capacity," "will to use," and "ultimate consequences" of using force abroad expand); Javits, War Powers Reconsidered, FOREIGN AFF., Fall 1985, at 130, 140 (a congressional role is especially necessary in the nuclear age because "advanced technology, instantaneous communications and super-weapons" constitute a constant threat to society); Wright, The Power of the Executive to Use Force Abroad, 10 VA. J. INT'L L. 43, 55 (1969) (expanding presidential powers increase danger to national security in light of the development of inherently destructive

weapons,
the "shrinking of the world," and greater United States international involvement).

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n9 War Powers: Origins, Purposes and Applications: Hearings Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs, 100th Cong., 2d Sess. 30 (1988) [hereinafter Hearings, War Powers: Origins, Purposes and Applications] (testimony of George R. Berdes, former Staff Consultant) ("State-sponsored terrorism represents a new kind of warfare, accurately and properly described by President Reagan in the case of Libya as armed aggression.").

n10 A declared war is a general or "perfect" war. The Supreme Court has characterized a declared war as "that which destroys the national peace and tranquility, and lays the foundation of every possible act of hostility." Miller v. Miller (Case of the Resolution), 2 U.S. (2 Dall.) 1, 21 (1781).

n11 A statute that authorizes limited hostilities but does not declare general war creates an "imperfect" war. *Id.* at 20; see *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Congress can authorize hostilities short of a declared war).

n12 BUREAU OF PUBLIC AFFAIRS, U.S. DEPT OF STATE, SPECIAL REP. NO. 138, LIBYA UNDER QADHAFI: A PATTERN OF AGGRESSION 1 (1986) [hereinafter LIBYA UNDER QADHAFI]; see M. SMYRL, CONFLICT OR CODETERMINATION? 76-77 (1988) (discussing Qaddafi's rise to power and the accompanying general escalation of tension with the United States); see generally Note, The U.S. Raid on Libya: A Forceful Response to Terrorism, 14 BROOKLYN J. INT'L L. 187, 190-96 (1988) (by D. Turndorf) [hereinafter Note, U.S. Raid on Libya] (discussing Libyan-United States relations).

n13 AMBASSADOR-AT-LARGE FOR COUNTERTERRORISM, OFFICE OF THE SECRETARY OF STATE, U.S. DEPT OF STATE, JAN. FACT SHEET: LIBYA'S QADHAFI CONTINUES SUPPORT FOR TERRORISM 1-2 (1989) [hereinafter CONTINUED LIBYAN TERRORIST SUPPORT]; see Note, U.S. Raid on Libya, *supra* note 12, at 190-92 (characterizing terrorism as Qaddafi's primary instrument of foreign policy).

n14 See CONTINUED LIBYAN TERRORIST SUPPORT, *supra* note 13, at 3-5 (identifying examples of Libyan-supported terrorism against United States citizens, officials, and interests); LIBYA UNDER QADHAFI, *supra* note 12, at 5-7 (summarizing Libyan terrorist acts between 1980-1985); see also Note, U.S. Raid on Libya, *supra* note 12, at 190-91 (alleging that Libya supported the 1972 massacre of 11 Olympic athletes in Munich).

n15 Weintraub, U.S., Citing Libyan Fire, Reports Attacking a Missile Site and Setting 2 Ships Ablaze, N.Y. Times, Mar. 25, 1986, at A1, col. 6; see President's Report to the Speaker of the House of Representatives, Relative to the Libyan Attack on U.S. Forces Engaged in Freedom of Navigation Exercises in the Gulf of Sidra, 22 WEEKLY COMP. PRES. DOC. 423 (Mar. 26, 1986) [hereinafter President's Report on Libyan Attack] (informing Congress of the Libyan attack on United States forces). The Libyans fired SA-5 surface-to-air missiles at United States aircraft flying over the high seas in the Gulf of Sidra. *Id.* These missiles missed their targets. *Id.*

n16 President's Report on Libyan Attack, *supra* note 15, at 423.

n17 Tagliabue, Two Killed, One Fifty-Five Hurt in Bomb Explosion at Club in Berlin, N.Y. Times, Apr. 6, 1986, at A1, col. 6; see M. SMYRL, *supra* note 12, at 78 (linking Libya to the bombing of the Berlin nightclub).

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n18 Gwertzman, Plots on Global Scale Charged, N.Y. Times, Apr. 15, 1986, at A1, col. 3.

n19 War Powers, Libya and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, International Security and Science of the House Comm.

on Foreign Affairs, 99th Cong., 2d Sess. 50 (1986) [hereinafter Hearings, War Powers, Libya and State-Sponsored Terrorism] (testimony of Rep. Lantos). At the hearing, Representative Lantos queried: "How on God's green Earth can one justify the fact that the French were consulted three days in advance and our congressional leadership was consulted three hours in advance?" *Id.*

n20 U.N. CHARTER art. 51. Article 51 provides that:

Nothing in the present Charter shall impair the inherent right of

individual
or collective self-defence if an armed attack occurs against a Member of
the
United Nations, until the Security Council has taken measures necessary to
maintain international peace and security. Measures taken by Members in
the
exercise of this right of self-defence shall be immediately reported to the
Security Council and shall not in any way affect the authority and
responsibility of the Security Council under the present Charter to take
at any
time such action as it deems necessary in order to maintain or restore
international peace and security.

Id.

n21 President's Report to the Speaker of the House of
Representatives, Consistent with the War Powers Resolution, Relative to
U.S. Air
and Naval Forces Conducting Bombing Strikes on Terrorist Facilities and
Military
Installations in Libya, on April 14, 1986, 22 WEEKLY COMP. PRES. DOC. 499
(Apr.
16, 1986). The justification offered by President Reagan was rejected by
the
United Nations General Assembly. See G.A. Res. 41/38, 41 U.N. GAOR Supp.
(No.
23), at 34-35; Henkin, Use of Force: Law and U.S. Policy, in RIGHT V.
MIGHT:
INTERNATIONAL LAW AND THE USE OF FORCE 46 (1989) (criticizing President
Reagan's
claimed justifications of deterrence and preemption). But see Greenwood,
International Law and the United States' Air Operation Against Libya, 89
W. VA.
L. REV. 933, 942-44 (1987) (justifying bombing); Intoccia, American
Bombing of
Libya: An International Legal Analysis, 19 CASE W. RES. J. INT'L L. 177,
187-89
(1987) (same).

n22 The Paris Conference, which involved 145 nations and was convened
partly
in response to Iraq's March 1987 use of chemical weapons against Iran,
reviewed
the 1925 Geneva Convention on Chemical Weapons. Markham, War and
Finger-Pointing, N.Y. Times, Jan. 10, 1989, at A1, col. 1. Specifically,
it
addressed the fact that although the Convention bans the use of chemical
weapons, it does not ban production. Id. The conference concluded with the
participants agreeing that they would not use chemical weapons and that
they
would condemn such use. Declaration, Paris Conference on Chemical
Weapons, Jan.
11, 1989, reprinted in N.Y. Times, Jan. 12, 1989, at A10, col. 1.

n23 CONTINUED LIBYAN TERRORIST SUPPORT, supra note 13, at 6-7; Department of State, Press Conference by George P. Shultz at the Paris Chemical Weapons Conference, Press Release No. 2, at 1 (Jan. 10, 1989); see also Gordon, Libya Says it Can Make Chemical Arms if Others Do, N.Y. Times, Jan. 10, 1989, at A13, col. 4 (Qaddafi denied that the purpose of the Rabta facility was to produce

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chemical weapons).

Libya has reportedly used chemical weapons at least twice. In 1987, Libya used chemical weapons against a Chadian military unit. Duel Over Rabta, ECONOMIST, Jan. 7, 1989, at 34. Chad suffered no casualties but because the wind was blowing the wrong way, six Libyans died. Id. In January 1989, a Sudanese rebel group alleged that Libya had used chemical weapons against it during the previous six months. Pear, Sudanese Rebels Say They are Victims of Poison Gas, N.Y. Times, Jan. 10, 1989, at A12, col. 1.

n24 CONTINUED LIBYAN TERRORIST SUPPORT, supra note 13, at 6-7; Gordon, supra note 23, at A13, col. 4; Qaddafi, Warning on Force, Says He Wants U.S. Talks, N.Y. Times, Jan. 8, 1989, at A14, col. 1 [hereinafter Qaddafi, Warning on Force].

n25 Duel over Rabta, supra note 23, at 34; Qaddafi, Warning on Force, supra note 24, at A14, col. 3.

n26 Duel Over Rabta, supra note 23, at 33.

n27 Id.

n28 France, Canada, and Egypt accepted this assertion with few questions. Gordon, Soviets Dispute U.S. Assertion on Libyan Plant, N.Y. Times, Jan. 7, 1989, at A1, col. 5 [hereinafter Gordon, Soviets Dispute Assertion]. The United Kingdom said it had independent evidence confirming the United States claim that Rabta was a chemical weapons factory, but added that it did not support the use of force against Libya. Gordon, U.S. asks Soviet Aid in Pressing Libya on Chemical Arms, N.Y. Times, Jan. 6, 1989, at A1, col. 1. West Germany was

slow
to accept the United States statement, probably because the United States
also
insisted that a West German chemical firm was helping Libya construct the
plant.
Sciolino, U.S. Criticizes Bonn on Response to Charges on Chemical Company,
N.Y.
Times, Jan. 6, 1989, at A11, col. 1. The Soviet Union rejected the United
States claim. Gordon, Soviets Dispute Assertion, *supra*, at A1, col. 1.

n29 Markham, Among Europeans, Less Skepticism, N.Y. Times, Jan. 12,
1989, at
A10, col. 6.

n30 In 1986, President Reagan notified Congress only after ordering the
air
strike and only three hours before United States aircraft arrived over
Libya.
Hearings, War Powers, Libya and State-Sponsored Terrorism, *supra* note 19,
at 50
(testimony of Rep. Lantos). Similarly, President Reagan did not formally
notify
Congress of his decision to invade Grenada until after troops landed on
October
26, 1983, even though he made the decision on October 23, 1983. See Smith,
1,900 Troops, with Caribbean Allies, Invade Grenada and Fight Leftist
Units;
Moscow Protests; British are Critical, N.Y. Times, Oct. 26, 1983, at A1,
col. 6,
at A16, col. 3; Transcript of Schultz's News Conference on Why U.S. Acted,
reprinted in N.Y. Times, Oct. 26, 1983, at A18, col. 2. Although the
President
notified congressional leadership one day after he made the decision, no
consultation actually occurred. One legislator stated: "We weren't asked
for
advice. . . . We were informed what was taking place." Smith, *supra*, at
A16,
col. 3; see generally Quigley, The United States Invasion of Grenada:
Stranger
Than Fiction, 18 INTER-AM. L. REV. 271, 337-47 (1986) (analyzing the
sequence of
events surrounding the Grenada invasion to determine when the President
actually
made the decision). But cf. Hearings, War Powers, Libya and
State-Sponsored

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Terrorism, *supra* note 19, at 55 (testimony of Rep. Levine) (acknowledging
as
valid the President's justification for not consulting Congress prior to
ordering interception of hijackers of the cruise ship *Achille Lauro*); see
also

id. at 53 (testimony of Abraham Sofaer) (justifying the President's failure to consult). President Reagan's track record suggested that he would not consult with Congress before deciding to launch a preemptive strike against the Rabta facility.

n31 See *infra* Part II.A.1.

n32 See *infra* Part II.A.2.

n33 See *infra* Part II.B. Some presidents have erroneously relied upon their foreign affairs powers as constitutional authority for unilaterally introducing troops into hostilities. See *infra* text accompanying notes 95-101. Because the Framers envisioned congressional participation in war powers decisionmaking, the foreign affairs source of authority to direct the military must stop where the congressional and presidential war powers begin. The President's foreign affairs powers should be rejected as a source of exclusive presidential war powers because they open the door to executive abuse and tyranny. This potential is evident from the alarmingly sweeping language that the Department of State used to justify President Truman's decision to intervene in Korea:

Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.

Assignment of Ground Forces of the United States to Duty in the European Area, Hearings on S. Con. Res. 8 Before the Senate Comms. on Foreign Relations and Armed Services, 82d Cong., 1st Sess. 92-93 (1951) (statement of Secretary of State Dean Acheson), quoted in M. PUSEY, *THE WAY WE GO TO WAR* 9 (1969).

Similarly, the State Department justified the deployment of military forces in Vietnam in part by relying upon the President's foreign affairs powers:

Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the primary responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and

commit
them to military operations when the President deems such actions
necessary to
maintain the security and defense of the United States. . . .

L. MEEKER, U.S. DEPT OF STATE, THE LEGALITY OF U.S. PARTICIPATION IN
THE
DEFENSE OF VIET-NAM 11-12 (Mar. 4, 1966), quoted in M. PUSEY, *supra*, at
6. For
an analysis of the various justifications employed by Presidents Kennedy,
Johnson, and Nixon in the Vietnam War, see generally A. SCHLESINGER, *supra*
note
2, at 177-207.

The President may justifiably employ the military as an arm of foreign
policy
in situations that are unlikely to provoke armed conflict, but a general
foreign
policy exception to the war powers would allow the President to make war
at his
pleasure under the pretext of foreign affairs.

n34 U.S. CONST. art. I, @ 8, cl. 11.

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n35 THE FEDERALIST No. 69, at 418 (A. Hamilton) (C. Rossiter ed. 1961)
(envisioning the President as "first general and admiral of the military
and
armed forces"); see also Javits, *supra* note 8, at 132 (Framers intended to
provide the President with tactical authority while withholding the
ability to
declare war); Reveley, *Commentary*, *supra* note 3, at 64 (Framers'
substitution of
the word "declare" for the word "make" in article I indicates that they
did not
intend for Congress to exercise control over all aspects of war, but
merely over
its initiation); Wallace, *supra* note 2, at 744-46 (Congress has the
exclusive
power to declare war but may not attempt to control how it is conducted).

n36 See Wallace, *supra* note 2, at 744-46 (although Congress enjoys
exclusive
constitutional authority to declare war, it may not exercise control over
presidential "core powers" inherent in the President's constitutional
grant of
power under the commander in chief clause); see also Wallace, *The
President's
Exclusive Foreign Affairs Powers Over Foreign Aid*, 1970 DUKE L.J. 293,
314-21
[hereinafter Wallace, *Exclusive Powers*] (discussing the President's

"traditional core area [that] consists of a wide range of diplomatic functions and those functions of the Commander-in-Chief power as have foreign affairs importance.").

n37 See Wallace, *supra* note 2, at 745 (discussing the scope of the President's exclusive powers).

n38 Wallace, *Exclusive Powers*, *supra* note 36, at 314; see *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring) (Congress has the power to legislate as necessary to administer war "except such as interferes with the command of the forces and the conduct of campaign").

n39 The President might have argued that a *de facto* general war was created in 1986, when Libyan military forces and Libyan-supported terrorists attacked United States interests. See *supra* text accompanying notes 15-17. However, this argument would have run counter to the general conception of "perfect" wars, which by definition require a formal congressional declaration of war.

Thomas Jefferson and Alexander Hamilton bitterly debated the extent to which an attack, with no congressional response, could trigger the President's war powers. Jefferson believed that the President could only respond defensively until Congress authorized other uses of force. M. PUSEY, *supra* note 33, at 54-55. Hamilton, however, argued that once United States interests had been attacked, the President could take whatever action he believed was necessary. See Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1779-80 (1968) [hereinafter Note, *Power to Commit Forces*].

Under a constitutional analysis, Jefferson's argument must prevail. Recognizing a *de facto* war would violate the spirit of the Constitution by eliminating Congress from the war powers equation and providing the President with unbridled warmaking discretion.

n40 When the Constitution was written, international law treatises defined war broadly. Lofgren, *On War-Making, Original Intent, and Ultra-Whiggery*, 21 VAL. U.L. REV. 53, 57 (1986). Thus, this conception of a limited war is consistent with the Framers' views.

n41 U.S. CONST. art. I, @ 8, cl. 11. A letter of marque and reprisal authorized the owner of a private vessel to attack and capture enemy ships.

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BLACK'S LAW DICTIONARY 814 (5th ed. 1979); see Reveley, Commentary, *supra* note

3, at 63-64 (constitutional grant of authority to Congress to issue letters of

marque and reprisal indicates that the Framers intended for Congress to control

"all involvement of American forces in combat, except in response to sudden attack"). The 1856 Declaration of Paris banned the practice of issuing letters

of marque and reprisal. BLACK'S LAW DICTIONARY, *supra*, at 814.

n42 For examples of legislation authorizing imperfect war, see the War Powers

Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50

U.S.C. @@ 1541-1548 (1982)), and the Gulf of Tonkin Resolution, Pub. L. No. 88-408, 73 Stat. 384 (1964), repealed by 84 Stat. 2053 (1971). Although the

means by which Congress may authorize an imperfect war have changed, the importance of Congress' involvement has not. See Hearings, War Powers: Origins,

Purposes and Applications, *supra* note 9, at 164 n.57 (testimony of Elliot Richardson) (because proper constitutional interpretation requires an understanding of the principles that underlie the separation of powers, it is

misleading to focus upon specific 18th century devices or mechanisms); see also

Hearings, War Powers, Libya and State-Sponsored Terrorism, *supra* note 19, at 125 (testimony of Prof. W. Taylor Reveley) ("deeply rooted in the language of the

Constitution . . . is the necessity that Congress participate in American decisions regarding the use of force against other states, irrespective of whether the use of force requires secrecy, speed or only modest coercion").

n43 See *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (the President may

direct the movement of armed forces placed at his command, but only within the

limits established by Congress); *Little v. Bareme*, 6 U.S. (2 Cranch) 170, 177-79 (1804) (conduct of an imperfect war is limited to actions authorized by

Congress); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (war comes in two

flavors under the Constitution -- limited and general; in a limited war, the

President can go no further than the extent of his commission); see generally E.

KEYNES, UNDECLARED WAR 37 (1982) (discussing case law that defines the

imperfect
war concept).

n44 Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. @ 1541-1548 (1982)).

n45 Pub. L. No. 99-399, 100 Stat. 853 (1986) (codified at 22 U.S.C. @ 4801 (Supp. V 1987)).

n46 50 U.S.C. @ 1541(c) (1982). A logical reading of @ 2(c) of the War Powers Resolution envisions that the President may exercise his war powers in three situations. First, if a threat against United States interests is imminent, the President may invoke his constitutional self-defense power without relying on statutory authority. See *infra* Part II.B. Second, if the United States is attacked and the threat remains, the President may justify a military response either under his self-defense power, see *id.*, or under the War Powers Resolution. Finally, if United States interests are attacked but the threat has abated, the President may respond (up to 60 days) with military force pursuant to the War Powers Resolution, even though this response might not be justified under his self-defense power. If a threat is potential but not yet imminent, neither the War Powers Resolution nor the self-defense power would authorize a military response.

n47 See *supra* Part II.A.1.

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n48 The tense of the plain language appears dispositive: "a national emergency created by an attack." 50 U.S.C. @ 1541(c) (1982); see also Biden & Ritch, *supra* note 7, at 386 (concluding that the War Powers Resolution does not reach rescue situations or situations in which the President is "forestalling imminent attack" (emphasis in original)).

n49 Pub. L. No. 99-399, 100 Stat. 853 (1986) (codified at 22 U.S.C. @ 4801 (Supp. V 1987)).

n50 H.R. 4611, 99th Cong., 2d Sess. @ 4(b) (1986). This bill was one of 13 incorporated into the Omnibus Diplomatic Security and Antiterrorism Act.

n51 The Act likely would have withstood a constitutional challenge. See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936) (broad delegation of authority is permissible in the area of foreign affairs); see generally *L. TRIBE*, *supra* note 3, @ 4-2, at 158 (discussing the delegation doctrine).

n52 22 U.S.C. @ 4801 (Supp. V 1987). The Act primarily focuses on diplomatic security. It provides no authority for the President to send military forces abroad to combat international terrorism.

n53 Hearings, War Powers, Libya and State-Sponsored Terrorism, *supra* note 19, app. 7, at 224 (summary prepared by Ellen C. Collier, Specialist in United States Foreign Policy, Foreign Affairs and National Defense Division, Congressional Research Service, Library of Congress).

n54 The President either could have relied on his clearly defined warmaking powers or on powers implied through constitutional gaps. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson developed a framework for analyzing the President's exercise of war powers that were not specifically granted by the Constitution. *Id.* at 635 (Jackson, J., concurring). He argued that the "President's powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* According to Justice Jackson, presidential actions within the realm of constitutional gaps may fall into one of three categories. First, when the President acts consistent with the will of Congress, his power is at a maximum. *Id.* at 636-37. Second, when the President acts in the face of congressional silence, the constitutionality of the President's actions is uncertain. *Id.* at 637. Finally, when the President acts in opposition "to the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his constitutional powers minus any constitutional powers of Congress over the matter." *Id.*

This note proposes a more fluid framework for defining boundaries in the constitutional tug-of-war between the President and Congress. Rather than focusing on three discrete categories, it envisions a continuum, with the

left
endpoint representing exclusive presidential constitutional power and the
right
endpoint representing exclusive congressional constitutional power. The
center
of the continuum represents an area of shared constitutional powers,
including
presidential powers that are triggered by statutory authorization. Under
this
analysis, President Reagan could have unilaterally ordered a preemptive
military
strike against the Rabta plant only if the threat posed by the plant
invoked a
presidential power that would appear on the continuum to the left of the
point
at which the shared presidential/congressional powers would begin.

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n55 At least one commentator has argued that the self-defense power
does not
spring from any specific constitutional provision, but rather is "a
necessary
concomitant of sovereignty itself." Note, Power to Commit Forces, *supra*
note 39,
at 1778.

n56 See U.S. CONST. art. I, @ 8, cl. 15 (giving Congress authority "[t]o
provide for calling forth the Militia to . . . repel Invasions"); *id.* @
10, cl.
3 ("No State shall, without the Consent of Congress . . . engage in War,
unless
actually invaded, or in such imminent Danger as will not admit of delay.").

n57 *Id.* art II, @ 2, cl. 1.

n58 *Id.* @ 1, cl. 1.

n59 *Id.* @ 2, cl. 1.

n60 See THE FEDERALIST No. 69, at 418 (A. Hamilton) (C. Rossiter ed.
1961) (
President would have "supreme command and direction of the military and
naval
forces"); W. REVELEY, WAR POWERS, *supra* note 3, at 64-65 (Framers
recognized the
need for "single command" of the military during wartime).

n61 Article IV, section 4 provides, in part, that "[t]he United States
shall
guarantee to every State in this Union a Republican Form of Government, and
shall protect each of them against Invasion. . . ." U.S. CONST. art. IV, @

4.

n62 See W. REVELEY, WAR POWERS, *supra* note 3, at 39 (discussing the link between the clauses). That the Framers intended the President to retain the power to "repel sudden attacks" should come as no surprise. See *id.* ("[r]esponse to attack [was] a perennial favorite" for discussion at the Constitutional Convention). Not only does this presidential power make sense as a matter of military efficiency, but it is also consistent with the Framers' dominant view of executive power. See THE FEDERALIST 70, at 423 (A. Hamilton) (C. Rossiter ed. 1961) ("Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks. . . ."). But see Lofgren, War Making Under the Constitution: The Original Understanding, 81 YALE L.J. 672, 682-83 (1972) (article IV, @ 4 does not require the inference that the President was to have exclusive power to respond in defense of the states).

n63 A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 31-32 (1976); see also E. FIRMAGE & F. WORMUTH, TO CHAIN THE DOG OF WAR 18 (1986) (summarizing the debate over the changing of the constitutional language from "make" to "declare," and the individual delegates' views).

n64 See A. SCHLESINGER, *supra* note 2, at 4 (although the records of the debate over the change in constitutional language are ambiguous, apparently none of the delegates would have denied the President the power to respond in self defense); Lofgren, *supra* note 62, at 675-77 (records of the debates are unclear, but at least some delegates believed that the change in wording allowed the Executive to retain power to repel attacks); Note, Power to Commit Forces, *supra* note 39, at 1773 (same). Perhaps the reason that the records of the debate are so ambiguous is that the debate was relatively uncontroversial and filled only "one page out of the 1,273 that contained the printed records of the Constitution." Lofgren, *supra* note 62, at 675.

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n65 Velvel, *supra* note 2, at 67; see W. REVELEY, WAR POWERS, *supra* note 3, at

54 (Framers were only too familiar with tyranny by the British monarch, and they did not intend to incorporate this conception of the Executive into the Constitution).

n66 See *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."); THE FEDERALIST No. 69, at 418 (A. Hamilton) (C. Rossiter ed. 1961) (the President's commander in chief powers "amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies -- all which, by the Constitution under consideration, would appertain to the legislature" (footnote omitted) (emphasis in original)); W. REVELEY, WAR POWERS, supra note 3, at 63-65 (clause "viewed as a modest grant" limited to tactical decisions during authorized conflicts).

n67 U.S. CONST. art. II, @ 1, cl. 1.

n68 E. CORWIN, supra note 3, at 11; see also Note, Power to Commit Forces, supra note 39, at 1777 (discussing the debate between Hamilton (Pacificus) and Madison (Helvidius) over the nature and extent of the President's war powers and foreign relations powers).

n69 U.S. CONST. art. I, @ 1.

n70 See id. art. II, @ 1, cl. 1.

n71 7 WORKS OF ALEXANDER HAMILTON 80 (1851), quoted in G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 361 (1986). For Hamilton's general philosophy, see THE FEDERALIST No. 70, at 423 (A. Hamilton) (C. Rossiter ed. 1961) ("Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks. . . ."). Hamilton conceded, however, that the President's powers were limited in the warmaking sphere, that the Executive could not control the

exercise of Congress' powers, and that the Constitution created concurrent war powers authority in Congress and the President. See E. CORWIN, *supra* note 3, at 13 (discussing Hamilton's views).

n72 See E. CORWIN, *supra* note 3, at 11-12 (explaining Madison's arguments and his debate with Hamilton). The Hamilton-Madison debate was never and will never be resolved. This debate reflects an ideological schism over the relationship between Congress and the President and over their respective warmaking roles.

n73 E. CORWIN, *supra* note 7, at 277; see also Note, Power to Commit Forces, *supra* note 39, at 1775-76 (discussing the rapid expansion of presidential power under the commander in chief clause).

n74 See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) (President is "bound to resist" invasion without waiting for legislative approval); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186) (President has power to respond with military force if United States citizens or property are

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threatened). Some scholars read the concept of self defense narrowly, limiting the availability of a military response to invasions of United States territory or "some other attack." E. FIRMAGE & F. WORMUTH, *supra* note 63, at 34. But this view has been criticized as overly simplistic because it fails to define instances in which "some other attack" might justify use of the self-defense power. Born, Review Essay: The President's War Powers (Book Review), 23 TEX. INT'L L.J. 153, 158 (1988) (reviewing E. FIRMAGE & F. WORMUTH, *TO CHAIN THE DOG OF WAR* (1986)).

n75 6 THE WORKS OF DANIEL WEBSTER 261 (1851), quoted in E. FIRMAGE & F. WORMUTH, *supra* note 63, at 49.

n76 See Wallace, *supra* note 2, at 737 (President has often introduced forces into hostile action without congressional authorization); see also Note, Power to Commit Forces, *supra* note 39, at 1785 ("a widespread practice has

developed
of citing the commander-in-chief clause as independent authority for doing
apparently 'anything, anywhere that can be done with an army or navy'"
(quoting
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641-42 (1952)
(Jackson, J.,
concurring)); see generally A. SCHLESINGER, supra note 2, at 35-67
(summarizing
instances of unilateral presidential directives to the military).

n77 See M. PUSEY, supra note 33, at 54-55 (discussing Barbary Coast
incident
of 1801-1804); see also Biden & Ritch, supra note 7, at 375 (same); Note,
Power
to Commit Forces, supra note 39, at 1779 (same).

n78 See M. PUSEY, supra note 33, at 53 (Jefferson was "scrupulous in
respecting the authority of Congress to commit the country to war").

n79 See Note, Power to Commit Forces, supra note 39, at 1779-80
(discussing
Hamilton's broad view of the presidential prerogative).

n80 See M. PUSEY, supra note 33, at 60-61 (discussing Polk's invasion of
Mexico); Biden & Ritch, supra note 7, at 376-77 (same).

n81 Note, Power to Commit Forces, supra note 39, at 1780 (footnote
omitted).

n82 See id. (citing Act of May 13, 1846, ch. 16, 9 Stat. 9); see also
President's Message to Congress, May 11, 1846, reprinted in CONG. GLOBE,
29th
Cong., 1st Sess. 783 (1846), cited in Ratner, supra note 1, at 469 n.46
(Polk
advised Congress that his actions were in self defense).

n83 Representative Abraham Lincoln questioned President Polk's motives
and
the constitutionality of his actions. See M. PUSEY, supra note 33, at 61
(discussing Lincoln's criticism); see also Biden & Ritch, supra note 7, at
377
(same). Lincoln's statement in response to Polk's actions is quoted infra
in
the text accompanying note 149.

n84 See A. SCHLESINGER, supra note 2, at 58-60 (Lincoln exercised
"sweeping
action in the absence of congressional authorization," expanding the scope
of
both civilian and military presidential power).

n85 See id. at 58 (between April 12, 1861, and July 4, 1861, "Lincoln
ignored
one constitutional provision after another"); see also Biden & Ritch,
supra note

7, at 378 (Supreme Court Justice Benjamin Curtis accused Lincoln of being a "military despot").

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n86 Lincoln reportedly stated: "Was it possible to lose the nation and yet preserve the Constitution?" A. SCHLESINGER, *supra* note 2, at 59.

n87 *Id.* at 58-60.

n88 *Id.* at 60.

n89 See *id.* at 88-89 (providing an overview of McKinley's response to the Boxer Rebellion); see also M. PUSEY, *supra* note 33, at 60 (same); Biden & Ritch, *supra* note 7, at 379 (same).

n90 See M. PUSEY, *supra* note 33, at 60 (Boxer Rebellion was a "policing operation"); A. SCHLESINGER, *supra* note 2, at 88 (McKinley's "military intervention [was] for political purposes"); Biden & Ritch, *supra* note 7, at 379 (proffered justifications were pretextual).

n91 Ratner, *supra* note 1, at 470 (citing 34 CONG. REC. 4 (1900)).

n92 A. SCHLESINGER, *supra* note 2, at 89.

n93 For a thorough discussion of Congress' attempts to recover from 140 years of acquiescence, see A. SCHLESINGER, *supra* note 2, at 68-99.

n94 For example, Congress did not give President Roosevelt explicit statutory authority to declare a national emergency before the United States entered World War II. In searching for the authority to declare a limited national emergency, Roosevelt located 99 statutes, spanning 141 years, that provided limited grants of presidential power in emergency situations. A. SCHLESINGER, *supra* note 2, at 111. He read these statutes in conjunction with what he believed to be his inherent constitutional powers and thereby expanded his wartime authority. *Id.* at 122-26. Ever since Roosevelt's presidency, United States citizens have looked to the President to be the preeminent decisionmaker during times of national crisis. See *id.* at 530 (describing FDR's effect upon presidency). Roosevelt seduced the country so effectively that few contemporaries realized the lasting impact he would have upon the scope of presidential power.

See R. DALLEK, FRANKLIN D. ROOSEVELT AND AMERICAN FOREIGN POLICY 313, 529 (1979) (describing FDR's presidency).

n95 A. SCHLESINGER, *supra* note 2, at 135; see M. PUSEY, *supra* note 33, at 86-93 (describing Truman's arrogation of power during the Korean War); Friedman, Waging War Against Checks and Balances -- The Claim of an Unlimited Presidential War Power, 57 ST. JOHN'S L. REV. 213, 226-27 (1983) (Truman was the first president to claim broad inherent power to direct the military); Note, Power to Commit Forces, *supra* note 39, at 1791 (describing Truman's actions); see generally A. SCHLESINGER, *supra* note 2, at 127-76 (accretion of presidential power accelerated during the Korean War).

n96 See M. PUSEY, *supra* note 33, at 86-93 (circumstances permitted consultation); A. SCHLESINGER, *supra* note 2, at 134 (same).

n97 Truman was initially undecided about the source of his authority to introduce troops into Korea and even considered requesting a joint resolution to ratify his decision. A. SCHLESINGER, *supra* note 2, at 132. He ultimately decided not to consult with Congress and relied upon a combination of his

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treaty, executive, commander in chief, and foreign affairs powers. *Id.* at 131-33; see also M. PUSEY, *supra* note 33, at 94 (discussing Truman's search for authority).

n98 During the Cuban Missile Crisis, President Kennedy relied on his inherent executive power to order a blockade of Cuba. A. SCHLESINGER, *supra* note 2, at 174-75; cf. Note, Power to Commit Forces, *supra* note 39, at 1792 (Kennedy also claimed authorization from the Organization of American States Resolution).

n99 President Johnson ordered troops to the Dominican Republic in 1965, claiming that American lives were endangered by a revolution. Mohr, President Sends Marines to Rescue Citizens of U.S. From Dominican Fighting, N.Y. Times, Apr. 29, 1965, at A1, col. 6. Johnson dispatched 405 Marines immediately. *Id.* By the time the operation had concluded, he had deployed a total of 22,000 troops. A. SCHLESINGER, *supra* note 2, at 178. President Johnson did not precisely identify the source of his authority. See Presidential Text, Statement on Dominican Republic, reprinted in N.Y. Times, Apr. 29, 1965,

at A14,
col. 1.

n100 President Nixon justified the invasion of Cambodia and the bombing of Laos based upon an "elastic" theory of the commander in chief clause. A. SCHLESINGER, *supra* note 2, at 192. Nixon contended that under the commander in chief clause, he had the broad authority to deploy troops into armed conflict anywhere in the world upon his own initiative. *Id.* at 190.

n101 President Reagan relied on his commander in chief clause powers to justify both the 1983 invasion of Grenada and the 1986 air strike against Libya. See President's Report to the Speaker of the House, 22 WEEKLY COMP. PRES. DOC. 499 (Apr. 16, 1986) (Libya); Hearings, War Power, Libya and State-Sponsored Terrorism, *supra* note 19, at 185 (testimony of Rep. Fascell) (discussing President Reagan's justification for the air strike against Libya); President's Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Forces in Grenada, 2 PUB. PAPERS 1512-13 (Oct. 25, 1983) [hereinafter President's Letter on Grenada].

n102 But see *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (narrowly construing the commander in chief clause power to be limited to the direction of "movements of the naval and military forces placed by law at [the President's] command").

n103 67 U.S. (2 Black) 635 (1863).

n104 *Id.* at 670.

n105 *Id.*

n106 *Id.* at 670. But cf. Note, Power to Commit Forces, *supra* note 39, at 1781 (arguing that the expansion of the commander in chief power is not without "inherent limits" because the definitional constraints of "sudden attack" provide some check on the President).

n107 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186).

n108 *Id.* at 111. For a general overview of the bombardment of Greytown, see M. PUSEY, *supra* note 33, at 62-63.

n109 8 F. Cas. at 111.

n110 Id.

n111 Id. at 112 (emphasis added). In dictum, Justice Nelson discussed what today might be considered a preemptive strike:

Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently [sic], require the most prompt and decided action. Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of duty, is not worth preserving.

Id.

n112 M. PUSEY, *supra* note 33, at 62-63 (citation omitted).

n113 Although at one time United States citizens may have been threatened by the Nicaraguan mob, a fair reading of the facts strongly suggests that the threat had abated and that the bombardment was purely for retribution. Thus, at least one commentator has suggested that using *Durand* as precedent for self defense could not be "father from the mark." See Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 658 (1972).

n114 See A. SCHLESINGER, *supra* note 2, at 190-91; cf. Wormuth, *supra* note 113, at 664 (the combination of the "commander-in-chief clause and the supposed precedents [including *Durand*]" has provided the President with improper authority).

n115 See A. SCHLESINGER, *supra* note 2, at 190-91.

n116 343 U.S. 579 (1952).

n117 Id. at 582.

n118 Id. at 587-88.

n119 One possible reading is that the President cannot regulate domestic

industry upon the mere assumption that such action is necessary to defend or protect the United States -- even when the proposed regulation is incident to military hostilities. Or, *Youngstown* might mean only that when Congress provides a statutory mechanism to regulate an industry, the President cannot flout the purpose underlying that statute. For an analysis of the *Youngstown* case, see generally M. MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* (1977); Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953).

n120 *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

n121 See, e.g., *Baker v. Carr*, 369 U.S. 186, 211-14 (1962) (foreign affairs

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and war powers issues are nonjusticiable political questions for which the courts lack judicially manageable standards); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1308-09 (2d Cir. 1973) (legality of military activities in Cambodia is a nonjusticiable political question); *Berk v. Laird*, 429 F.2d 302, 305 (2d Cir. 1970) (same); see generally L. TRIBE, *supra* note 3, @ 4-6, at 173 (courts are reluctant to become embroiled in political disputes between the other branches); *id.* @ 3.16, at 71-79 (outlining the political question doctrine).

n122 See Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1255-56 (1969) (popular expectations influence the President's actions just as the President's actions shape popular expectations); Wright, *supra* note 8, at 51 (public opinion influences the President in war powers decisionmaking).

n123 Legislators are unlikely to protest unconstitutional presidential decisions that are politically popular. See *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("any actual test of power [would be] likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law"). This is largely because of their concerns with being reelected. See generally D. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

n124 See McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1, 4 (1966) (discussing the effect of community expectations upon judicial

decisionmaking).

n125 See Wright, *supra* note 8, at 51 (public opinion and the resulting congressional debate influence the President on war powers issues).

n126 Reveley, *supra* note 3, at 60-61.

n127 Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1982)).

n128 See 119 CONG. REC. 36,177 (1973) (discussing the background and purpose of the War Powers Resolution).

n129 See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 25 (1962) (political insulation allows judges to follow "the ways of the scholar"); Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1031 (1984) (judicial review insulates judges from the "pulling and hauling" of normal politics); Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 588 (1975) (judiciary is the most "disinterested" interpreter of the Constitution).

n130 The New Deal cases provide a graphic example of how constitutional decisionmaking is saturated by politics. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), commonly referred to as the "switch in time that saved nine," represented a judicial about-face in response to President Roosevelt's threat to pack the Supreme Court to save New Deal programs that were extremely popular with the United States public. Compare *Schechter Poultry Co. v. United States*, 295 U.S. 495, 551 (1935) (invalidating the National Industrial Recovery Act (NIRA) as an unconstitutional delegation of legislative authority to the Executive) and *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (NIRA's attempt to assist the coal industry was an unconstitutional extension of

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legislative authority to the Executive) with *Jones & Laughlin Steel Corp.*, 301 U.S. at 40-41 (distinguishing *Schechter* and *Carter Coal* but effectively overruling those decisions); cf. Ackerman, *supra* note 129, at 1055 (interbranch conflict such as that which occurred in the 1930s "refine[s] the issues of high legal principle involved in the political conflict and thereby allow[s] Americans to place a constitutional meaning upon a sustained series of electoral victories and legislative successes"); see generally A. MASON, W. BEANEY &

D.
STEPHENSON, JR., AMERICAN CONSTITUTIONAL LAW 229-37 (7th ed. 1983)
(detailing
the Court's New Deal decisions and its response to political pressures); R.
MCCLOSKEY, THE AMERICAN SUPREME COURT 174-79 (1960) (same).

Public opinion also influences judges in the adjudication of statutory
issues. See R. DWORKIN, LAW'S EMPIRE 349 (1986) (the "character and
spread of
public opinion" is relevant to statutory interpretation).

n131 Quotes, A.B.A. J., Aug. 1989, at 30.

n132 See W. REVELEY, WAR POWERS, *supra* note 3, at 11 (under current
interpretations of the Constitution, international law poses no major
obstacle
to presidential decisionmaking). But cf. Wright, *supra* note 8, at 56
("[n]ational security in the present world requires a subordination of
constitutional power to international law").

n133 Some scholars contend that international law provides the proper
framework for analyzing the constitutionality of military action. See
Moynihan,
The Modern Role of Congress in Foreign Affairs, 9 CARDOZO L. REV. 1489,
1500
(1988) (international law is the proper framework to determine whether the
use
of force is both "in [self-]defense and . . . defensible"); Wright, *supra*
note
8, at 55 (international law is a proper means of controlling presidential
discretion in the war powers). But see W. REVELY, WAR POWERS, *supra* note
3, at
11 (international law imposes no constraint upon war powers
decisionmaking).

n134 The Paquette Habana, 175 U.S. 677, 700 (1900). Even when
international
law is incorporated into United States law, it cannot modify the
Constitution.
Hearings, War Powers, Libya and State-Sponsored Terrorism, *supra* note 19,
at 150
(testimony of Profs. Cox & Reveley) (neither the United Nations Charter
nor anyother treaty can "circumvent, modify, amend, or repeal the Constitution").
Moreover, under some circumstances the President may be
constitutionally obligated to ignore international law. See E. FIRMAGE &
F.
WORMUTH, *supra* note 63, at 140-41 (President may not act pursuant to
international law on subject matter that "has been entrusted by the
Constitution
to Congress, not to the President"); see generally G. ALLISON, THE ESSENCE
OF
DECISION (1971).

n135 U.S. CONST. art. II, @ 3.

n136 For example, in 1984 Nicaragua complained to the United Nations that the United States had violated international law by mining Nicaraguan harbors. See Joyner & Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 VA. J. INT'L L. 621, 637 (1985) (discussing the Nicaraguan charges and the United States response). The United States vetoed the Security Council resolution condemning its conduct. *Id.* Nicaragua then filed suit in the International Court of Justice. *Id.* The Reagan Administration denied that the court had jurisdiction and ignored the proceedings despite "harsh criticism" by allies, enemies, and even Congress.

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Id. Such flouting of the rule of law did little to persuade Americans that the President's actions were consistent with what the constitutional war powers should mean. See *U.S. World Court Move Deplored*, N.Y. Times, Apr. 14, 1984, at A12, col. 3 (former Department of State lawyer criticizes Reagan Administration for "turn[ing] the rule of law into a one-way street"); Lewis, *Against the Law*, N.Y. Times, Apr. 12, 1984, at A27, col. 1 (criticizing the United States for flouting the rule of law); *Illegal Deceptive and Dumb*, N.Y. Times, Apr. 11, 1984, at A26, col. 1 (same); Ullman, *World Court Evasion*, N.Y. Times, Apr. 11, 1984, at A27, col. 1 (same); *Captain Disaster*, N.Y. Times, Apr. 9, 1984, at A19, col. 5 (criticizing Reagan's policy in Nicaragua as a violation of international law and "illegitimate" foreign policy).

n137 Another way in which international law influences constitutional law is by supplying legal principles that help define certain concepts, such as self defense. See E. FIRMAGE & F. WORMUTH, *supra* note 63, at 48-50 (international law affected Daniel Webster's interpretation of the self-defense power).

n138 *The War Powers After 200 Years: Congress and the President at Constitutional Impasse: Hearings Before the Special Subcomm. on War Powers of the Senate Comm. on Foreign Relations*, 100th Cong., 2d Sess. 56 (1988) (testimony of Dr. McDonald, Professor of History, University of Alabama).

n139 See E. FIRMAGE & F. WORMUTH, *supra* note 63, at 273 (President must

consult if time permits); Ratner, *supra* note 1, at 469-70 (same).

n140 President's Letter on Grenada, *supra* note 101, at 1512-13; Letter from Davis R. Robinson, Legal Adviser, U.S. Dep't of State, to Prof. Edward Gordon, Chairman, ABA Comm. on Grenada, Section on Int'l Law and Practice (Feb. 10, 1984), reprinted in 18 INT'L L. 381, 381 (1984), cited in Quigley, *supra* note 30, at 273-74. Professor Quigley criticizes this justification by arguing that most United States citizens in Grenada did not believe that they were in danger and that the State Department's rationale was post hoc. Quigley, *supra* note 30, at 287-93.

n141 See *supra* note 30.

n142 6 THE WORKS OF DANIEL WEBSTER 261 (1851), quoted in E. FIRMAGE & F. WORMUTH, *supra* note 63, at 49.

n143 See *supra* text accompanying notes 22-29.

n144 Although production of chemical weapons does not violate international law, use of chemical weapons does. See Geneva Convention on Chemical Weapons, June 17, 1925, 26 U.S.T. 571, 575 T.I.A.S. No. 8061, 67, 94 L.N.T.S. 65, 69 (entered into force in the United States, with reservation, Apr. 10, 1975).

Five nations in the Middle East currently produce nerve gas: Egypt, Israel, Syria, Iraq, and Iran. C. Centner, The Arab Viewpoint on Chemical Weapons and its Effect Upon a Proposed International Ban 4-6 (May 1989) (unpublished manuscript) (copy on file at The Georgetown Law Journal). Libya, without admitting that it built the Rabta plant to produce chemical weapons, has claimed that it has the right to do what other nations can do under international law -- make, but not use, chemical weapons. Gordon, *supra* note 23, at A12, col. 3.

n145 Cf. Greenwood, *supra* note 21, at 945 (it is not sufficient that the

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United States anticipates a Libyan attack on some unspecified future date; to remain within the limits of the self-defense power, the threat must be reasonably imminent as of the date of the bombing); Tucker, Using Force Against

Libya?, N.Y. Times, Jan. 11, 1989, at A23, col. 2 (concluding that "there is no apparent justification in the law of the [United Nations] Charter for bombing the Libya plant").

Some commentators, focusing on the earlier United States strike against Libya, have disagreed with this analysis. See Intoccia, *supra* note 21, at 210-12 (justifying United States action against Libya in April 1986 because preemptive action against ongoing terrorism deters future aggression); Torricelli, The War Powers Resolution of the Libyan Crisis, 7 PACE L. REV. 661, 668-69 (1987) (United States raid on Libya in 1986 was justifiably undertaken to "deter and pre-empt" future attacks on United States citizens).

n146 M. CELMER, *TERRORISM, U.S. STRATEGY, AND REAGAN POLICIES* 88 (1987). Terrorist groups are usually "small and homogeneous and are comprised of individuals that are closely related by family or friendship." *Id.* Because of this, they are seldom vulnerable to techniques such as electronic surveillance. *Id.*

n147 *Id.* at 88-89 (reduced intelligence funding has hindered United States intelligence capabilities); Abrams, *supra* note 4, at B1, col. 4 (congressional oversight has had a deleterious impact on intelligence collection and other covert activities).

n148 Cf. *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) (only the President, acting pursuant to the commander in chief power, can decide upon the degree of force necessary to suppress armed hostile resistance); *Martin v. Mott*, 25 U.S. (12 Wheat) 19, 32-33 (1827) (President must decide the proper military response to a threat.)

n149 Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848), reprinted in 1 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 451 (R. P. Basler ed. 1953), quoted in Biden & Ritch, *supra* note 7, at 377 (emphasis in original). Abraham Lincoln was a legislator at the time he wrote this letter.

n150 See 6 *THE WORKS OF DANIEL WEBSTER* 261 (1851), quoted in E. FIRMAGE & F. WORMUTH, *supra* note 63, at 49.

n151 See *supra* text accompanying notes 22-28.

n152 See Note, *Power to Commit Forces*, *supra* note 39, at 1779.

n153 Wallace, *supra* note 2, at 738.

n154 H. PARMET, *JFK: THE PRESIDENCY OF JOHN F. KENNEDY* 278 (1983); cf. G.

ALLISON, *supra* note 134, at 40 (quoting Soviet statement that Cuban missile sites were unnecessary to the Soviet Union because "powerful rockets" could strike a devastating blow from the Soviet Union).

n155 See Wright, *supra* note 8, at 48 (arguing that reasonable persons "may disagree as to which foreign security interests are worth protecting").

n156 One commentator has suggested that a "harm" analysis might be the proper

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test for when the President may order military action without congressional consultation. *Id.* at 48-49.

n157 See E. FIRMAGE & F. WORMUTH, *supra* note 63, at 17-31 (discussing the constitutional text and principles underlying the allocation of war powers); W.

REVELEY, *WAR POWERS*, *supra* note 3, at 29-31 (scope and precision of the textual grant indicates that the Framers intended to confer broad war powers authority on Congress).

n158 Compare U.S. CONST. art. I, @ 8, (Congress may "provide for common Defence . . . declare war, grant Letters of Marque and Reprisal . . . raise and support Armies . . . provide and maintain a Navy . . . provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections repel Invasions . . . provide for organizing, arming and disciplining the Militia [and] make all Laws necessary and proper") with *id.* art. II, @ 1, cl. 1 (executive power clause) and *id.* @ 2, cl. 1 (commander in chief clause). Commentators have drawn similar conclusions. See W. REVELEY, *WAR POWERS*, *supra* note 3, at 31-38 (comparing the textual grants and concluding that despite gaps, the Framers intended Congress to be involved in policy decisions involving the military); Rogers, *supra* note 4, at 1195-98 (same).

n159 THE FEDERALIST NO. 69, at 418 (A. Hamilton) (C. Rossiter ed. 1961) (President's power as the Commander in Chief is limited to tactical control).

n160 W. REVELEY, *WAR POWERS*, *supra* note 3, at 64-65.

n161 See *id.* at 175-79 (requirement of congressional consultation on warmaking decisions provides a majoritarian check on presidential power); Henkin, *Foreign Affairs and the Constitution*, FOREIGN AFF., Fall 1986, at 284, 302 (absent exigent circumstances and when the opportunity exists, the President must consult with Congress); Ratner, *supra* note 1, at 470 (same).

n162 Hearings, War Powers, Libya and State-Sponsored Terrorism, *supra* note 19, at 125 (testimony of Prof. W. Taylor Reveley) ("deeply rooted in the language of the Constitution . . . is the necessity that Congress participate in American decisions regarding the use of force against other states, irrespective of whether the use of force requires secrecy, speed or only modest coercion").

n163 See Hearings, War Powers: Origins, Purposes and Application, *supra* note 9, at 203-04 (testimony of Elliot Richardson) (arguing that consultation should, at a minimum, include the leadership of both houses and the chairpersons of key committees); see also Biden & Ritch, *supra* note 7, at 396-412 (proposing legislation that would require consultation for war powers decisions).

Not all commentators agree that consultation is constitutionally compelled, or even that it is a good idea. Representative Hyde has argued that the President should not be required to consult with Congress because "[w]e can't keep a secret." Hearings, War Powers, Libya and State-Sponsored Terrorism, *supra* note 19, at 136-37. He has quoted an unidentified member of Congress who reportedly said that he "could condone . . . a leak if it was the only way to block an ill-conceived operation." *Id.*

n164 Blakesley, An Essay on Executive Branch Attempts to Eviscerate the Separation of Powers (Book Review), 1987 UTAH L. REV. 451, 455 (reviewing E. FIRMAGE & F. WORMUTH, *TO CHAIN THE DOG OF WAR* (1986)) (Constitution provides for

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Congress to play a greater role in foreign affairs than "mere ratification of presidential action").

n165 But cf. *INS v. Chadha*, 462 U.S. 919, 959 (1983) ("exercise of

legislative power" is constitutional only if Congress respects the bicameralism and presentment clauses). The principles underlying Chadha pose no barrier to the policy dialogue between Congress and the President that this note envisions. Chadha requires Congress to conform with specific procedural requirements when exercising legislative power. *Id.* at 952. If congressional action, regardless of what that action is called, alters "legal rights and duties," presentment and bicameralism apply. *Id.* But consultation merely provides the President with advice and dialogue. The leadership cannot alter any of the President's "legal rights or duties." Chadha invalidated the one-house veto -- it does not apply to the consultation mechanism.

n166 Congress has considered similar proposals in the past. See S.J. Res. 340, 99th Cong., 2d Sess. (1986) (amendment to the War Powers Resolution that would have established a permanent consulting body), reprinted in Hearings, War Powers, Libya and State-Sponsored Terrorism, *supra* note 19, at 216-17; H.R. Res. 8735, 93rd Cong., 1st Sess. (1973) (bill that would have created a Joint Committee on National Security to "provide a manageable forum for regular consultation between the President and congressional leaders"), cited in M. SMYRL, *supra* note 12, at 148. For another proposal facilitating joint war powers decisions, see Biden & Ritch, *supra* note 7, at 396-410.

n167 But cf. Hearings, War Powers, Libya and State-Sponsored Terrorism, *supra* note 19, at 128 (testimony of Prof. W. Taylor Reveley) (arguing that it would be difficult to create a small congressional consultation committee because many members of Congress would want to participate).

n168 P. Buchen, The American President's Discretion in Foreign Affairs: Rules of the Decision Process 9 (Feb. 15, 1989) (unpublished manuscript) (copy on file at The Georgetown Law Journal). Mr. Phil Buchen was counsel to President Ford.

n169 *Id.*

n170 See *United States v. Nixon*, 418 U.S. 683, 712-13 (1973) (recognizing executive privilege doctrine but not permitting President to invoke it in

the
face of criminal investigation and in the absence of national security
concerns); see generally L. TRIBE, supra note 3, @ 4-14, at 202-15
(discussing
executive privilege doctrine).

n171 See 5 U.S.C. @ 552(b) (1982) (listing Freedom of Information Act
exemptions); Classified Information Procedures Act, Pub. L. No. 96-456, 94
Stat.
2025 (1980) (codified at 18 U.S.C.A. Appendix (1982)) (establishing
procedures
to exempt government information from disclosure that is sensitive to
national
security).

n172 See U.S. CONST. art. II, @ 4 ("The President . . . shall be
removed from
Office on Impeachment for . . . Treason, Bribery, or other High Crimes and
Misdemeanors."); see generally L. TRIBE, supra note 3, @ 4-16, at 215-33
(discussing the impeachment provision).

n173 Only two Presidents have been seriously threatened with
impeachment. In
1867, Andrew Johnson was impeached by the House and came within one vote of

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PAGE 36

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conviction in the Senate. See L. TRIBE, supra note 3, @ 4-16, at 217.
Richard
Nixon probably would have been impeached if he had not resigned in 1974.
Id. at
218. Thus, it is highly unlikely that impeachment would be a serious
threat to
the President.

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100297
***** Print Completed *****

Time of Request: October 11, 2000 11:13 am EST

Print Number: 40:0:15024850 Number of Lines: 1673
Number of Pages: 36
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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Mary U. Binns (CN=Mary U. Binns/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:12-OCT-2000 05:22:02.00

SUBJECT: President: have killed the bill clinton that signed the China legislation and ordered

TO: Stephen K. Horn (CN=Stephen K. Horn/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Charles C. Easley (CN=Charles C. Easley/OU=OA/O=EOP@EOP [OA])

READ:UNKNOWN

TO: Mary U. Binns (CN=Mary U. Binns/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: pandadesk@ibm.net (pandadesk@ibm.net [UNKNOWN])

READ:UNKNOWN

TEXT:

Categories=

DeliveredDate= 10/11/2000 4:02:15 PM

RouteTimes= 10/11/2000 4:02:15 PM

RouteTimes= 10/11/2000 4:02:14 PM

RouteServers= CN=INET3/O=EOP

CopyTo= VicePresident@Whitehouse.GOV

SendTo= President@Whitehouse.GOV

PostedDate= 10/11/2000 3:58:39 PM

Subject= President: have killed the bill clinton that signed the China
legislation and ordered

From= WKonz10298@aol.com

SMTPOriginator= EIR\$PR@WH2.EOP.GOV

SCANNER RESULTS

have killed the bill clinton that signed the China legislation and ordered

MESSAGE BODY

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#41140)

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Received: from FCPWH-DAEMON by WHITEHOUSE.GOV (PMDF V5.2-33 #41140)

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Received: from imo-r05.mail.aol.com ([152.163.225.5])

by WHITEHOUSE.GOV (PMDF V5.2-33 #41140)
with ESMTP id <01JV7T5J43XA8WXZ90@WHITEHOUSE.GOV>; Wed,
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id 1.24.b98d93c (6622); Wed, 11 Oct 2000 15:58:39 -0400 (EDT)
Date: Wed, 11 Oct 2000 15:58:39 -0400 (EDT)
From: WKonz10298@aol.com
Subject: Change of Will
To: President@Whitehouse.GOV
Cc: VicePresident@Whitehouse.GOV
Message-id: <24.b98d93c.2716206f@aol.com>
MIME-version: 1.0
X-Mailer: AOL 5.0 for Windows sub 120
Content-type: text/plain; charset=US-ASCII
Content-transfer-encoding: 7BIT
Comments: FCP version 1.7 jms/990907
Original-recipient: rfc822;EIR\$PR

Dear President William J. Clinton:

I think the signing of the trade legislation is an attempt too change
the American Will.

Had you acted properly in all check systems. The President would
have killed the bill clinton that signed the China legislation and ordered
a war powers summery too access the harm and effects on national security.
since I am the NSA director now. It is so ordered.

I would also like a joint US/China bombing operation over Gary Locke's
native
cities eradicating any threat of his re-election.

Wilbert A. Konz
WKonz10298@aol.com

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Sherman A. Williams (CN=Sherman A. Williams/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:14-OCT-2000 13:46:30.00

SUBJECT: War Powers Release

TO: Megan C. Moloney (CN=Megan C. Moloney/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

TEXT:

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

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The following is a HEX DUMP:

===== END ATTACHMENT 1 =====

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

October 14, 2000

TEXT OF A LETTER FROM THE PRESIDENT
TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES
AND THE PRESIDENT PRO TEMPORE OF THE SENATE

October 14, 2000

Dear Mr. Speaker: (Dear Mr. President:)

At approximately 5:15 a.m. eastern daylight time, October 12, 2000, a small boat exploded alongside the USS COLE (DDG 67) while the USS COLE was mooring to a harbor fueling island during a refueling stop in the port of Aden, Yemen. A number of American sailors were killed or wounded, and the USS COLE suffered extensive damage. Department of Defense assets were immediately identified to provide medical, security, and disaster responses.

Later in the day on October 12, 2000, approximately 45 military personnel from U.S. Naval Forces Central Command deployed to Aden to provide medical, security, and disaster response assistance. In addition, a team of approximately 50 U.S. military security personnel arrived in Aden in the early morning hours of October 13, 2000. It is also anticipated that additional similar security elements may be deployed to the area. The security personnel will enhance the ability of the United States to ensure the security of the USS COLE and the personnel responding to the incident. Although the security personnel are equipped for combat, their presence is solely for the purpose of assisting in on-site security. Finally, two U.S. Navy surface combatant vessels are operating in or near Yemeni territorial waters to provide communications and other support, as required. United States forces will redeploy as soon as the additional security support is determined to be unnecessary.

I have taken this action pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution.

I appreciate the support of the Congress in this action to assist in ensuring security of U.S. military forces and other personnel overseas.

Sincerely,

WILLIAM J. CLINTON

#

Automated Records Management System
Hex-Dump Conversion

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Alexander N. Gertsen (CN=Alexander N. Gertsen/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:14-OCT-2000 12:43:34.00

SUBJECT: Re: The final release of the day

TO: Megan C. Moloney (CN=Megan C. Moloney/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Nanda Chitre (CN=Nanda Chitre/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Oliver D. Pangborn (CN=Oliver D. Pangborn/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

TEXT:
Thank you for keeping us in the loop

Megan C. Moloney
10/14/2000 12:38:35 PM
Record Type: Record

To: Nanda Chitre/WHO/EOP@EOP, Alexander N. Gertsen/WHO/EOP@EOP
cc:
Subject: The final release of the day

FYI -- This is heading our way in a little bit....
----- Forwarded by Megan C. Moloney/WHO/EOP on 10/14/2000
12:38 PM -----

Sherman A. Williams
10/14/2000 12:18 PM
Record Type: Record

To: Megan C. Moloney/WHO/EOP@EOP
cc:
Subject: The final release of the day

Megan,

We just got back the War Powers letters regarding deployment of troops in Yemen, which needs to be release today. I need to deliver the letters first to Sen. Thurmond & Speaker Hastert. I should have the release for

you around 1:00pm. Thanks again!

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jill S. Ganek (CN=Jill S. Ganek/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:27-OCT-2000 18:06:41.00

SUBJECT: u.s. v. woodley and tax court letter

TO: Eric S. Angel (CN=Eric S. Angel/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TEXT:

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

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{\f43\froman\fcharset162\fpqr2 Times New Roman Tur;}{\f44\froman\fcharset186\fpqr2 Times New Roman Baltic;}{\f45\fswiss\fcharset238\fpqr2 Arial CE;}{\f46\fswiss\fcharset204\fpqr2 Arial Cyr;}{\f48\fswiss\fcharset161\fpqr2 Arial Greek;}{\f49\fswiss\fcharset162\fpqr2 Arial Tur;}{\f50\fswiss\fcharset186\fpqr2 Arial Baltic;}{\f51\fmmodern\fcharset238\fpqr1 Courier New CE;}{\f52\fmmodern\fcharset204\fpqr1 Courier New Cyr;}{\f54\fmmodern\fcharset161\fpqr1 Courier New Greek;}{\f55\fmmodern\fcharset162\fpqr1 Courier New Tur;}{\f56\fmmodern\fcharset186\fpqr1 Courier New Baltic;}{\f129\fswiss\fcharset238\fpqr2 Tahoma CE;}{\f130\fswiss\fcharset204\fpqr2 Tahoma Cyr;}{\f132\fswiss\fcharset161\fpqr2 Tahoma Greek;}{\f133\fswiss\fcharset162\fpqr2 Tahoma Tur;}{\f134\fswiss\fcharset186\fpqr2 Tahoma Baltic;}{\f183\fmmodern\fcharset238\fpqr1 Lucida Console CE;}{\f184\fmmodern\fcharset204\fpqr1 Lucida Console Cyr;}{\f186\fmmodern\fcharset161\fpqr1 Lucida Console Greek;}

{\f187\fmmodern\fcharset162\fpqr1 Lucida Console Tur;}{\f189\fswiss\fcharset238\fpqr2 Lucida Sans Unicode CE;}{\f190\fswiss\fcharset204\fpqr2 Lucida Sans Unicode Cyr;}{\f192\fswiss\fcharset161\fpqr2 Lucida Sans Unicode Greek;}{\f193\fswiss\fcharset162\fpqr2 Lucida Sans Unicode Tur;}{\f195\fswiss\fcharset238\fpqr2 Arial Black CE;}{\f196\fswiss\fcharset204\fpqr2 Arial Black Cyr;}{\f198\fswiss\fcharset161\fpqr2 Arial Black Greek;}{\f199\fswiss\fcharset162\fpqr2 Arial Black Tur;}

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\par }\pard \qj\fi360\widctlpar\adjustright { [*1009] BEEZER, Circuit Judge:

\par }\pard \qj\fi360\sb120\widctlpar\adjustright { We take this case en banc to address the constitutionality of a practice followed by the Executive for nearly 200 years.

The question before us is whether the President of the United States may constitutionally confer temporary federal judicial commissions during a recess of the Senate pursuant to article II, section 2 of the Constitution.

\par I

\par On February 28, 1980, Walter Heen was nominated to fill a judicial vacancy in the United States District Court for Hawaii. The Senate Judiciary Committee began confirmation hearings on his nomination on September 25, 1980. When the Senate recessed on December 16, 1980, testimony

and hearings on the nomination were complete, but the nomination [**2] did not come before the full Senate for its advice and consent. During the Senate's recess, on December 31, 1980, President Carter conferred a commission on Judge Heen pursuant to the

recess appointment clause of article II of the United States Constitution. Heen then took his oath and assumed his duties as district court judge. On January 21, 1981, Heen's nomination was withdrawn by President Reagan. Heen continued sitting as a district judge pursuant to his recess commission until December 16, 1981, when the 97th Congress ended its First Session. n1

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\par }\pard \qj\widctlpar\adjustright {-----Footnotes-----

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n1 Withdrawal of Judge Heen's nomination, standing alone, did not impair his authority to sit as a district court judge. }\i See { U.S. Const. art. II, \a7 2, cl. 3; }\i see also In re Marshalship for the Southern and Middle Districts of Alabama {, 20 F. 379, 382 (N.D. Ala. 1884) (recess commission continues until the end of next session of Congress).

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {On September 18, 1981, while Heen was sitting out his commission, appellant Janet Woodley was indicted on three [**3] counts of narcotics violations. Woodley filed a motion to suppress evidence, which was denied by Heen. Judge Heen then presided over a bench trial on stipulated facts and found Woodley guilty as charged in the indictment.

\par Woodley appealed the denial of her motion to suppress. A panel of this court raised the issue }\i sua sponte { whether Judge Heen could constitutionally preside over Woodley's trial. n2 The panel held that he could not and it vacated Woodley's conviction. }\i United States v. Woodley {, 726 F.2d 1328, 1339 (9th Cir. 1983). The court having convened en banc, }\i

\i United States v. Woodley {, 732 F.2d 111 (9th Cir. 1984) (order granting rehearing en banc), we hold that the recess appointment clause extends to judicial officers and that a recess appointee to the federal bench can exercise the judicial power of the United States.

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n2 Although the recess appointment issue was not raised by the parties, this court must examine jurisdictional problems }}\i sua sponte. Miller v. Transamerican Press, Inc.}}{, 709 F.2d 524, 527 n.2 (9th Cir. 1983). The case at bar presents such a jurisdictional issue and is subject to our review. }}\i See, e.g., Glidden Co. v. Zdanok}}{, 370 U.S. 530, 536, 8 L. Ed. 2d 671, 82 S. Ct. 1459 (1962).

\par \par }\pard \qj\widctlpar\adjustright {-End Footnotes----- [**4]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {II
\par The recess appointment clause provides that: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, \a7

2, cl. 3. Article III, in turn, provides in relevant part that: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, \a7 1.

\par Woodley contends that under generally accepted principles of statutory construction, the more specific language of article III governs over the general language of the recess appointment clause. She concludes therefore that article III forbids interim judicial recess appointments. We reject this argument.

\par The United States Supreme Court has unequivocally stated that "the Constitution . . . [**1010] must be regarded as one instrument, all of whose provisions are to be deemed of equal validity." }}\i Prout v. Starr}}{, 188 U.S. 537, 543, 47 L. Ed. 584, 23 S. Ct. 398 (1903). Moreover, while article [**5] III speaks specifically about the tenure of federal judges, article I is equally specific in addressing the manner of their appointment. There is therefore no reason to favor one Article over the other.

\par The language of the recess appointment clause explicitly provides that the President has the power to fill }}\i all}}{ vacancies during the recess of the Senate. The }}\i Federalist}}{ papers clarify the meaning of the recess clause, stating that it "is to be considered as supplementary to the [clause] which precedes" and that the vacancies referred to "must be construed to relate to the 'officers' described in the preceding [clause]." }}\i The Federalist No. 67}}{

, at 455 (A. Hamilton) (J. Cooke ed. 1961). The preceding clause in question provides in relevant part that the President "shall nominate, and by and with the Advice and Consent of the Senate shall appoint . . . }}\i Judges of the supreme Court, and all other Officers of the United States}}{ . . ." U.S. Const. art. II, \a7

2, cl. 2 (emphasis added). The language further underscores that there is no basis upon which to carve out an exception from the recess power for federal judges. Particularly relevant in this context is Alexander [**6] Hamilton's statement that "as to the mode of appointing the judges: This is the same with that of appointing the officers of the union in general" }}\i The Federalist No. 78, supra}}{, at 522. n3

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n3 The United States Supreme Court has noted that "the opinion of [] {\i The Federalist} {] has always being considered as of great authority . . . and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed." } {\i Cohens v. Virginia} { , 19 U.S. (6 Wheat.) 264, 5 L. Ed. 257 (1981).

\par \par }\pard \qj\widctlpar\adjustright {- - - - -End Footnotes- - - - -

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {III

\par Woodley also argues that there is no historical evidence that the Framers intended the recess provision to apply to the judiciary. This argument is not only refuted by the express language of the recess clause, which, as previously noted, refers to } {\i all} { vacancies, but it is also refuted by legislative history, as well as historical practice, consensus, and acquiescence.

\par Although the recess appointment clause was adopted without debate, 2 Farrand, [**7] } {\i Records of the Federal Convention} { 533, 540 (1911), there is evidence that it was not entirely uncontroversial. Edmund Randolph, the governor of Virginia, initially declined to sign the Constitution, in part because the recess provision gave the Executive the power to confer judicial commissions during the recess of the Senate. 3 Farrand, } {\i supra} {, at 123, 127.

\par In 1789, shortly after ratification of the Constitution, George Washington, who had served as President of the Constitutional Convention, exercised his power under the recess provision. During the recess between the sessions of the First

Congress, he conferred three recess district judge commissions. 30 } {\i The Writings of George Washington} {, 457-58, 473, 485 n.75 (J. Fitzpatrick ed. 1939).

At the time of these appointments, Edmund Randolph and two contributors to } {\i The Federalist} {, Alexander Hamilton and John Jay, served as members of President Washington's Cabinet. There is no evidence that they doubted the constitutionality of the recess appointments.

n4 Moreover, the district court judges were confirmed upon the return of the Senate without objection to their recess appointments. 1 } {\i Executive Journal of the Senate} { [**8] 38, 40 (1790). It is further noteworthy that President Washington's

recess appointments of Justice Johnson in 1791 and of Chief Justice Rutledge in 1795 went unchallenged. n5 One commentator has aptly [*1011] noted that "the most significant historical fact is that by the end of 1823, there had been five

recess appointments to the Supreme Court. During this period, when those who wrote the Constitution were alive and active, not one dissenting voice was raised against the practice." Note, } {\i Recess Appointments to the Supreme Court -- Constitutional But Unwise} {?, 10 Stan. L. Rev. 124, 132 (1957).

\par \par }\pard \qj\widctlpar\adjustright {- - - - -Footnotes- - - - -

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n4 Randolph, who was Attorney

y General, was advised by President Washington of Judge Griffin's recess appointment. }{\i See}{ 30 }{\i Writings of George Washington, supra}{ , at 472-73. Secretary of State Jay, in turn, had the duty to seal all civil commissions. }{\i See Marbury v. Madison}{, 5 U.S. (1 Cranch.) 137, 2 L. Ed. 60 (1803).

\par n5 Although Rutledge was not ultimately confirmed, it was not because he was a recess appointee, but because of his opposition to the Jay Treaty. }{\i See Ex parte Ward}{, 173 U.S. 452, 454 n.1, 43 L. Ed. 765, 19 S. Ct. 459 (1899).

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {The actions of the three branches of our government have consistently confirmed the President's power to make recess appointments. The Executive Branch has made extensive use of the recess power. Approximately 300 judicial recess appointments have been made in our nation's history. n6 President s Eisenhower and Kennedy alone made fifty-three such appointments during their Administrations.

}{\i See}{ H. Chase, }{\i Federal Judges The Appointing Process}{ 86-88, 114-15 (1972).

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n6 These statistics were compiled from the files of the Office of the Deputy Attorney General at our request.

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {The Legislative Branch has consistently confirmed judicial recess appointees without dissent. Moreover, Congress has passed legislation providing for the salaries of recess appointees, without excluding judges. 5 U.S.C. \a7 5503; }{\i see also}{

S. Res. 334, 86th Cong., 2d Sess., 106 Cong. Rec. 18,130-45 (1960) (statement of Senator Hart) (confirming President's power to make judicial recess appointments).

\par Finally, we turn to the Judicial [**10] Branch. The only direct challenge, prior to the present action, to the President's power to make judicial recess appointments was rejected by the Second Circuit in }{\i United States v. Alcocer}{

, 305 F.2d 704 (2d Cir. 1962), }{\i cert. denied}{, 371 U.S. 964, 9 L. Ed. 2d 511, 83 S. Ct. 545 (1963). Although the United States Supreme Court has never passed on the issue, numerous Justices have been recess appointees.

Chief Justice Rutledge sat as a recess appointee for six months and participated in two decisions. He delivered the opinion of the Court in }{\i United States v. Peters}{, 3 U.S. (3 Dall.) 121, 1 L. Ed. 535 (1795) and wrote with the majority in }{\i

Talbot v. Janson}{, 3 U.S. (3 Dall.) 133, 1 L. Ed. 540 (1795). Justice Curtis, who received a recess appointment

in 1851, sat as a judge of the Circuit Court of the United States for the First Circuit and the Rhode Island District Court, while he was a recess appointee.

}{\i See}{ Note, }{\i supra}{, at 131 n.24. Altogether, fifteen recess appoint

tments

have been made to the Supreme Court. Staff of House Comm. on the Judiciary, 86th Cong., 1st Sess., *Recess Appointments of Federal Judges* 40 (Comm. Print 1959). Of these, at least four [*

*11] appointees sat on the Court prior to their confirmation. Note, *supra* {}, at 125. There is no evidence that any member of the Supreme Court ever objected to this practice on constitutional grounds.

\par IV

\par Our historical review demonstrates that there is an unbroken acceptance of the President's use of the recess power to appoint federal judges by the three branches of government. Woodley argues, however, that the Supreme Court's recent decision in *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), teaches that historical patterns cannot save an unconstitutional practice.

\par We agree that historical acceptance alone cannot conclusively establish a practice's constitutionality. Yet while we rely only in part on historical consensus in upholding the President's authority to make judicial recess appointments,

we cannot ignore historical observance. The teachings of *Chadha* are not to the contrary. That case held that historical acceptance of the legislative veto could not prevent it from running afoul of the Constitution. 103 S. Ct. at 2279 n.13. The legislative veto is, however, a recent practice, barely 50 years old. Its use does not reach back to the [*12] days of the Framers, such as the practice at issue. Moreover, it is an impermissible

statutory [*1012] methodology, unsupported by an express constitutional grant of authority. While the use of the recess clause to make temporary judicial appointments has been accepted by all three branches of government for nearly 200 years, the relatively young legislative veto has been referred to by the United States Supreme Court as "the most recent episode in a long tug of war between the Executive and Legislative Branches" *Buckley v. Valeo*, 424 U.S. 1, 140 n.176, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976) (per curiam). n 7

\par The first legislative veto provision was challenged shortly after its passage. *See* 37 Op. Att'y Gen. 56, 63-64 (1933). Eleven Presidents have gone on record challenging the Congressional veto power as unconstitutional. *Chadha*, 103 S. Ct. at 2779 n.13.

\par The United States Supreme Court has made clear that considerable weight is to be given to an unbroken practice, which has prevailed [*13] since the inception of our nation and was acquiesced in by the Framers of the Constitution when they were participating in public affairs. *See*, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322, 81 L. Ed. 255, 57 S. Ct. 216 (1936); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412, 48 S. Ct. 348, 72 L. Ed. 624 (1928); *Stuart v. La*

\par -----Footnotes-----

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\par -----End Footnotes-----

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ird}{
, 5 U.S. (1 Cranch) 299, 2 L. Ed. 115 (1803). This principle was reaffirmed by
the Court less than a month after }{\i Chadha}{. In }{\i Marsh v. Chambers}{, 4
63 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983), Chief Justice Burger, w
ho also authored }

{\i Chadha}{, noted that "in light of the unambiguous and unbroken history of m
ore than 200 years, there can be no doubt that the practice of opening legislat
ive sessions with prayer has become part of the fabric of our society." }{\i Ma
rsh}{

, 103 S. Ct. at 3336. Much in the same way, the use of the recess provision to
appoint federal judges has been inextricably woven into the fabric of our natio
n.

\par V

\par Woodley says that a technical argument could be made that the language of
the recess clause giving the President the power to fill all vacancies that "ma
y happen during the [**14] Recess of the Senat

e," means that only those vacancies that occur during the recess itself can be
filled by Presidential appointment. She reasons therefore that Judge Heen's app
ointment is invalid, because the vacancy which he filled did not occur during a
recess of the Sen

ate. Woodley's interpretation conflicts with a common sense reading of the wor
d }{\i happen}{, as well as the construction given to this word by the three br
anches of our government.

\par In a vacuum, the use of the word }{\i happen}{ could be interpreted to ref
er to vacanc

ies that either "happen to occur" or "happen to exist" during a recess of the S
enate. n8 Yet the former interpretation would lead to the absurd result that al
l offices vacant on the day the Senate recesses would have to remain vacant at
least until the Se

nate reconvenes. Not only judicial positions, but all offices within the purvi
ew of article II,

clause 2 would have to remain vacant. The positions of cabinet members and oth
er high government officials would have to remain unfilled until the return of
th

e Senate. If a vacancy occurred on the last day before the Senate's recess, th
e President would be without power to fill that vacancy in the ensuing [**15]
recess. Even assuming that the Senate was informed of the vacancy prior to its
recess and the [*

l
013] President submitted a timely nomination, the Senate would still be faced
with the dilemma of either confirming a candidate of whose qualifications littl
e is known or leaving that office vacant until the Senate reconvenes. We agree
with the Second C

ircuit that this interpretation "would create Executive paralysis and do violen
ce to the orderly functioning of our complex government." }{\i Allocco}{, 305 F
.2d at 712; }{\i see also}{ Note, }{\i supra}{

, at 126 (apparent purpose of recess clause "was to assure the President t
he capacity for filling vacancies at any time to keep the Government running sm
oothly"). We cannot attribute to the Framers an intent to create such a potent
ially dangerous situation. }{\i See South Carolina v. United States}{

, 199 U.S. 437, 449, 50 L. Ed. 261, 26 S. Ct. 110 (1905).

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n8 English language dictionaries of the Seventeenth, Eighteenth and Nineteenth centuries shed little light on this issue. }{\i See, e.g., Cole's Dictionary}{ (1692) (defining "hap" as "to catch or snatch"); }{\i Blount's Dictionary}{ (2d ed. 1719) (defining "happe" as to "match or catch"); }{\i Bailey's Dictionary}{ (1737) ("to fall out"); }{\i Sheridan's English Dictionary}{ (2d ed. 1789) ("To fall out by chance, to come to pass; to light on by accident"); 1 }{\i Webster's Dictionary}{ (1828) ("To come by chance," "to come, to befall," "to light"); }{\i Richardson's English Dictionary}{ (1839) ("Any thing, something, that comes or falls into our hold or possession, any thing caught; chance accident, luck.") It is noteworthy, however, that it is only in modern usage that }{\i happen}{ has come to signify merely "to take place or occur." }{\i Webster's New International Dictionary}{ (2d ed. 1934).

\par \par }\pard \qj\widctlpar\adjustright {- - - - -End Footnotes- - - - - [**16]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright { We also emphasize that both the courts and the Executive Branch have consistently construed the recess clause as giving the President the authority to fill all vacancies that exist while the Senate is in recess. }{\i See, e.g., Allocco}{

, 305 F.2d at 712-15 (President may make appointments to all vacancies that exist during a Senate recess); }{\i In re Farrow}{ , 4 Wood. 491, 3 F. 112, 116 (N.D. Ga. 1880) (President has power to make appointments "notwithstanding the fact that the vacancy filled by his appointment first happened when the senate was in session."); 1 Op. Att'y Gen. 631, 633 (1823) ("Whether [a vacancy] arose during the session of the Senate, or during their recess, it equally requires to be filled."); 2 Op. Att'y Gen. 525, 528 (1832) (President may make recess appointments "'if there happen to be any vacancies during the recess.'"); 19 Op. Att'y Gen. 261, 263 (1889) ("Wherever }{\i there is a vacancy there is a power to fill it}{.") (emphasis in original).

\par Both Houses of Congress have apparently recognized the soundness of this construction of the recess power. }{\i See}{ Nomination of Charles Beecher Warren to be Attorney General, 67 Cong. Rec. 263-64 (1925) (recognizing [**17] President's power to fill vacancies regardless of when they arose) ; 52 Cong. Rec. 1369-70 (1915) (statement of Congressman Borland) (recognizing power of president to fill vacancies that occurred during a previous session of the Senate). Moreover, Congress has provided for payment of recess appointees, such as Heen, whose nominations were pending at the time of the Senate's recess. 5 U.S.C. \a7

5503(a)(2). We therefore decline to adopt Woodley's "happen to occur" argument and recognize the President's power to fill all vacancies that exist during a recess of the Senate.

\par VI

\par Finally, we address Woodley's related arguments that the recess appointments clause is merely a "housekeeping measure" and that Judge Heen lacks the attributes of an article III judge contrary to the teachings of }{\i Northern Pipeline Construction Co. v. Marathon Pipe Line Co.}{, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982).

\par In }{\i Marathon}{, Justice Brennan's plurality opinion held that Congress may not, through a statute, constitutionally vest the non-article III adjunct bankruptcy judges with article III powers. }{\i Id.}{ at 87. n9 Yet the present case is not concerned with an attempt to circumvent [**18] article III by statute, but with the scope of an express constitutional provision. Moreover, the recess appointment clause is not simply a statutory solution to a judicial problem or a mere housekeeping measure. The clause prevents the Executive from being incapacitated during the recess of the Senate. This in turn prevents extended judicial vacancies, which can cause the denial of the important right of access to the courts. The Framers considered the recess appointment clause sufficiently important to include it in the Constitution. In the early days of the Republic, travel time was measured in days, not hours, and extended congressional recesses were expected. The advent of modern jet travel, instant communication, and present day prolonged sessions of Congress do not justify characterizing [**1014] the recess appointment clause merely as a housekeeping measure.

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\par }\pard \qj\widctlpar\adjustright {- - - - -Footnotes- - - - -

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n9 Justice Brennan was himself a recess appointee.

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A recess appointee lacks life tenure and is not protected from salary diminution. As [**19] a result, such an appointee is in theory subject to greater political pressure than a judge whose nomination has been confirmed. Yet our Constitution has bestowed

upon the Executive the power to make interim judicial appointments. This power is not unfettered, however, but is subject to its own limitations and safeguards. It may only be invoked when the Senate is in recess, and recess commissions expire at the end

of the next congressional session. U.S. Const. art. II, \a7 2, cl. 3; }{\i see Staebler v. Carter}{

, 464 F. Supp. 585, 597 (D.D.C. 1979). We must therefore view the recess appointee not as a danger to the independence of the judiciary, but as the extraordinary exception to the prescriptions of article III. }{\i Cf. Marathon}{ , 458 U.S. at 70 (certain exceptional powers bestowed upon Congress by Constitution not subject to prescriptions of article III). The judicial recess appointee, who has sworn to uphold the Constitution, fills a void left by those preceding in office, thereby permitting the unbroken orderly functioning of our judicial system.

\par It should also be noted that as a practical matter, a recess appointee could not be a "lion under the throne," subject to the whims [**20] of the President. 28 U.S.C. \a7

144 (bias or prejudice of a judge). "The evils of legislative and executive coercion . . . have no support in our nation's history." }{\i Allocco}{, 305 F.2d at 709.

\par VII
\par Even viewing the recess clause as an unwise

constitutional provision, it is not for this court to redraft the Constitution. Changes in that great document must come through constitutional amendment, not through judicial reform based on policy arguments. Accordingly, we hold that Judge Heen, as a

recess appointee to the federal bench, could exercise the judicial power of the United States.

\par The case is remanded to the panel for determination on the merits.

\par BROWNING, Chief Judge, SNEED, SKOPIL, FARRIS, ALARCON and POOLE, Circuit Judges, concurring.

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\par }\pard \qj\widctlpar\adjustright {DISSENTBY:
\par }\pard \qj\fi360\widctlpar\adjustright {NORRIS; FLETCHER; FERGUSON; REINHARDT
RDT

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\par }\pard \qj\widctlpar\adjustright {DISSENT:
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\par }\pard \qj\fi360\widctlpar\adjustright {NORRIS, Circuit Judge, with whom FLETCHER, FERGUSON and REINHARDT, Circuit Judges, join in the dissent.

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {Article III of the Constitution provides that "the judicial Power of the United States" shall be exercised by judges whose independence from the political branches of government is assured by guarantees of life tenure and undiminished compensation. Today, our Court carves out an [**21] exception to this explicit and unqualified constitut

i
onal command by holding that the judicial power of the United States may be exercised by judges who serve at the pleasure of the President and the Senate. As Professor Freund aptly commented, every recess appointee sits with "one eye over his shoulder on

Congress." } {\i Harvard Law School Record} {, October 8, 1953, p.1, col.5. He has no assured tenure beyond the next session of the Senate.

\par I agree with the majority that there is a direct conflict between the Recess Appointments Clause of Article II and the tenure and salary provisions of Article III

of the Constitution. I also agree with the majority that in deciding which clause should prevail, we must look beyond the Constitution itself. As the majority observes, the text gives us "no reason to favor one article over the other."

\par Nor do the contemporaneous writings of the Framers of the Constitution shed much light on the issue. } {\i The Federalist} { and other sources overflow with references to the importance of an independent judiciary as a corollary of the very

centerpiece of the constitutional plan -- the separation of powers. But the records of the constitutional era tell [**22] us virtually nothing about the Recess Appointments Clause or how it was to interact with the tenure and salary provisions of Article III.

\par [*1015] My major point of disagreement with the majority is its reliance upon the executive's practice of making recess judicial appointments as virtually the sole basis for its conclusion that the practice is constitutional. In my view, the majority skips what I believe should be a crucial step in the constitutional inquiry: evaluating and balancing the competing constitutional values at stake. Because of its uncritical acceptance of the historical practice as determinative of

the constitutiona

I issue, the majority fails to make any serious comparative analysis of the concerns for governmental efficiency underlying the Recess Appointments Clause and the principle of judicial independence underlying the tenure and salary provisions of

Article III.

\par We need only look to recent history to appreciate that there is genuine tension between the values underlying the two opposing constitutional provisions.

President Eisenhower's recess appointments to the Supreme Court of Chief Justice Earl Warren in 195

3 and Justice Brennan in 1956 both created [**23] controversy about the legitimacy of recess appointments

to that Court. Senator Joseph McCarthy's public interrogation of Justice Brennan while the latter was a sitting Justice of the Court tells its own cautionary tale:

\par Senator McCarthy. You, of course, I assume, will agree with me and a number of the members of the committee -- that communism is not merely a political way of life, it is a conspiracy designed to overthrow the United States Government.

\par M

r. Brennan. Will you forgive me an embarrassment, Senator. You appreciate that I am a sitting Justice of the Court. There are presently pending before the Court some cases in which I believe will have to be decided the question what is communism, at least

in the frame of reference in which those particular cases have come before the Court.

\par I know, too, that you appreciate that having taken an oath of office it is my obligation not to discuss any of those pending matters. With that qualification, whether

or the label communism or any other label, any conspiracy to overthrow the Government of the United States is a conspiracy that I not only would do anything appropriate to aid suppressing, but a conspiracy which, of course, [**24] like every American, I

abhor.

\par Senator McCarthy. Mr. Brennan, I don't want to press you unnecessarily, but the question was simple. You have not been confirmed yet as a member of the Supreme Court. There will come before that Court a number of questions involving the all-important

issue of whether or not communism is merely a political party or whether it represents a conspiracy to overthrow this Government.

\par I believe that the Senators are entitled to know how you feel about that and you won't be prejudicing then any cases by answering the question.

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\par } { \i Hearings Before the Senate Committee on the Judiciary on Nomination of William Joseph Brennan, Jr.: 85th Cong., 1st Sess., 17-18 (1957) } {.

\par } \pard \qj \f360 \sb120 \widetlpar \adjustright { Even before Justice Brennan's ordeal, the recess appointment

of Chief Justice Warren provoked what seems to have been the first scholarly comment concerning the constitutionality of such appointments. n1 The Warren appointment occurred after } { \i Brown v. Board of Education } {

, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1

954), was originally argued to the Supreme Court but before reargument actually took place. In response to the Warren appointment, the eminent constitutional

scholar [**25] Professor Henry M. Hart, Jr. warned that for Warren to take his seat and decide cases before his confirmation by the Senate would "violate the spirit of the Constitution, and possibly also its letter." } { \i Harvard Law School Record } { , October 8, 1953, p.2, col.2. Professor Hart noted that Warren's permanent appointment would be

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subject to three future contingencies: (1) the decision of the President to forward his nomination to the Senate; (2) the decision of the President not to withdraw the nomination before it has been acted upon; and (3) the decision of the Senate to confirm the nomination. The Senate will be entirely free . . . to postpone its action until near the close of the session in order to see how the new nominee is going to vote.

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\par } { \i Id. } { Hart then stated, "I cannot believe that the Constitution contemplates that any Federal Judge . . . should hold office, and decide cases, with all these strings tied to him." } { \i Id. } { Recognizing that, as the majority here stresses, recess appointments had been made in the past and that Attorneys General had assumed such appointments to be valid, Hart stressed that "occasional practice backed by mere assumption [**26] cannot settle a basic question of constitutional principle." } { \i Id. } { Looking to "the spirit and purpose of the Constitution," Hart observed

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\par the impropriety [of recess appointments to the federal judiciary] becomes unmistakable. On few other points in the Constitutional Convention were the framers in such complete accord as on the necessity of protecting judges from every kind of extraneous influence upon their decisions.

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\par } { \i Id. } { Hart concluded, a judge
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\par cannot possibly have this independence if his every vote, indeed his every question from the bench, is subject to the possibility of inquiry in later committee hearings and floor debates to determine his fitness to continue in judicial office.

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\par } { \i Id. } { The majority today all but ignores the careful analysis of constitutional purposes and values that Professor Hart obviously believed was critical to resolution of the tension between Article III and the Recess Appointments Clause.

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\par -----Footnotes-----

\par } \pard \qj \f360 \sb120 \widetlpar \adjustright { n1 It was not until } { \i United States v. Allocco } { , 305 F.2d 704 (2d Cir. 1962), that the question was apparently first presented to an Article III court for decision. } { \i See } { Part

V }{\i infra}{.

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tnotes- - - - - [**27]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {To be sure, the executive's practice of vesting recess appointees with Article III power has a long and impressive historical pedigree, but the majority indis-

minately defers to this practice as dispositive of its constitutionality. In my view, such uncritical acceptance of a practice as a basis for judging its constitutionality is inconsistent with the judiciary's historic role as the final arbiter of the con-

stitutionality of the actions of the political branches of government. }{\i Marbury v. Madison}{

, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). To make my point that the majority allows practice to play an exaggerated role in its constitutional analysis, I will employ

a four-step inquiry. First, I will review the text of the Constitution. Second, I will examine the contemporaneous writings of the Framers as they pertain to the two clauses in question. Third, I will weigh the competing values that animate the two c-

auses. Finally, after discussing the role of historical practice as a factor in constitutional analysis generally, I will consider the specific practice of making recess judicial appointments as a factor in deciding the constitutionality of that practice.

\par I. THE [**28] CONSTITUTIONAL TEXT

\par The Constitution presents us with two separate and contradictory clauses, one in Article II and one in Article III, each clear and unambiguous on its face. The Recess Appointments Clause, Article II, section 2, provides:

\par The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

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\par }{\i U.S. Const., art. II, \a7 2, cl. 3}{.

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {When read in light of a preceding clause, U.S. Const. art. II, \a7

2, cl. 1, which gives the President the general power to "appoint Ambassadors . . . , Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . . ," the language of Article II

seems to empower the President to grant recess commissions to fill judicial vacancies.

\par Article III, on the other hand, seems equally clear that only persons with the independence secured by life tenure and protection against diminished compensation [**1017] may exercise the judicial power of the United States. The relevant portion of

Article III states simply and unconditionally,

\par The judicial [**29] Power of the United States, shall be vested

in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for th-

their Services a Compensation, which shall not be diminished during their Continuance in Office.

On its face, this language admits of no exception; its command is that only judges with Article III protections may wield Article III power.

Hence, we face an extraordinary situation: a direct conflict between two provisions of the Constitution. No accommodation seems possible; one clause must yield to the other. The majority, in holding that Judge Heen could serve as an Article III judge without possessing Article III protections, resolves the conflict in favor of the Recess Appointments Clause. In doing so, it necessarily reads into the unambiguous language of Article III an exception for recess appointees. I recognize, of course, that the converse is also true: to hold that the Recess Appointments Clause does not apply to Article III judges would in turn mean reading an exception into that clause. That, in the last analysis, is the choice I believe we should make.

Because I agree with the majority that the tension between these two contradictory provisions cannot be resolved solely by reference to the Constitution itself, I turn next -- as we customarily do when the meaning of the Constitution is not clear from its text -- to the contemporaneous writings that reflect the thinking of the Framers. Unfortunately, those sources also fail to tell us which of the two competing clauses the Framers intended to prevail over the other.

-----Footnotes-----

The two law review treatments of the question, both student notes, also agree that the issue cannot be resolved by reference to the constitutional text alone. See Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 Colum. L. Rev. 1758, 1766 (1984) [hereinafter cited as Note, *Historical Practice*]; Note, *Recess Appointments to the Supreme Court -- Constitutional But Unwise*?, 10 Stan. L. Rev. 124, 130 (1957) [hereinafter cited as Note, *Recess Appointments*].

-----End Footnotes-----

II. THE CONTEMPORANEOUS WRITINGS

The contemporaneous writings of the Framers are virtually barren of any references to the Recess Appointments Clause. Although the record contains a few scattered references to the Clause, it was never explained, debated or discussed in any meaningful way. See Note, *Historical Practice* at 1766-73; Note, *Recess Appointments* at 126-130. Other than the text of Article II, Section 2 itself, all we know is that the Clause was proposed just ten days before the end of the Constitutional Convention and was adopted without debate. 2 Farrand, *The Records of the Federal Convention of 1787* 540 (1911); C. Rossiter, *1*

787: The Grand Convention}{ 224 (1966).

\par Even }{\i The Federalist}{, normally a fruitful source of information on t
he thinking of the Framers, is almost silent on the subject of the President's
power to make recess appointments. }{\i The Federalist}{
, No. 76, quotes the Clause itself but fails to mention the judicial branch of
government. n3 Although }{\i The Federalist}{, No. 78, does state that the "mod
e of appointing the judges . . . is the same" as that "fully discussed in the t
wo last numbers,"

}{\i id.}{ at 503, "the two last numbers" [**32] of }{\i The Federalist}{, No
s. 76 and 77, which were concerned with the appointment of other federal office
rs, include no reference to the Recess [**1018] Appointments
Clause other than its verbatim quotation at the outset of No. 76.

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\par }{\p \qj\fi360\sb120\widetlpar\adjustright {n3 }{\i The Federalist}{, No
. 67, (A. Hamilton) (Modern Library ed. 1937) [Hereinafter, all references to }
{\i The Federalist}{ are to the Modern Library edition.], re
futes the specious argument by anti-federalists that the President would be emp
owered by the Recess Appointments Clause to make interim appointments to the Se
nate.

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\par }{\p \qj\fi360\sb120\widetlpar\adjustright {In contrast to the paucity o
f comments on the Recess Appointments Clause by the Framers, the historical rec
ord is a cornucopia of references to the principle of life tenure enshrined in
Article III.

History makes absolutely clear the supreme importance the Framers attached to a
n independent judiciary as a vital corollary to the fundamental concept of the
constitutional plan, the separation of powers.

\par The experience of the Framers with the colonial judiciary [**33] had not
been a happy one. The signers of the Decl
aration of Independence charged that the King "obstructed the Administration of
Justice by refusing his Assent to Laws for establishing Judiciary Powers. He
has made Judges dependent on his Will alone for the tenure of their office and
the amount and pay

m
ent of their salaries." The Declaration of Independence para. 11-12 (U.S. 1776)
. The Framers recognized that these protections, when embodied in the Act of S
ettlement of 1701, had previously freed English judges from royal control. To
translate their co
ncern for judicial independence into practice, the Framers included in Article
III the requirement that federal judges have permanent tenure and undiminishabl
e compensation. }{\i See}{ Pittman, }{\i
The Emancipated Judiciary in America: Its Colonial and Constitutional History}{

, 37 A.B.A.J. 485, 588 (1951). The Framers were determined to ensure that feder
al judges would not be beholden to the executive or the legislature but only to
the law and their own consciences.

\par In contrast with the dearth of references to the Recess Appointments
Clause, the contemporaneous writings overflow with commentary on the fundam
ental importance of permanency [**34] in office as the cornerstone of an independ
ent judiciary. Alexander Hamilton, writing as Publius, eloquently expressed th

e co
ncerns of the Framers:

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\par } \pard \qj \widetlpar \adjustright {As liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security} {\i
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\par } {\i The Federalist} }, No. 78 at 504-05 (emphasis added).
\par } \pard \qj \fi360 \sb120 \widetlpar \adjustright {Hamilton also articulated the Framers' belief that life tenure was necessary to ensure that the judiciary would play its crucial role as the guardian of individual liberty against the power of government:

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\par } \pard \qj \widetlpar \adjustright {If then, the courts [**35] of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in judges which must be essential to the faithful performance of so arduous a duty.

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\par } {\i The Federalist} }, No. 78 at 508. Thus, the letter as well as the spirit and guiding intention of Article III is inconsistent with the exercise of judicial power by recess appointees whose tenure is dependent upon both political branches of government. n4

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\par } \pard \qj \fi360 \sb120 \widetlpar \adjustright {n4 The Columbia Note expressed the conclusion as follows: "In short, the evidence is overwhelming that the framers accorded a central role to article III's tenure and salary provisions in ensuring judicial independence and thereby contributing to the constitutional scheme of separation of powers." Note, } {\i Historical Practice} }, at 1767-68.

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\par } \pard \qj \widetlpar \adjustright {- - - - -End Footnotes- - - - -

\par } \pard \qj \fi360 \sb120 \widetlpar \adjustright {In sum, the Framers left us an abundance of commentary [**36] on Article III, but only a few scattered general references to the Recess Appointments

Clause. The only explicit reference to the interaction of the [*1019] two provisions is in Edmund Randolph's letter to the Virginia House of Delegates explaining his reasons for not signing the proposed Constitution transmitted to the states by the Constitutional Convention. 3 Farrand, }{\i supra}{, 123-27.

\par In his letter, Randolph argues that the Constitution had created an excessively powerful executive, citing as partial evidence for this view his belief that the Recess Appointments

Clause gave the President the power of conferring judicial commissions during the recess of the Senate. There is no evidence, however, that Randolph's comments about the Recess Appointments Clause in this letter represented anything other

than the temporary position of a volatile political figure whose "gyrations" regarding both the value and meaning of the Constitution are well known to historians. }{\i See}{, J. Main, }{\i The Anti-Federalists: Critics of the Constitution, 1781-1788}{

257 (1961). By the time of Virginia's state convention on the Constitution, Randolph had so far banished his earlier doubts regarding [*37] the Constitution that he had actually become one of its "staunchest supporters." G. Bancroft, }{\i History of the Formation of the Constitution of the United States}{ 316 (1882).

\par Contrary to the impression created by his letter, Randolph stated at the Virginia convention that the powers of the President were in all respects carefully circumscribed: "He can do no important act without the concurrence of the Senate." 3 J. Elliott, }

{\i The Debates in the Several State Conventions on the Adoption of the Federal Constitution}{, 201 (1907) (5 vols.) [hereinafter cited as }{\i Elliott's Debates}{. He attacked the provisions for the appellate jurisdiction of the federal judiciary, but he maintained that judicial independence had been adequately guaranteed. 3 }{\i Elliott's Debates}{

205. Despite the fact that Randolph consistently highlighted the flaws in the Constitution for the benefit of his fellow members of the Virginia state convention, he never repeated his original concern about the Recess Appointments Clause, even on the day the Clause was read aloud to the Virginia convention.

n5 In fact, the Virginia convention did not discuss the Clause at all. 3 }{\i Elliott's Debates}{

. As at the other [*38] state conventions, the only doubts raised at the Virginia convention about the independence of the judiciary stemmed from the fact that the Constitution did not prohibit augmentation of judicial salaries, not from the Recess Appointments Clause. 3 }{\i Elliott's Debates}{ 517.

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\par }{\p \qj\fb360\sb120\widetlpar\adjustright {n5 The Columbia Note acknowledges the limited force of Randolph's remarks: "These postconvention changes in position undercut any attempt to attribute Randolph's initial understanding of the recess appointments clause to the framers as a group." Note, }{\i Historical Practice}{ at 1772 n.79.

\par \par \qj\widetlpar\adjustright {- - - - -End Footnotes- - - - -

Other than Randolph's letter, there is no evidence in any of the extant records of the Constitutional Convention or of the various state conventions that the Framers intended the Recess Appointments Clause to apply to the judiciary. See Farrand, The Records of the Federal Convention of 1787 (1911); J. Strayer, The Delegate from New York (1939) (Constitutional Convention Notes of John Lansing, Jr.); Hutson, "John Dickinson at the Federal Constitutional Convention," 40 William and Mary Quarterly 256 (1983); Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution (1907). For all the record shows, the Framers' attention was never focused on the conflict. If it did occur to them, it was not mentioned in the

debates. As one commentator concludes, "The legislative history of article II and of the recess appointments clause reveals no specific intent on the part of the framers regarding how the two provisions would interact." Note, Historical Practice at 1768.

Thus the contemporaneous writings contain scant mention of the Recess Appointments Clause. They do contain extensive commentary on Article III, but with the isolated exception of Randolph's letter, the contemporaneous writings do not address the relationship between the two clauses. As one scholarly commentary concluded:

Although the legislative history of the recess appointments clause arguably supports extending the clause to vacancies in the federal judiciary, this evidence must be balanced against the heavy emphasis that article III's

legislative history places on the value of judicial independence. Take together, therefore, the legislative history of the two provisions is equally capable of supporting either of two interpretations: that the recess appointments

clause was intended as a limited exception to article III's tenure and salary provisions, or that the tenure and salary provisions are absolute requirements and the recess appointments clause was therefore not intended to extend to vacancies in the federal judiciary.

Note, Historical Practice at 1773.

III. CONSTITUTIONAL VALUES

A. The role of values in constitutional interpretation

The first step in the inquiry, examination of the constitutional text, and the second step, exploration of the contemporaneous writings, leave us with an unresolved conflict between two provisions of the Constitution and no real indication of how the Framers

intended the two clauses to interact. Thus, the next step in our analysis - weighing the values that animate the two provisions -- becomes a vital part of the interpretive process. Only after that step is completed will I turn to the historical practice of using the recess appointment power to fill vacancies in Article III courts. The majority, in contrast, simply omits the step of weighing the competing values, resulting in a truncated analysis based almost entirely on

n historical practice.

\par The Supreme Court has consistently observed the principle that in interpreting the Constitution, we are to be mindful of the concerns that animate its various provisions. }{\i See e.g., Virginia v. Tennessee}{ , 148 U.S. 503, 519, 37 L. Ed. 537, 13 S. Ct. 728 (1893); }{\i Legal Tender Cases}{, 79 U.S. (12 Wall.) 457, 531, 20 L. Ed. 287 (1870); }{\i Gibbons v. Ogden}{, 22 U.S. (9 Wheat.) 1, 187, 6 L. Ed. 23 (1824). The classic statement was provided in }{\i

Prigg v. Pennsylvania}{, 41 U.S. (16 Pet.) 536, 10 L. Ed. 1060 (1842):

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ll, indeed, probably, be found, when we look to the character of the constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact

, that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications, in its actual application

i on to particular [**42] clauses. And, perhaps, the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to

g iven to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed If, by one mode of interpretation, the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode, it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistible, that the latter ought to prevail.

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\par }{\i Id.}{ at 610-12.

\par }{\pard \qj\fi360\sb120\widctlpar\adjustright {Inquiry into fundamental constitutional values is especially important when two provisions of the Constitution are in tension with each other. The Court's attempt to resolve the conflict between the two religion clauses of the First Amendment illustrates the essential

process of weighing competing constitutional values. The Establishment Clause and the Free Exercise Clause are both cast in absolute terms, and either of them, if expanded to a logical extreme, [**43] would tend to clash with the other. }{\i

Walz v. Tax Commission}{

, 397 U.S. 664, 668-69, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970). In resolving this tension, the Supreme Court attempts to strike [*1021] a balance between the values implicated by the two clauses. n6 In balancing the Establishment Clause and the

Free Exercise Clause,

\par Both the Court and various commentators have explored the historical background of the first amendment in order to guide interpretation of the two religion clauses, but here as elsewhere, "too literal [a] quest for the advice of the

Founding Fathers" is often futile. The historical record is ambiguous, and many of today's problems were of course never envisioned by any of the Framers. Under these circumstances, one can only examine the human values and historical purposes underlying the religion clauses to decide what doctrinal framework might best realize those values and purposes today.

L. Tribe, *1 American Constitutional Law*, § 14-3 (emphasis added).

-----Footnotes-----

In striking the balance, the Court charts a course of neutrality that attempts to preserve the values of autonomy and freedom of religious bodies while avoiding any semblance of established religion. For example, in *Tilton v. Richardson*, 403 U.S. 672, 29 L. Ed. 2d 790, 91 S. Ct. 2091 (1971), the Supreme Court decided whether the Higher Education Facilities Act of 1963, authorizing aid to church-related institutions, violated either the Establishment Clause or Free Exercise Clause of the First Amendment.

The Court framed its inquiry as follows: "First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?" *Id.* at 678. Thus, although the Court did not explicitly state its approach, it resolved the conflict by examining the Act in light of the values underlying both constitutional provisions.

-----End Footnotes----- [**44]

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976) -- a case involving a conflict between the fair trial guarantee of the Sixth Amendment and the free press command of the First Amendment -- further illustrates how the Court weighs competing values in interpreting and applying the Constitution. In *Nebraska Press*, the Court was confronted with a "prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged." 427 U.S. at 570. The Court adopted a balancing approach, determining "as Learned Hand put it, [whether] 'the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" *Id.* at 562. Implicitly, *Nebraska Press* resolves the tension between the First and Sixth Amendments by balancing the values of free speech against those of fair press on a case-by-case basis. The Court concluded that the prior restraint was invalid because th

e state had not met the "heavy burden" required to justify a prior restraint; thus, in the particular case, the Court decided [**45] the balance favored the values embodied in the First Amendment.

We cannot adopt such a case-by-case balancing approach to resolve the tension between the Recess Appointments Clause and Article III, because the question whether recess appointees may exercise the judicial power of Article III demands a categorical yes or no answer. Nevertheless, both [**1022] *Walz* and *Nebraska Press* suggest that the resolution of conflict between two provisions of the Constitution requires an evaluation and balancing of underlying values. Our next step, therefore, is to evaluate and balance the competing values underlying the Recess Appointments Clause and Article III.

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[**1023] I recognize that whenever possible we should strive to reconcile an apparent conflict in the Constitution. A classic statement of this principle follows:

What then, becomes the duty of the court? Certainly, we think, so to construe the constitution, as to give effect to both provisions, so far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them, as to preserve the true intent and meaning of the instrument.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393, 5 L. Ed. 257 (1821). As Chief Justice John Marshall stated in *Marbury v. Madison*, "It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it." 5 U.S. (1 Cranch) 137, 174, 2 L. Ed. 60 (1803). In the present case, however, we confront an unavoidable conflict between two provisions of the Constitution. No accommodation is possible; one clause must yield to the other with respect to judicial appointments. Of course, construing the Recess Appointments Clause not to apply to the judiciary would not render it meaningless; it would still apply with full force to appointments to executive agencies.

-----End Footnotes-----

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[**1024] B. The competing values animating the two clauses

We begin the process of weighing the competing values by considering the values that animate Article III. There can be no doubt that the Framers considered the salary and tenure protections of Article III to be critical institutional safeguards of judicial independence. Recently, in *Pacemaker Diagnostic Clinic of America v. Instromedix*, 725 F.2d 537, 541 (9th Cir. 1984) (en banc), our court reaffirmed this fundamental constitutional value: "The attributes of Article III judges, permanency in office and the right to an undiminished compensation, are as essential to the independence of the judiciary now as they were when the Constitution was framed." The Supreme Court stressed the importance of Article II

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safeguards to judicial independence in }{\i Northern Pipeline Co. v. Marathon Pipe Line Co.}{, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982):

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\par }{\pard \qj\widetlpar\adjustright {In sum, our Constitution unambiguously e nunciates a fundamental principle -- that the "judicial Power of the United Sta tes" must be reposed in an independen t Judiciary. It commands that the independence of the Judiciary be jealously g uarded, and it provides clear [**47] institutional protections for that indepe ndence.

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\par }{\i Id.}{ at 60; }{\i see also United States v. Will}{, 449 U.S. 200, 21 7-18, 66 L. Ed. 2d 392, 101 S. Ct. 471 (1980) ("A Judiciary free from control by the Executive and the Leg islature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."). n8

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\par }{\pard \qj\fi360\sb120\widetlpar\adjustright {n8 There is extensive schola rly commentary on the relationship between judicial independence and the princi ple of separation of powers. }{\i See generally}{ G. Wood, }{\i The Creation of the American Republic, 1776-1787}{, 453-63 (1969); Levi, }{\i S ome Aspects of Separation of Powers}{, 76 Colum. L. Rev. 371 (1976); Note, }{\i Federal Magistrates and the Principles of Article III}{, 97 Harv. L. Rev. 1947 , 1949 (1984).

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\par }{\pard \qj\fi360\sb120\widetlpar\adjustright {In my view, the majority sim ply fails to take the institutional protections of Article III as seriously as our court did in }{\i Pacemaker}{ and the Supreme Court did in }{\i Marathon}{

; indeed, the majority denigrates the tenure [**48] and salary provisions when it argues that there are no examples of executive or legislative coercion of a recess appointee. This rationale implies that the institutional protections of Article III are of little consequence because we can rely on the integrity and courage of individual judges to assure judicial independence. The Framers, qui te obviously, did not share that view. Rather, they were firm in their convict ion that permanency of office and salary protection were crucial institutional safeguards against encroachment on the judicial power by the political branches. As our court st ated recently, "Our own experience attests to the substance and reality of [Art icle III's] guarantees. A separate and independent judiciary, and the guarantees that assu re it, are present constitutional necessities, not relics of antique ideas." }{\i Pacemaker}{, 725 F.2d at 541.

\par Moreover, we must preserve not only the reality but also the appearance of judicial independence. Public confidence in the integrity and independence of the courts is imperative, especially when a constitutional confrontation between th

the judiciary and the political branches creates a national crisis. Such confidence [**49] could be threatened if, for example, recess appointees were called upon to participate in a highly charged case involving the constitutional limits on presidential power. The facts of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952) provide a thought provoking historical hypothetical. Imagine a recess appointee sitting on a Supreme Court that was otherwise divided, four to four, on the question of the constitutionality of President Truman's steel mill seizure. Imagine further that this hypothetical [**1023] justice is courageous and intends to vote

on his conscience. Were he to believe the President's action in seizing the mills was unconstitutional, the recess appointee would confront the possibility that an infuriated President might withdraw his nomination. If, on the other hand, the justice were to believe the seizure was constitutional, he would find it difficult if not impossible to avoid the appearance that his tie breaking vote had been influenced by the President's power to cut short his tenure on the Court. *United States v. Nixon*, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974) is another case from our recent past [**50] in which public faith in the independence of the judiciary could have been shaken if a recess Supreme Court appointee had provided a swing vote. These historical hypotheticals graphically illustrate the importance of the tenure and salary provisions of Article III as safeguards against institutional destabilization.

Fortunately, we have not had to confront these disturbing scenarios, because circumstances have not yet combined to produce a recess appointment to our highest court during such trying times of national crisis. There are, however, no guarantees against such an occurrence. Entrusting the decision in such cases -- where the constitutional limits of presidential power are on the line -- to judges whose office depends on whether the President decides to withdraw their nomination, would threaten seriously the ideal of separation of powers. Yet, if the majority's approach prevails, it may take a crisis of the magnitude of *Youngstown* or *United States v. Nixon* to cause us to regret today's decision.

The threat of institutional destabilization posed by recess appointments is not purely hypothetical. History informs us that during the civil rights struggle of the [**51] 1960's, political pressures induced recess appointees to avoid politically sensitive cases. A writer of contemporary history has recounted some of these events of that turbulent period:

[Griffin] Bell and [Walter] Gewin both began service on the Fifth Circuit on October 6, 1961, with interim appointments so they could begin work on the overloaded backlog of cases. But their appointments would not become final until after confirmation hearings by the Senate Judiciary Committee and approval by the Senate the following March. At an initial meeting with [Chief Judge Elbert] Tuttle, Bell suggested that the sensitivity of race cases was such that they might create problems for Gewin at the confirmation hearings.

Tuttle agreed and said he would not assign such cases to Gewin until after confirmation and for the same reason would also withhold such assignments from

Bell.

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\par J. Bass, }{\i Unlikely Heroes}{ 164 (1981). The difficulty with such judicial accommodation to political pressure is that it requires the assignment process itself to depart from strict neutrality and enter the realm of political machination. Yet, a fundamental purpose of Article III was to isolate [**52] the judiciary from just such political entanglements.

\par }\pard \qj\fi360\sb120\widetlpar\adjustright {The strain on judicial independence

and the threat to the appearance of independence exemplified by the Fifth Circuit's experience during the struggle for civil rights and the confrontation of Justice Brennan by Senator McCarthy are but two examples of the potentially pernicious effects

of departing from the Article III

mandate that judicial power be exercised only by judges with permanent tenure and protection against diminution of salary. We have no way of knowing how many other recess appointees may have been shunted away from controversial cases because they were vulnerable to political retaliation for unpopular decisions. Nor do we have any way of knowing if a judge privately succumbs to intense pressure and decides a case in a manner that ensures his confirmation rather than accord

ing to the dictates of legal principle and precedent. What we do know is that the constitutional plan of separation of powers rests on clear institutional protections for judicial independence.

\par [*1024] The concerns for efficiency, convenience, and expediency that underlie the Recess Appointments

Clause pale in comparison. The purpose served [**53] by the President's power to fill judicial vacancies during a recess of the Senate is obviously to avoid delay in the administration of justice in federal courts.

I recognize that such a recess commission allows a new judge to begin working immediately on a backlog of cases rather than waiting for the Senate to reconvene. There are ways, however, of coping with pressing caseloads without compromising the prin

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ciple of judicial independence. Because district and circuit judges are largely interchangeable, interdistrict or intercircuit assignments provide an expedient and effective way of dealing with a short term problem. Such transfers are a common practice i

n the federal judicial system.

\par When it comes to the Supreme Court, different considerations might come in to play. In the event of a freak accident -- for example, the deaths of enough Supreme Court Justices to void a quorum -- use of the executive's recess appointment

power could be one way to deal with an emergency. Congress, however, has the authority to provide for such exigencies in ways that do not compromise judicial independence. When, for example, the Supreme Court is unable to muster a quorum to

hear a direct appeal [**54] from a district court, it is directed by statute to remand a case for decision by a special panel of the circuit that includes the district from which the appeal was taken. 28 U.S.C. \a7 2109 (1982); }{\i

see also *United States v. Aluminum Co. of America*}{

, 148 F.2d 416, 421 (2d Cir. 1945) (example of such a special panel). Moreover

, in the unlikely event of a true emergency demanding immediate action when the Supreme Court lacks a quorum, the Senate can reconvene in a matter of days, if not hours to perform its constitutional role -- giving "advice and consent" to the executive's judicial nominations.

\par The majority asserts that the Recess Appointments Clause is necessary to avoid "the denial of the important right of access to the Courts" and to prevent "the executive from being incapacitated during the recess of the Senate"; it does not, however, cite a single instance when use of the recess appointment

power was necessary to achieve those objectives. Indeed, the majority presents no evidence that any President made a recess appointment to ensure the continued functioning of the judiciary through a crisis that could not have been handled by existing

Article III judges. With one exception, [**55] the federal courts have functioned since 1964 without the assistance of recess appointees. The sole exception is Judge Heen.

\par Thus, could we set historical practice aside, I believe our decision today would be relatively easy. Given that the language of the two clauses is in conflict and that the intentions of the Framers are unclear, the principles that animate the salary and tenure provisions of Article III -- judicial independence and separation of powers -- clearly outweigh the concerns of expediency and efficiency that underlie the Recess Appointments

Clause. In other words, if we were writing on a clean slate, if we were reviewing Judge Heen's recess commission without history to support it, I find it inconceivable that we would interpret the Constitution as the majority does today -- subordinating

Article III values to the executive's general power to make recess appointments. With that thought in mind, I turn to the role of historical practice in the constitutional equation.

\par IV. HISTORICAL PRACTICE

\par The fourth step of the inquiry -- factoring the historical practice of recess judicial appointments into the constitutional analysis -- brings into sharp relief the majority's [**56] almost exclusive reliance on a unilateral practice of the executive as the justification for finding the practice to be constitutional.

\par }{\i A. The judicial role: Evaluation of historical practice}{

\par In two recent cases, }{\i Immigration and Naturalization Service v. Chadha}{, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983), and }{\i Marsh v. Chambers}{

, 463 U.S. 783, [*1025] 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983), the Supreme Court developed an analytic framework for evaluating historical practice in constitutional interpretation. }{\i Chadha}{

teaches us that even a long historical pedigree does not conclusively establish the constitutionality of a practice. }{\i Marsh}{

illustrates that in limited circumstances historical practice may be an accurate guide to the intentions of the Framers. The two cases together establish the principle that the courts must critically evaluate a historical practice before deciding how much

weight to accord it in the process of interpreting the Constitution.

\par In }{\i Chadha}{, the Supreme Court resolved a conflict between historical practice and the principle of separation of powers, analogous to the conflict we confront today. At issue was the [*

*57] constitutionality of a statute authorizing one house of Congress to inval

idate by resolution a decision of the executive branch made pursuant to congressionally delegated authority. When the Court decided *Chadha*, the one-house veto was a practice of long and continuous standing. See *Chadha*

, 103 S. Ct. at 2793 (White, J., dissenting). Yet, that fact did not deter the Court from declaring the practice unconstitutional. In fact, Chief Justice Burger noted that "our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies" *Chadha*, 103 S. Ct. at 2781. The teaching of *Chadha*

is clear. Historical practice is not irrelevant to Constitutional inquiry, but it will not "save [a practice] . . . if it is contrary to the Constitution." *Id.* at 2781.

Chadha does not, I hasten to add, stand for the proposition that historical practice has no role to play in constitutional interpretation. Indeed, *Marsh v. Chambers*

is authority that a practice with a lineage that can be traced back to the time of the Framers may ^[**58] serve as a guide to the Framers' understanding of the workings of the Constitution. But *Marsh* also illustrates the proposition that rather than simply accepting the historical practice, courts should evaluate carefully a historical practice dating back to the Framers before deciding its constitutionality.

In *Marsh*, the Court held that the Nebraska Legislature's practice of opening each session with a prayer offered by a state-paid chaplain did not violate the Establishment Clause. In reaching that decision, the Court considered the practice of the First Congress, which not only appointed the first legislative chaplain but also drafted and recommended the Bill of Rights for adoption by the states. The Court cited to a uniquely full historical record indicating that the practice was extensively considered and approved by the Framers. *Id.*

, 103 S. Ct. at 3335. The bill to appoint a legislative chaplain was extensively debated by the First Congress. Indeed, the bill was opposed by John Jay and John Rutledge on First Amendment grounds. The Court in *Marsh* cited this unique record of debate and opposition as evidence that the "subject was considered carefully and the ^[**59] action not taken thoughtlessly" *Id.* Thus, the teaching of *Marsh*

is that historical practice is only to be given decisive weight if it is "infused . . . with power" by the considered judgment of the Framers following careful debate. *Id.*

The majority apparently reads *Marsh* as authority for according great weight to the practice of making recess judicial appointments because the practice also dates back to the administration of

George Washington. In doing so, the majority overlooks the *Marsh* Court's careful evaluation of the context and characteristics of the practice of appointing legislative chaplains before accepting it as a reliable guide to constitutional meaning. Only after

stressing that the practice was carefully debated and adopted by the First Congress, and that the First Congress drafted and proposed the Bill of Rights, did the Court accord the practice substantial weight in interpreting the First Amendment. *Id.*

Chadha illustrates the corollary of *Marsh*: even longstanding historical practice should receive ^[*1026] little deference if it sheds no light on

n the intentions of the Framers.

\par }\pard \qj\widctlpar\adjustright {\i B. Historical practice and the Framers'}{ [*60] }\i intent: No record of considered deliberation}{

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {Thus our task is to evaluate critically the historical practice of recess judicial appointments. The majority treats this case as if }\i Marsh}{ were controlling rather than }\i Chadha}{

. I recognize that the practice we consider today is similar to the practice the Court evaluated in }\i Marsh}{

in one important respect: it stretches back to the time of the Framers. There is, however, an equally important difference. President Washington's use of the recess appointment power to confer interim judicial commissions is not accompanied by a record of considered deliberation that gives us meaningful insight into the intentions of the Framers.

\par In this critical respect, a close comparison of the case here with }\i Marsh}{ is instructive. In the case at hand, the historical record fails to inform us whether that the Framers considered the possibility that recess appointments could violate

Article III. Indeed, the majority is careful to observe that these appointments by President Washington were made without objection or apparent consideration of the potential conflict with Article III.

n9 This blank record stands in sharp contrast with the [*61] full record of preliminary consideration given by the First Congress to the First Amendment implications of appointing a legislative chaplain. Thus, the early historical practice of

recess appointments to the judiciary has not been "infused with power" by the considered judgment of the Framers. As }\i Marsh}{ suggests, such a practice is entitled to less deference than a practice that we

know was "considered carefully" by the Framers. }\i Marsh}{, 103 S. Ct. at 3335.

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\par }\pard \qj\widctlpar\adjustright {-----Footnotes-----

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n9 The Columbia Note agrees: "At no time during this early period did opposition to the practice make its way into the public record, either in Congress or the courts." Note, }\i Historical Practice}{, at 1776.

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {Moreover, the first legislative chaplain was appointed by the very same body -- the First Congress -- that proposed the Bill of Rights. There is no reason to credit George Washington with any special insight into how the Framers intended the recess appointment power of Article II to interact with the salary and tenure provisions of Article III. [*62]

\par There is a ready explanation as to why the public record does not reflect that President Washington's recess judicial appointments were subject to the same careful scrutiny as was the appointment of a legislative chaplain by the First Congress. Unlike the practice approved by the collective action of Congress in }\i Marsh}{, the use of the recess appointment power to confer interim judicial commissions involves the unilateral action of individual Presidents. Although Congress may ultimately confirm a recess appoi

ntee, it has no authority or opportunity to review the President's exercise of his recess appointment power because an interim commission is simply not subject to Senate approval.

The distinction between the unilateral historical practice of the executive and the collective actions of the Congress becomes important in the process of assessing the interpretive weight of the practice. Congress is a deliberative body composed of peers. An action taken by Congress almost n

ecessarily is subject to constitutional challenge and reasoned debate by the members of that body. A unilateral action by the President, in contrast, can be implemented without debate or discussion. Although [**63] the majority is correct in observing t

hat Alexander Hamilton and John Jay were members of Washington's first cabinet, the historical record does not tell us whether Hamilton and Jay had even considered the question whether Article III limited the executive's recess appointment

power to non-judicial offices, or, if they did, whether they had occasion to express their views, whatever they may have been, in the privacy of a Cabinet meeting or in conversation with the President alone.

What we do know is that Hamilton and Jay were faced with different concerns as [**1027] members of Washington's cabinet than they were as architects of the Constitution and authors of *The Federalist* {

. Members of a cabinet have political agendas, and the fact that they may not have spoken out against a recess judicial appointment does not necessarily mean that they considered it to be constitutional. As members of a national administration, they very well may have been preoccupied with other matters deemed more pressing at the time; they were, after all, faced with a w

i
de range of problems as members of the first administration of a new government. Voicing objection about the constitutionality of [**64] recess judicial commissions may not have been very high on their political agenda. Moreover, the realities of getti

n
g the job done and accommodating various contending factions do not lend themselves to the same process of reasoned deliberation and debate as did the framing of our fundamental charter or of the Bill of Rights. Finally, members of either political branch

are not in the same position as sitting Article III judges faced with a decision affecting the interests of real parties engaged in a concrete dispute.

Recently, Justice Rehnquist cited a clear example of the dramatic change in attitude toward the meaning of the Constitution that can accompany an individual's switch in roles from holding office in one of the political branches to the judiciary:

{ In the fall of 1864, the constitutionality of the so-called "greenback legislation" which the government had used to finance the war effort was headed for a Court test, and Lincoln was very much aware of this fact. He decided to appoint his Secretary of the Treasury, Salmon P. Chase, who was in many respects the architect of the greenback legislation, saying to a

confidant that "We wish for a Chief Justice who will [**65] sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore,

more, we must take a man whose opinions are known" 2 Warren 401.

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\par Address by Associate Justice Rehnquist, "Presidential Appointments to the Supreme Court," University of Minnesota College of Law (October 19, 1984) (reported in N.Y. Times, October 20, 1984 \a7

1, at 1, 9.). As Justice Rehnquist reports, the changed attitude that accompanied Chase's new role thwarted Lincoln's intentions:

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\par The ultimate irony in Lincoln's effort to pack the Court was the Court's first decision in the so-called Legal Tender Cases, *Hepburn v. Griswold*, 75 U.S. 603, 8 Wall. 603, 19 L. Ed. 513. In 1870 the Court held, in an opinion by Chief Justice Chase, who had been named Chief Justice by Lincoln primarily for the purpose of upholding the greenback legislation, that this legislation was unconstitutional Chief Justice Chase's vote in the legal tender cases is a textbook example of the proposition that one may look at a legal question dif

ferently as a judge than one did as a member of [**66] the Executive Branch. There is no reason to believe that Chase thought he was acting unconstitutionally when he helped draft and shepherd through Congress the greenback legislation, and it may well be

that if Lincoln had actually posed the question to him before nominating him as Chief Justice, he would have agreed that the measures were constitutional. But administrators in charge of a program, even if they are lawyers, simply do not ponder these questions in the depth that judges do, and Chase's vote in the legal tender cases is proof of this fact.

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\par } {i Id.} { Even if Hamilton and Jay -- in their capacity as members of the first Cabinet -- had directly confronted the question of the constitutionality of recess appointments

to the judiciary, they would not have faced a concrete controversy exposed to the light and heat of the adversarial process. n10

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\par } \pard \qj\fi360\sb120\widctlpar\adjustright {n10 For the same reason, the majority's observation that individual judges did not object to their own recess appointments

is of little consequence. The recess appointee has no formal opportunity and little incentive to consider in depth the constitutionality of his own appointment.

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\par } \pard \qj\fi360\sb120\widctlpar\adjustright { [*1028] To sum up, } {i Marshall} { establishes that a lineage that began with the Framers is a necessary con

dition that must be met for a historical practice to be considered a reliable guide to the intentions of the Framers. Just as clearly, however, such a lineage is not a sufficient condition. If the Framers adopted a practice carelessly or without attention to a possible constitutional infirmity, then the lineage is entitled to little weight in constitutional analysis. Although the practice of recess judicial commissions does stretch back to the time of the Framers, there is no record that the practice was adopted through a process of reasoned deliberation. After evaluating the practice in light of the standards applied by the Supreme Court in *Marsh* and *Chadha*, I cannot escape the conclusion that the early historical practice is not a reliable indicator that the Framers intended the recess appointment power to extend to vacancies in Article III courts.

C. Historical practice and structural accommodation: Judicial silence and individual liberties

Even though the historical practice of recess judicial appointments is not an accurate guide to the Framers' intentions, [**68] it could still be argued that the judiciary should defer to the executive's longstanding practice on the theory that it constitutes a "structural accommodation" between the various branches of government. One commentator articulated the theory as follows:

Because the Constitution is a broad charter of government and not a statute, it establishes a flexible framework for the exercise of national power. The legislative, executive, and judicial branches are not hermetically sealed units with exactly defined powers, but are interlocking spheres of influence, each with a core of constitutionally assigned functions and enumerated powers. Thus, situations arise in which it is charged that one branch's interpretation of the scope of its

authority exceeds the limits imposed by either the constitutional text or structure. In such situations, it may be possible to show that similar exercises of power have occurred repeatedly in the past and have not been challenged or openly opposed by the

other two branches. A court may be offered this evidence with the argument that historical practice has "settled" the constitutional question at issue, regardless of whether the practice took [**69] place early enough in the nation's history to be capable of providing evidence of original intent.

Note, *Historical Practice*, at 1777-78. The Supreme Court's decision in *Chadha* establishes that the mere fact that historical practice is of long standing does not relieve the judiciary of the responsibility of assessing the practice and measuring it against constitutional standards. In the case at hand, two reasons emerge for concluding that the historical practice of recess judicial appointments is not entitled to judicial deference as evidence of a "structural accommodation". First, judicial silence cannot be interpreted as acquiescence.

cence in the constitutionality of a practice because Article III courts cannot react to an encroachment on their separate powers until presented with the issue in a concrete case or controversy. Second, because Article III's

tenure and salary provisions are designed as safeguards of individual as well as institutional interests, the courts have a duty to prevent erosion of those safeguards that transcends the structural importance of an independent judiciary.

¶ Inaction by the judiciary cannot represent acquiescence in a structural accommodation.

-- The judiciary's role in our system of checks and balances is a passive one. Because of the case or controversy requirement of Article III, federal courts can only act when a dispute is presented to them by parties with a concrete stake in the outcome. The courts do not initiate law suits; rather they react to actions filed by parties. Even when deciding cases or contro-

versies, "the judicial branch acts primarily on the litigants before the court." *Pacemaker*, 725 F.2d at 542.

¶ [*1029] In contrast, the political branches, the legislature and the executive, are both active. Both the President and Congress have the power to initiate action to define operationally their role in the constitutional scheme of separate and divided powers. Thus, historical acquiescence of the political branches in a practice of uncertain constitutional validity can arguably be defended as a "structural accommodation" that ought not be upset by the courts. Cf. Note, *Historical Practice*, at 1773. With the political branches, this "structural accommodation" can, at least to some extent, be inferred from silent acceptance by one political branch in

the face of action [*71] by the other. The important distinction is that silence by the courts cannot be construed as acquiescence in the constitutionality of even a longstanding practice.

¶ This distinction sheds light on two cases cited by the majority for the broad proposition that historical practice is entitled to judicial deference. It is true that in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 81 L. Ed. 255, 57 S. Ct. 216 (1936), the Court did in part rely on historical practice in upholding the Congressional delegation to the President of the power to declare illegal the provision of arms to nations involved in the Chaco conflict. *Id.* at 327-29. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 72 L. Ed. 624, 48 S. Ct. 348 (1928), also involved a constitutional challenge to the delegation of power by Congress to the executive. ¶ Because both cases involve the constitutionality of Congressional delegations of authority to the President, they are distinguishable from the instant case, which involves the independence of the passive branch, the judiciary. ¶

¶ -----Footnotes-----

¶ ¶ Despite broad language in *Curtiss-Wright* to the effect that "an impressive array of legislation . . . enacted by nearly every Congress from the beginning of our nat-

ional existence . . . must be given unusual weight," 299 U.S. at 327, a careful examination of Justice Sutherland's opinion reveals that the historical factor was invoked only

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fter a long and careful analysis of constitutional policies and values. Indeed one influential commentator described the opinion as "theoretical" and observed that, "although the decision might have been bottomed upon narrower grounds, Justice Sutherland

accepted the case as an invitation to propound certain of his long-held convictions about the source and distribution of the federal government's foreign affairs power." L. Tribe, *50 American Constitutional Law* 4-2, at 159 (1978).

Curtiss-Wright is not authority for the proposition that longstanding historical practice should be decisive and end further inquiry into fundamental constitutional values. Quite the contrary, Curtiss-Wright stands squarely in the tradition of careful constitutional interpretation that necessarily involves close scrutiny of the values that animate the provisions of the Constitution.

Similarly in J. W. Hampton, Chief Justice Taft undertook a careful analysis of the policies and principles underlying the separation of powers and

concluded that Congressional delegation of the power to fix certain tariff rates was consistent with those principles. 276 U.S. at 405-411. Only after that inquiry was complete did Chief Justice Taft turn to a consideration of historical practice.

Id. at 412. Again a close reading of the decision leads to the conclusion that the process of constitutional interpretation is not complete absent careful attention to constitutional values and principles. [**72]

Moreover, all of the cases cited by the Columbia Note in support of the structural accommodation theory involve the relationship between the political branches -- the executive and the legislature -- and not the independence of the judiciary.

See Note, *Historical Practice*, at 1778-80. For example, the *Pocket Veto Case*, 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894 (1929), involved the longstanding practice of Presidents of using pocket vetoes to avoid Congress' override power.

Dames & Moore v. Regan, 453 U.S. 654, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981), concerned the authority of the President to settle claims by United States nationals against Iran in the absence of explicit Congressional authorization.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819), involved the power of Congress to create a national bank. *Youngstown Sheet and Tube Co. v. Sawyer*

, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952), in which the structural accommodation argument was raised by Justice Frankfurter in dissent, implicated the President's power to seize steel mills without authority delegated by Congress.

-----End Footnote----- [**73]

In sum, in our constitutional system the judiciary is entrusted with the ultimate responsibility for interpreting the Constitution, including the authority to review the constitutionality of actions by the political branches of government

an Article III

court by a judge without Article III protections.

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n13 }\i Northern Pipeline Co. v. Marathon Pipe Line Co.}, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1981), established the

general principle that parties to a case or controversy in a federal forum are entitled to have the cause determined by judges with the salary and tenure guarantees of Article III. The }\i Marathon}{

Court cataloged three limited exceptions to that general principle: territorial courts, military tribunals, and "public rights" cases. 458 U.S. at 64-70. }\i See also}{ Note, }\i Historical Practice}{, at 1758.

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {In sum, whatever role a pro

cess of structural accommodation may have to play in adjusting the relationship between the political branches, it is clear that judicial silence in the face of action by the executive or legislative branches cannot be construed as a waiver of the constit

u

tional rights of individuals. n14 Our system affords each individual [*1031] litigant the opportunity to vindicate his or her personal rights through the judicial process. The political branches cannot extinguish such rights by establishing "adverse possession" through longstanding historical practice.

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n14 The Columbia Note argues that the personal rights component of Article III is secondary to its structural component. Note, }\i Historical Practice}{

, at 1788-90. The Note acknowledges this court's decision in }\i Pacemaker, i d.}{ at 1788 & n.174, but argues that the fact that a litigant can raise the lack of Article III judicial power for the first time on appeal and the fact that

a

court may raise the issue sua sponte are evidence that a jurisdictional and not a personal claim is involved. This argument is clearly fallacious. The fact that a claim of lack of Article III

power shares some characteristics with jurisdictional claims does not demonstrate that it does not share other characteristics with personal claims. For example, in }\i Pacemaker}{

our court relied on individual consent to validate the Magistrates Act, but availability is a characteristic of personal rights and not jurisdictional requirements. }\i Pacemaker}{

makes the law in this circuit clear: a claim that an adjudication made in violation of the salary and tenure provisions of Article III is both a personal claim and a jurisdictional one.

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tnotes- - - - - [**77]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {In cases where individual rights are at stake, the Supreme Court has not hesitated to affirm fundamental constitutional principles and vindicate those rights even in the face of an intimidating historic

al practice. One of the most renowned such cases is }{\i Brown v. Board of Education}{, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954). n15

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n15 Another individual liberties case involving a clash between historical practice and constitutional values is }{\i Bridges v. California}{, 314 U.S. 252, 86 L. Ed. 192, 62 S. Ct. 190 (1941). }{\i Bridges}{

also resembles the case we decide today because the Court was similarly faced with a conflict between two provisions of the Constitution. In }{\i Bridges}{

the Court confronted the apparent conflict between a state's interest in assuring criminal defendants a fair and impartial trial as supported by the Sixth Amendment and the First Amendment's guarantee of freedom of the press. A California trial court had punished as contempt the publication of a newspaper editorial and a telegram criticizing its proceedings in a labor dispute. As Justice Black wrote, "If the inference of conflict . . . be correct, the iss

ue before us is of the very gravest moment. For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." }{\i Id.}{ at 260.

\par The approach of today's majority to the resolution of such a conflict -- deference to historical practice -- was suggested by Justice Frankfurter in his dissent. He believed that the case could be resolved by recourse to "the uninterrupted course of constitutional history . . ." }{\i Id.}{.

at 279 (Frankfurter J., dissenting). Justice Frankfurter traced the authority of the courts to impose prior restraints on the press through the contempt power back to the common law which "was written into the Judiciary Act of 1789 . . . by Oliver Ellsworth, one of the framers

of the Constitution." }{\i Id.}{ at 285. The }{\i Bridges}{ majority rejected this contention, focusing on the values the framers were attempting to realize in the First Amendment freedom of speech and of the press. }{\i Id.}{

at 264-65. While never explicitly resolving the potential conflict between free press and fair trial, the Court found that the extrajudicial statement did not represent "a clear and present danger" of interference with the administration of justice, and hence found the imposition of contempt to violate the First Amendment. }{\i Id.}{ at 272-73.

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\par }\pard \qj\widctlpar\adjustright {- - - - -End Footnotes- - - - - [**78]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {In }{\i Brown}{, the Supreme Court overturned the hoary historical practice of segregation, long rationalized by courts under the "separate but equal" doctrine. The }{\i Brown}{

Court faced a practice that not only had "been inextricably woven into the fabric of our nation," in the words of today's majority, but had received the imprimatur of the Supreme Court itself. }{\i See Plessy v. Ferguson}{, 163

U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 (1896). Racial segregation began at a time when the drafters of the Fourteenth Amendment were still alive; indeed the same Congress that authored the Fourteenth Amendment segregated the schools in the District of Columbia.

See R. Berger, *Government by Judiciary* 117-33 (1977). But the Supreme Court in *Brown*

was not daunted by the undisputed fact that the historical practice of racially segregating schools had been accepted as consistent with the Constitution for generations. The *Brown*

Court realized that constitutional tradition demands that the courts look beyond the fact of historical acceptance when a practice is challenged as unconstitutional. Our constitutional heritage requires courts to look to the values and

principles that breathe life and meaning into the words of the Constitution. When those principles demanded that segregation be struck down as inconsistent with the constitutional mandate of equal protection of the laws, the *Brown*

Court did not hesitate to vindicate the Constitution, despite a formidable combination of historical practice and longstanding precedent. As one commentator concluded, "*Brown v. Board of Education*

[*1032] clearly demonstrates that even a long, widespread, continuous, and judicially approved

practice, in an area of doubtful constitutional meaning, will receive no judicial deference as evidence of a structural accommodation when it is alleged to have resulted in a denial of individual liberties." Note, *Historical Practice*, at 1783.

The individual rights component of Article III thus provides a second distinction between the historical practice of recess judicial appointment from the historical practices considered in the majority's cases, *Curtiss-Wright* and *J. W. Hampton*. As I have already noted, *Curtiss-Wright* and *J. W. Hampton* both involved the constitutionality of Congressional delegation of power to the President. Neither case implicated individual rights.

Footnotes-----

The majority also cites *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 2 L. Ed. 115 (1803), but as in *Curtiss-Wright* and *J. W. Hampton*, the historical practice considered in *Stuart v. Laird*

does not implicate individual constitutional rights. *Stuart v. Laird*

is a one page opinion by Justice Patterson involving the question of whether Justices of the Supreme Court could also serve as circuit justices, consistent with the constitutional limitations of the original jurisdiction of the Supreme Court. Justice Patterson responded, "To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction." *Id.*

at 309. The practice, however, had already been eliminated by amendment of the Judiciary Act in 1801, and Justice Patterson's final observation was, "Of course

se, the question is at rest, and ought not now to be disturbed." }{\i Id.}}{
Although Justice Patterson's terse remarks are somewhat cryptic, they surely c
annot be read to foreclose consideration of constitutional values when a longst
anding historical practice is challenged.

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tnotes- - - - - [**81]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {Thus, my evaluation of the e
arly historical practice of making recess judicial appointments leads me to con
clude that, while the practice offers some support for the majority's decision
that the

Recess Appointments Clause carves out an exception to Article III, the strength
of that support is quite limited. Recess appointments
are unilateral actions by the President; they lack the deliberative quality th
at gives increased weight to the early enactments of the First Congress. The o
riginal recess appointments

by President Washington were apparently made without the open debate and discu
ssion that would have "infused them with power" in the language of }{\i Marsh}{
. Moreover, less weight should be given to the historical practice of recess ap
pointments

to the judiciary than was given to the historical practice of delegating power
to the President in }{\i Curtiss-Wright}{ and }{\i J. W. Hampton}{
, because those cases involved "structural accommodations" between the active p
olitical branches rather than with the judiciary, the passive branch. Finally,
recess judicial appointments implicate individual as
well as institutional interests. Even when the political branches alone are i
nvolved, [**82] }{\i Chadha}{

informs us that longstanding historical practice is not decisive. Clearly, th
e historical practice of recess judicial appointments is entitled to far less w
eight than the historical practice considered in }{\i Marsh}{
; despite the age of the practice, it teaches us very little, if anything, abou
t the Framers' intentions. I see no reason why the executive's practice of usi
ng the recess appointment power to fill
judicial vacancies should be entitled to any more weight than the practice hel
d unconstitutional in }{\i Chadha}{.

\par V. CONCLUSION

\par To summarize the results of the four-part inquiry, the first two steps --
a review of the text of the Constitution and the contemp
oraneous writings of the Founders -- offer little guidance for our decision. T
he two remaining factors -- constitutional values and historical practice -- co
me down on opposite sides of the scale, but the principles of separation of pow
ers and judicial i
ndependence that animate Article III heavily outweigh the concerns of expedienc
y and efficiency that underlie the Recess Appointments Clause. With the scales
tipped sharply in favor of Article III

by the fundamental constitutional values at stake, the historical [**83] pract
ice fails to provide enough insight into the intentions of the framers to resto
re the balance, much less tip it in favor of the Recess Appointments
Clause. In the last analysis, like Professor Hart, "I [*1033] cannot believe
that the Constitution contemplates that any Federal judge . . . should hold of
fice, and decide cases, with all these strings tied to him."

\par I recognize that the only other court that has considered the question we
decide today reached the same result as the majority. In }{\i United States v.
Allocco}{, 305 F.2d 704 (2d Cir. 1962), the Second Circuit also held that the

Recess Appointments

Clause carves out an exception to Article III. Like today's majority, however, the Second Circuit assumed without analysis that historical practice was dispositive of the question.

Footnotes-----

Significantly, the *Allocco* decision in 1962 was made without the benefit of the Supreme Court's recent decisions in *Chadha*, *Marsh*, and *Marathon*. The two student notes reach the same result as today's majority and the Second Circuit in *Allocco*. See Note, *Historical Practice*; Note, *Recess Appointments*.

-----End Footnotes----- [**84]

The path chosen by our court and the Second Circuit in *Allocco* is a tempting one. Our burden would be far lighter if we could avoid the trying task of weighing constitutional values against historical practice in a struggle to interpret the Constitution faithfully. Simple deference to historical practice is an easy way to resolve deep conflicts.

Although a serious clash between historical practice and constitutional principle may be a rare occurrence, we are not without guidance from the Supreme Court as to how we should proceed. Our enterprise today is part of a long tradition of constitutional interpretation, one that has always involved the evaluation of both constitutional values and historical practice. In *Chadha*

, the Court interpreted the Constitution so that its fundamental purposes would be fulfilled, despite the intimidating reality of a longstanding historical practice. In *Marsh v. Chambers*

, the Court deferred to a practice that reflected the Framers' carefully considered assessment of its constitutionality. In *Brown v. Board of Education*

, where individual rights were at stake, the Court chose fundamental constitutional values over a deeply rooted and intractable historical practice. Thus, the lesson of our constitution

al history is that historical practice is but one guide to constitutional meaning. When a fundamental constitutional value is in conflict with historical practice, the Constitution must triumph and practice must give way to principle.

Today we must choose between Article III and the Recess Appointments Clause. We must also choose between deference to the historical practice of many chief executives and vindication of the fundamental constitutional values of judicial independence and separation of powers.

These choices are not easy, but they must be made. And when we choose with reverence for the Constitution and respect for our proud heritage of constitutional interpretation, our choices are ultimately clear. The fundamental principle of separation of

powers must prevail over a peripheral concern for governmental efficiency, and core constitutional values must prevail over uncritical acceptance of historical practice.

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\par } }\pard \qc\li1200\ri1200\widctlpar\adjustright {UNITED STATES of America, Plaintiff-Appellee, v. Janet WOODLEY, Defendant-Appellant
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\par No. 82-1028
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\par UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
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\par } }\pard \qc\fi360\li1200\ri1200\widctlpar\adjustright {726 F.2d 1328; 1983 U.S. App. LEXIS 14686
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\par } }\pard \qc\li1200\ri1200\widctlpar\adjustright {October 19, 1982, Argued and Submitted
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\par December 8, 1983, Decided

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\par }\pard \qj\widctlpar\adjustright {SUBSEQUENT HISTORY:

\par [**1]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {As Amended March 8, 1984.

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\par }\pard \qj\widctlpar\adjustright {PRIOR HISTORY:

\par Appeal from the United States District Court for the District of Hawaii.

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\par JUDGES:

\par }\pard \qj\fi360\widctlpar\adjustright {Canby, Norris and Reinhardt, Circuit Judges.

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\par }\pard \qj\widctlpar\adjustright {OPINIONBY:

\par }\pard \qj\fi360\widctlpar\adjustright {NORRIS

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\par }\pard \qj\widctlpar\adjustright {OPINION:

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\par }\pard \qj\fi360\widctlpar\adjustright { [*1329] NORRIS, Circuit Judge:

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {This case presents a question of substantial constitutional importance: whether a person lacking the essential attributes of an article III

judge -- life tenure and protection against diminution of compensation -- may nonetheless exercise the judicial power of the United States by virtue of a recess appointment made pursuant to article II, section 2 of the Constitution. n1 We are thus called upon to address the inherent tension between the so-called recess appointment clause, which on its face applies to vacancies in any government office, and section 1 of article III which provides that only judges with article III protection may exercise the judicial power of the United States. n2 We are required to decide, in other words, whether the recess appointment power of the President applies to vacancies in the judicial as well as the executive branch of government.

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\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n1 The recess appointment clause provides:

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\par }\pard \qj\widctlpar\adjustright {The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

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\par U.S. Const. art. II, \a7 2. [**2]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n2 The relevant portion of article III provides:

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The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a

Compensation, which shall not be diminished during their Continuance in Office.

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\par U.S. Const. art. III, \a7 1.

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\par -----End Footnotes-----

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {I

\par Appellant Janet Woodley was indicted on September 18, 1981, for importing, intending to distribute, and conspiring to distribute heroin in violation of title 21, sections 841(a) (1), 952(a), and 960(b) (1) of the United States Code. Woodley filed motions to suppress evidence allegedly obtained in violation of the fourth amendment. A hearing was held on Woodley's suppression motions before Judge

Walter Heen on November 16, 1981. Judge Heen denied the suppression motions and presided over a bench trial conducted on stipulated facts at which Woodley was found guilty on all three counts. n3

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n3 We note that the Judgment and Probation Commitment Order was issued not by Judge Heen but by Judge Martin Pence. The government does not argue that that fact should affect our treatment of the issues in this case. In any event, we believe that it would not.

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\par }\pard \qj\widctlpar\adjustright {- -----End Footnotes----- [**3]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {Judge Heen had been nominated to fill a judicial vacancy in the district of Hawaii on February 28, 1980. On September 25, 1980, the Senate

Judiciary Committee began confirmation hearings on Heen's nomination. Although testimony and hearings were complete, no vote had been taken when the Senate recessed on December 16, 1980. On December 31, 1980, while the Senate was still in recess, President

Jimmy Carter conferred a commission on Heen who then began to sit as a district judge. Less than one month [**1330] later, on January 21, 1981, President Reagan withdrew Heen's nomination. Heen continued to sit as a district judge, however, until December

16, 1981, when the First Session of the 97th Congress ended. Thus, at the time he ruled on Woodley's suppression motions and presided over her trial in November and December 1981, Heen sat only by virtue of his recess appointment.

During this period, he possessed neither life tenure nor guaranteed compensation -- the essential attributes of an article III judge. On appeal this court raised sua sponte the question whether this fact rendered Heen's appointment, and hence all

recess appointments to the judiciary, constitutionally infirm. [**4]

\par Strong arguments can be marshaled both for and against application of the recess appointment clause to the judiciary. On the one hand, if the recess appointment clause applies to judicial vacancies, a person may exercise the judicial power without the institutional protections of article II I that the Framers considered essential to judicial independence. A judge rece

iving his commission under the recess appointment clause may be called upon to make politically charged decisions while his nomination awaits approval by popularly elected officials. Such a judge will scarcely be oblivious to the effect his decision may have on the vote of these officials. Professor Freund aptly summarized the problem when he referred

ed to the recess appointee as a judge sitting "with one eye over his shoulder on Congress." Harvard Law School Record, October 8, 1953, at 1.

\par Questions of governmental efficiency must, however, also be considered. A application of the recess appointment

clause to the judiciary arguably ensures that the nation's judicial business is not delayed because of lengthy vacancies in judicial office. In this case, for example, two and one-half years passed before a judge enjoying [**5] the protections of

article III filled the vacancy temporarily occupied by Judge Heen. A mechanism by which judicial offices may be filled within a reasonable time is obviously of great practical value in assuring the continued smooth operation of the courts.

\par II

\par In resolving the conflict between article II and article III we look to the language of the Constitution viewed in light of accepted principles of statutory construction, to the history of both articles, and to the Supreme Court decisions interpreting them. Despite long historical practice to the contrary, }{\i

see infra}} at slip op. at 5737, ~-~-~, these considerations persuade us that only those judges enjoying article III protections may exercise the judicial power of the United States.

\par A

\par Under familiar principles of statutory construction, the very specific language of article III would, absent a countervailing reason, prevail over the general language of article II. }{\i See *Busic v. United States*}, 446 U.S. 398, 406, 100 S. Ct. 1747, 1752, 64 L. Ed. 2d 381 (1980); }{\i *Preiser v. Rodriguez*}, 411 U.S. 475, 489-90, 93 S. Ct. 1827, 1836-37, 36 L. Ed. 2d 439 (1973). Article III

states explicitly [**6] and unambiguously that the judicial power is to be exercised by those holding "their Offices during good Behavior and . . . at stated Time

s, receiv[ing] for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, \a7 1. This language is unusually specific. As Justice Frankfurter noted,

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\par }{\pard \qj\widetlpar\adjustright {no provisions of the Constitution, barr

ing only those that draw on arithmetic, as in prescribing the qualifying age for a President and members of Congress or the length of tenure of office, are more explicit and specific than those pertaining to courts established under Article III.

"The judi

cial power" which is "vested" in these tribunals and the safeguards under which their judges function are enumerated with particularity. Their tenure and compensation, the controversies which may be brought before them, and the distribution of original a

nd appellate jurisdiction among these tribunals are defined and circumscribed, not left at [*1331] large by vague and elastic phrasing. The precision which

characterized these portions of Article III is in striking contrast to the imprecision of so many other provisions of the Constitution. [**7] . . .

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\par } {\i National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.} {, 337 U.S. 582, 646, 69 S. Ct. 1173, 1209, 93 L. Ed. 1556 (1949) (Frankfurter, J., dissenting).

\par } \pard \qj\fi360\sb120\widctlpar\adjustright { We cannot disregard such an explicit constitutional requirement, for

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\par } \pard \qj\widctlpar\adjustright {when the Constitution . . . gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the translation. Precisely because "it is a } {\i constitution} { we are expounding," }

{\i M'Culloch v. Maryland} {, 17 U.S. 316, 4 Wheat. 316, 407 [4 L. Ed. 579], we ought not to take liberties with it.

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\par } {\i Id.} { at 646-47, 69 S. Ct. at 1196. Only an even more explicit constitutional provision could justify disregard of article III's command that the judicial power shall be exercised only by those enjoying article III protection.

\par } \pard \qj\fi360\sb120\widctlpar\adjustright {The recess appointment clause is not such a constitutional provision. The clause does not mention the judicial branch at all. It is phrased in the most general language, stating only t

hat its provisions apply to "all vacancies that may happen during the recess of the Senate," U.S. Const. art. II, \a7 2, cl. 3. This language appears insufficient [**8] to overcome the explicit command of article III.

\par B

\par Second, a careful examination of the records and writings of the constitutional period leads us to conclude that the Framers did not intend to allow the housekeeping provisions of the recess appointment clause to impinge on their paramount concern for judicial independence.

\par The experience

of the Framers with the colonial judiciary had not been a happy one. Prior to the Glorious Revolution of 1688, English judges had been "lions under the throne," creatures of the King. The Act of Settlement of 1701 had remedied this situation in England

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by granting English judges life tenure and undiminishable compensation. But the Act had no effect in the colonies. In their lack of independence from the Executive, the colonial judiciaries remained similar to those of the England of Charles I. Courts

were constituted by the colonial governors under authority of the crown. Any attempt by the governors or the colonial assemblies to free judges from royal control was rapidly quashed. E. Russell, } {\i Review of Colonial Legislation} {

189 (1915). Colonial history is replete with examples of royal abuse of judicial power. Judges who did not follow [**9] the wishes of the King or royal governor were summarily discharged. } {\i See} { Pittman, } {\i The Emancipated Judiciary in America: Its Colonial and Constitutional History} {, 37 A.B.A.J. 485, 488 & n. 5 (1951) (citing 6 } {\i North Carolina Colonial Rec

ords}{ 591; 9 }{\i New Jersey Archives}{ 321; 7 }{\i New York Colonial Document
s}{ 476; 11 }{\i
Board of Trade Journal}{ 229-233). The signers of the Declaration of Independence charged that the King

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\par }\pard \qj\widctlpar\adjustright {obstructed the administration of justice by refusing his assent to laws for establishing judiciary power. He has made judges dependent on his will alone for the tenure of their office and the amount and payment of their salaries.

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\par The Declaration of Independence para. 13 (U.S. 1776).

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {In reaction to the excesses of the colonial courts, the Framers emphasized strongly and repeatedly the need for an independent judiciary. Hamilton, for instance, stated:

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\par }\pard \qj\widctlpar\adjustright {[I] agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from [**10] its union with either of the other departments;

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rtments; that as all the effects of such an union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered,

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wered, awed or influenced by its coordinate branches; [*1332] and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution; and in a great measure as the citadel of the public justice and the public security.

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {The complete independence of the courts of justice is peculiarly essential in a limited Constitution.

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\par }\pard \qj\widctlpar\adjustright {
\par The Federalist No. 78, at 523-24 (A. Hamilton) (J.E. Cooke ed. 1961). To translate their concern for judicial independence into practice, the Framers included in article III

the requirement that federal judges have life tenure and undiminishable compensation. The Framers recognized that these protections had freed the English judges from royal control. Pittman, }{\i supra}{
, at 485. The Framers similarly sought to make the federal judges [**11] servants not of the Executive but only of their consciences.

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {Yet the Framers also recognized, in adopting the recess appointment clause, the need to ensure the continued functioning of government when vacancies in office occurred. Article II, section 2 was thus adopted as a housekeeping measure. It provided that the President could fill vacancies in government that occurred during a recess of the Senate by granting a temporary commission which would expire at the end of the next Senate session.

\par The Framers, however, apparently never explicitly addressed the question w

hether the recess appointment

clause applied to the judicial branch. The clause was proposed just ten days before the end of the Constitutional Convention and adopted without debate. 2 Farrand, }{\i Records of the Constitutional Convention}{, 540 (1937); C. Rossiter, }{\i

1787: The Grand Convention}{ 224 (1966). There is no evidence in any of the extant records of the Constitutional Convention or of the various state conventions that the Framers intended the recess appointment clause to apply to the judiciary. }{\i See}{

Farrand, }{\i supra}{; J. Strayer, }{\i The Delegate from New York}{ (1939) (Constitutional Convention Notes [**12] of John Lansing, Jr.); James H. Hutson, "John Dickinson at the Federal Constitutional Convention," 40 }{\i William and Mary Quarterly}{

256 (1983); J. Elliot, }{\i The Debates in the Several State Conventions on the Adoption of the Federal Constitution}{, 5 vols. (1901). In fact, research into the origins of the clause has uncovered only sparse evidence that the Framers gave any thought to it at all.

\par The government argues, however, that at least two sources, }{\i The Federalist}{

and a letter written after the Constitutional Convention by Edmund Randolph, the governor of Virginia, indicate clearly that the Framers intended that the President's power under the recess appointment

clause extend to the judiciary. The government cites }{\i The Federalist}{, Nos. 67 and 76, for "Hamilton's view" that "this latter 'auxiliary method of appointment' relates to 'all vacancies' in offices described in article II's general appointments clause and is 'nothing more than a supplement to the other . . .'" The }{\i Federalist}{

, No. 67, however, does not concern the judiciary at all. Rather, Hamilton in No. 67 refuted those Anti-federalists who sought to discredit the Constitution with the claim that the recess [**13] appointment

clause enabled the President to make interim appointments to the Senate. }{\i SEE}{ J. Story, 3 }{\i Commentaries on the Constitution of the United States}{ 410 (1833). Hamilton argues only that the scope of the recess appointment clause does not extend

beyond the parameters delineated in the clause immediately preceding. He nowhere discusses the different question whether recess appointments may be made to every office mentioned in that clause.

\par In fact, there is no consideration given in any of }{\i The Federalist}{ papers to the relationship between the federal judiciary and the recess appointment power of the President. The government cites }{\i The Federalist}{

, No. 76, despite the fact that No. 76 makes no mention of the judicial branch of government or of the recess appointment clause, other than to quote verbatim the clause itself. }{\i The Federalist}{

, No. 78, does indeed say that the "mode of appointing the judges . . . is the same" as that "fully discussed in the two last numbers" concerned [**133] with the appointment of the other federal officers. Yet "the two last numbers" of }{\i

The Federalist}{, Nos. 76 and 77, include no reference to the recess appointment clause [**14] other than its quotation at the outset of No. 76. Hamilton's silence on this issue lends support to the view that the Framers considered the

recess appointment clause a mere housekeeping measure.

\par The sole reference in the historical record to the Framers' views about the relationship between the federal judiciary and the recess appointment

clause comes in Edmund Randolph's letter to the Virginia House of Delegates explaining his reasons for declining to add his signature to the proposed Constitution transmitted to the states by the Constitutional Convention. 3 Farrand, *supra* at 123, 127. In that letter, Randolph argues that the Constitution had created an excessively powerful Executive, citing as partial evidence for this view his belief that the recess appointment clause gave the President the power of conferring judicial commissions during the recess of the Senate. There is no evidence, however, that Randolph's comments about the recess appointment clause in this letter represented anything other than the temporary position of a volatile political figure whose "gyrations" regarding both the value and meaning of the Constitution are well known to historians. *See*, J. [**15] Main, *supra*

The Anti-Federalists: Critics of the Constitution, 1781-1788} 257 (1961). By the time of the Virginia state convention on the Constitution, Randolph had so far banished his earlier doubts regarding the Constitution that he had actually become one of its "staunchest supporters." G. Bancroft, *History of the Formation of the Constitution of the United States* 427 (1885). Contrary to the impression created by his letter, Randolph stated at the Virginia convention that the powers of the President were in all respects carefully circumscribed: "He can do no important act without the concurrence of the Senate." 3 Elliot, *supra* at 201. He attacked the provisions for the appellate jurisdiction of the federal judiciary, but he maintained that judicial independence had been adequately guaranteed. *Id.* at 205. Despite the fact that Randolph consistently highlighted the flaws in the Constitution for the benefit of his fellow members of the Virginia state convention, he never mentioned the recess appointment clause, even on the day the clause was read aloud to the Virginia convention. In fact, the Virginia convention did not discuss the clause at all. *Id.* at 496, [**16]

570. As at the other state conventions, the only doubts raised at the Virginia convention about the independence of the judiciary stemmed from the fact that the Constitution did not prohibit augmentation of judicial salaries, not from the recess appointment clause. *Id.* at 517.

Thus, the sparse legislative history regarding the recess appointment clause teaches us little about the intent of the Framers. We are certainly unpersuaded that the available evidence indicates that the Framers envisioned that judges holding temporary appointments could properly exercise article III powers.

The recess appointment clause was apparently modeled on a similar provision in the South Carolina Constitution of 1778. C. Warren, *The Making of the Constitution* 530-31 (1929).

That constitution provided that South Carolina ordinaries, the equivalent of judges, were to be chosen by a joint vote of the state House and Senate and were to have tenure during good behavior. S.C. Const. art. XXIV (1778). The South Carolina Constitution provided also that the Governor could make a recess appointment to any vacancy in an office to be filled by vote of the state legislature. The appointee would [**17] hold office until the next election to the state legislature.

slature. S.C. Const. art. XXVI (1778). There is evidence that the South Carolina

recess appointment clause was not intended to apply to judicial offices. The South Carolina legislature passed legislation in 1815 authorizing the Governor to make temporary appointments to the office of ordinary. }{\i State v. Hutson}

{ , 12 S.C.L. (1 McCord) 240 (Const.Ct.1821). Such legislation would have been unnecessary if ordinaries had been covered by the recess appointment clause of the Constitution of 1778.

\par [*1334] C

\par The final reason for concluding that the recess appointment clause does not permit judges lacking article III protection to exercise article III power is that Supreme Court precedent seems to mandate that result.

\par The Supreme Court has long emphasized the overriding importance of an independent judiciary. In 1920, the Court considered whether application of the federal income tax to the salaries of federal judges constituted diminution of income. }{\i

Evans v. Gore}{ , 253 U.S. 245, 40 S. Ct. 550, 64 L. Ed. 887 (1920). The Court, quoting Washington, Hamilton, Marshall, and Wilson at great length, [**18] concluded that "independence of action and judgment"

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\par }{\pard \qj\widctlpar\adjustright {is essential to the maintenance of the guarantees, limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

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\par }{\i Id.}} at 253, 40 S. Ct. at 553. The Court stressed that, in order to ensure the integrity of the judiciary, judges must not only be independent of outside influence in fact, but must also be "above even the suspicion of any influence." }{\i Id.}}

at 257, 40 S. Ct. at 554 (quoting Chief Justice Taney in letter to Secretary of Treasury). Thirteen years later, in }{\i O'Donoghue v. United States}{ , 289 U.S. 516, 53 S. Ct. 740, 77 L. Ed. 1356 (1933), the Court stated that

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\par the acts of each [department should] never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest [**19] influence, direct or indirect, of either of the other two powers."

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\par }{\i Id.}} at 530, 53 S. Ct. at 743. Other cases contain similar language . }{\i See, e.g., American Insurance Co. v. Canter}{ , 26 U.S. (1 Pet.) 511, 54 S. 7 L. Ed. 242 (1828) (courts whose judges do not have article III protection are "incapable of receiving" the judicial power conferred by the Constitution on the judicial branch of government).

\par }{\pard \qj\fi360\sb120\widctlpar\adjustright {The preeminence of the constitutional requirement that article III power may not be exercised by judges lacking article III protection has been reemphasized in two more recent cases in which the Court held

unconstitutional statutory schemes designed to promote judicial efficiency. In *Glidden Co. v. Zdanok*, 370 U.S. 530, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962), the question presented was whether Joseph Jackson, a judge of the United States Court of Customs and Patent Appeals, could preside over a criminal trial in a United States District Court. Jackson sat by virtue of 28 U.S.C. §

294(d) (1976) which authorizes retired judges to sit by designation of the Chief Justice on either the courts of appeals or the district courts. Lurk, the defendant, alleged that as a member of the Court of Customs and Patent Appeals, Judge Jackson enjoyed only statutory assurance of tenure and compensation. Thus, Lurk claimed, in being tried by such a judge he had been "denied protection of judges with tenure and compensation guaranteed by Article III." *Id.* at 533, 82 S. Ct. at 1464.

The Court held that Judge Jackson could preside over Lurk's trial because the Court of Customs and Patent Appeals was, in fact, a court constituted under article III whose judges enjoyed article III protection. The opinion strongly indicates that had the Court not found that Judge Jackson enjoyed the constitutional protections of life tenure and undiminished compensation it would have reached a contrary result. The Court first noted that the "necessity for an [article III] judge is uncontested." *Id.* at 537, 82 S. Ct. at 1466. Regardless whether Lurk's trial was conducted fairly, the Court held,

"Article III, § 1 . . . is explicit and gives the petitioners . . . a basis for complaint without requiring them to point to particular instances of mistreatment in the record." *Id.*

Id. at 533, 82 S. Ct. at 1464. The essential question, therefore, was not whether 28 U.S.C. §

294(d) provided a useful mechanism by which to lessen the workload of the district courts. The question, instead, was whether the members of courts from which § 294(d) judges were drawn enjoyed article III protections. Thus, the Court held that only upon a determination that they did enjoy such protections would they be allowed to exercise article III powers.

In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982), the Court once again stressed the importance of judicial independence in the constitutional scheme. That case presented a challenge to the constitutionality of the Bankruptcy Reform

Act of 1978, which granted to judges without article III protection jurisdiction over all bankruptcy matters. Bankruptcy judges were appointed for fourteen year terms, could be removed by the judicial council of the circuit in which they sat on grounds of "incompetence, misconduct, neglect of duty or physical or mental disability," and were not protected from salary diminution by Congress. *Id.* at 102 S. Ct. at 2862. The appellees claimed that they were thus not article III

judges and could not exercise article III power. *Id.* at 2864.

The *Marathon* Court, in a plurality opinion by Justice Brennan, held

that Congress could not delegate article III powers to the bankruptcy courts without granting the judges of those courts article III protection. In dissent, Justice White argued strongly that Congress, in creating the bankruptcy courts, had created an efficient, workable system to address an increasingly pressing problem. }{\i Id.}{} at 2894-2896. Without disputing the worthiness of Congress' goals or the efficiency of the system Congress had designed, the plurality stated unequivocally:

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\par }{\pard \qj\widctlpar\adjustright {The inexorable command of [article III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art.

III. Those attributes are also clearly set forth:

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\par "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior and shall, at stated Times, receive for their Services, a Compensation, which shall not [**23] be diminished during their Continuance in Office." Art. III, \a7 1.

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\par }{\i Id.}{} at 2865. The plurality specifically tied its holdings to the mandate of the Constitution that the federal courts be absolutely independent. It noted:

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\par In sum, our Constitution unambiguously enunciates a fundamental principle -- that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protection for that independence.

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\par }{\i Id.}{} at 2866. Because the Bankruptcy Act vested judicial power in judges without article III protection it violated the constitutional command that such power be vested only in judges who enjoy those safeguards. Thus, }{\i Marathon}{} clearly demonstrates that the imperatives of article III take precedence over a statute providing an indisputably efficient solution to a pressing judicial problem. }{\i See also Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.}{} , 712 F.2d 1305 (9th Cir.1983), }{\i reh'g en banc granted}{} , 718 F.2d 971 (9th Cir.1983).

\par }{\pard \qj\fi360\sb120\widctlpar\adjustright {In sum, the plain language [**24] of the Constitution, the history of the adoption of article II and article III, and decisions of the Supreme Court emphasizing in the strongest terms the

necessity of a judiciary independent both in fact and in appearance all demand that we adhere strictly to the constitutional command that only those who enjoy article III protections may exercise article III power. The government argues, however, that the long and accepted practice of recess appointments to article III courts has created a "historical consensus" that judicial appointments made pursuant to the recess appointment clause are not subject to the requirements of article III. It is to that argument that we now turn.

\par IV

\par The recess appointment clause was used with some frequency to fill judicial vacancies during the late eighteenth and early [1336] nineteenth centuries. By the end of 1823, five recess appointments had been made to the Supreme Court while twenty had been made to the inferior federal courts. Chief Justice Rutledge not only sat on the Supreme Court by virtue of a recess commission but also authored a decision of the Court before his confirmation by the Senate.

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See *United States v. Peters*, 3 U.S. (3 Dall.) 121, 1 L. Ed. 535 (1795) [25]

(Rutledge, J.). No evidence exists that the constitutional propriety of these appointments was ever questioned. This fact suggests that recess appointments

to the judiciary, if not contemplated or explicitly sanctioned by the Framers, were nonetheless not considered highly objectionable by them. As one author has noted:

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\par } \par \qj \widetlpar \adjustright {During this period, when those who wrote the Constitution were alive and active, not one dissenting voice was raised against the practice. It would seem that the framers must have looked upon recess appointments

as an exceptional expedient to fill vacancies on the Court and not as a violation of article III.

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\par Note, } {\i Recess Appointments to the Supreme Court -- Constitutional But Unwise} {? 10 Stan.L.Rev. 124, 132 (1957).

\par } \par \qj \fi360 \sb120 \widetlpar \adjustright {Recess appointments were made to the federal judiciary as frequently after the constitutional period as during it. In all, 283 recess appointments

were made to the federal bench -- six of those to the Supreme Court -- between 1823 and 1964. The practice, however, fell into disuse a generation ago. Judge Heen's appointment in 1980 was the only recess appointment in the past twenty years. } {\i See

} { Appellee's Second [26] Supplemental Brief at A1-A25.

\par Executive acceptance of the power to make recess appointments to the judiciary is evidenced not only by frequent use of the power, but also by some twenty four opinions of the attorneys general. That of Attorney General Stanberry in 1868 is one of the more elaborate:

\par For it seems a greater evil to be without officers altogether, than to have officers who hold only by the temporary appointment of the President. I say by the } {\i temporary} { appointment of the President, for, in strict language, the President can

not invest any officer with a full title to the office without the concurrence of the Senate. Whether the President appoints in the session or in the recess, he cannot and does not } {\i fill the office} { without the concurrence of the Senate. He may } {

\i fill the vacancy} { in the recess, but only by an appointment which lasts until the end of the next session.

\par For instance, in filling a vacancy in the office of judge, whose tenure is in effect for life, his appointee can only hold for a fraction of time.

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\par } \par \qj \widetlpar \adjustright {

\par 12 Op.Atty.Gen. 82, 41 (1868) (emphasis in original).

\par } \par \qj \fi360 \sb120 \widetlpar \adjustright {Congressional acceptance of

presidential power to make recess [**27] judicial appointments is equally indisputable. The statute authorizing the payment of recess appointees to all offices makes no exception for judges, and Senator Philip Hart, in support of a resolution requesting the President to use his recess appointment power sparingly in filling judicial vacancies, noted that

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\par }\pard \qj\widctlpar\adjustright {if there ever was ground for the argument that the more specific language of Article III of the Constitution would be construed as excluding judiciary appointments from the general authorization given the President in Article II, time has answered it. The President does have that power and this Resolution does not argue otherwise.

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\par 106 Cong.Rec. 18,130 (1960).

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {Thus, both Congress and the Executive have long accepted the power of the President to make recess appointments

to the federal bench. But while the members of both the legislative and executive branches are sworn to uphold the Constitution, the courts alone are the final arbiters of its meaning. }{\i United States v. Nixon}{, 418 U.S. 683, 703, 94 S. Ct. 3090, 3105, 41 L. Ed. 2d 1039 (1974); }{\i Marbury v. Madison}{, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). The question [**28] before us, then, is what weight to attach to these legislative and executive interpretations of the scope of [*1337] presidential power to make recess appointments.

\par Early Supreme Court authority suggested that great weight was to be given to historical practice. In }{\i Stuart v. Laird}{, 5 U.S. (1 Cranch) 299, 2 L. Ed. 115 (1803), the Court considered the question whether judges of the Supreme Court could sit as circuit judges without having a separate commission to sit on the circuit court. The Court held that

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\par }\pard \qj\widctlpar\adjustright {practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

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\par }{\i Id.}{ at 308.

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {The view that a long and continuous practice is entitled to a presumption of constitutionality gained further currency in the early part of this century. Several Supreme Court cases during this [**29] period considered historical practice in resolving constitutional questions. n4 The Court best enunciated the theo

ry of these decisions in }{\i United States v. Midwest Oil Co.}{, 236 U.S. 459, 472-73, 35 S. Ct. 309, 312-13, 59 L. Ed. 673 (1915), stating that

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\par }\pard \qj\widctlpar\adjustright {government is a practical affair intende

d for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice.

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\par -----Footnotes-----

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n4 }\i See, e.g., Myers v. United States}{, 272 U.S. 52, 175, 47 S. Ct. 21, 45, 71 L. Ed. 160 (1926); }\i Ex parte Grossman}{, 267 U.S. 87, 118, 45 S. Ct. 332, 336, 69 L. Ed. 527 (1925); }\i Fairbank v. United States}{, 181 U.S. 283, 307, 21 S. Ct. 648, 657, 45 L. Ed. 862 (1901).

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\par }\pard \qj\widctlpar\adjustright {-End Footnotes-----

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {This early line of Supreme Court authority, holding that unchallenged historical practice is sufficient [**30] evidence of constitutionality, no longer, however, represents the thinking of the Court. Recent Supreme Court discussions of the issue indicate that any practice, no matter how fully accepted or efficient, is "subject to the demands of the Constitution which defines powers and

... sets out just how those powers are to be exercised." }\i INS v. Chadha }{, 462 U.S. 919, 945, 103 S. Ct. 2764, 2781, 77 L. Ed. 2d 317 (1983).

\par In }\i INS v. Chadha}{, the Court considered the constitutionality of a statute authorizing one house of Congress to invalidate by resolution a decision of an agency of the executive branch made pursuant to congressionally delegated authority. At the time the Court decided }\i Chadha}{, the practice of including a one-house veto provision in legislation had become so common as to have indisputably become a practice of long and continuous acceptance. As the dissent noted,

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\par }\pard \qj\widctlpar\adjustright {over the past five decades, the legislative veto has been placed in nearly 200 statutes. The device is known in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy. [**31]

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\par }\i Id.}{ at 968, 103 S. Ct. at 2793 (White, J. dissenting) (footnote omitted). Moreover, the practice of one-house vetoes, accepted as constitutional by Presidents since World War II, }\i id.}{, had become a central tool of the legislative process. It was more than "efficient, convenient, and useful." It was "an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress' control over lawmaking." }\i Id.}{ at ~~~, 103 S. Ct. at 2795.

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {Yet, this historic acceptance of the

one-house veto did not prevent the Court from holding the practice unconstitutional. In fact, Chief Justice Burger noted for the majority that "our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing [*1

338] with increasing frequency in statutes which delegate authority to executive and independent agencies." }{\i Id.}{ at ~-~-
, 103 S. Ct. at 2781. The Court stated that, regardless of historical practice, "policy arguments supporting even useful 'political inventions' [*32] are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised." }{\i Id.}{

\par The Court also dispensed quickly with arguments based on governmental efficiency.

y. Claims that the one-house veto had become central in the relationship between the President and Congress would not override constitutional commands. Chief Justice Burger stated emphatically that

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\par } \par \qj \widetilde{\par} \adjustright {convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government. . . .

\par } \par \qj \fi360\sb120 \widetilde{\par} \adjustright {The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices we

re consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often

encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. }{\i See Youngstown Sheet & Tube Co. v. Sawyer}{

, 343 U.S. 579 [72 S. Ct. 863, 96 L. Ed. 1153] [*33] (1952). With all the obvious flaw

s of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

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\par }{\i Id.}{ at , , 103 S. Ct. at 2780, 2788.

\par } \par \qj \fi360\sb120 \widetilde{\par} \adjustright {The teaching of }{\i Chadha}{ is clear. Historical acceptance and governmental efficiency are not unimportant. They will not, however, "save [a practice] if it is contrary to the Constitution." }{\i Id.}{

at 944, 103 S. Ct. at 2781. It is undisputed that the practice of recess appointments

to the judiciary is widely accepted and may, in some situations, contribute to judicial efficiency. Such appointments, however, offend the explicit and unambiguous command of article III that the judicial power be exercised

only by those enjoying life tenure and protection against diminution of compensation. A practice condemned by the Constitution cannot be saved by historical acceptance and present convenience. n5 We therefore [*1339] hold that because he lacks the essential

attributes of an article III judge, a recess appointee to the federal [*

*34] bench cannot exercise the judicial power of the United States.

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\par }\pard \qj\widctlpar\adjustright {- - - - -Footnotes- - - - -

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {n5 The government argues that the recent decision of the Supreme Court in }{\i Marsh v. Chambers}{ , 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983), dictates that we accord controlling weight to the fact that recess appointments to the judiciary were made during the early constitutional period. We disagree.

\par In }{\i Marsh}{, the Court was faced with the question whether the practice of the Nebraska legislature of opening each of its sessions with a prayer offered by a state-paid chaplain violated the establishment clause. In holding that

legislative prayer does not offend the first amendment, the Court relied on a uniquely full historical record indicating that the practice was extensively considered and approved by the Founding Fathers. We have no such record in this case.

\par The first legislative chaplain was appointed during the first Congress. Indeed, three days before final agreement was reached on the language of the Bill of Rights, Congress enacted legislation providing for the appointment of a chaplain. That legislation was not ad

opted lightly. An extensive debate took place in Congress. The bill to appoint chaplains drew opposition from both John Jay and John Rutledge on the ground that the delegates "were so divided in religious sentiments . . . that [they] could not join in the

same act of worship." }{\i Id.}{ 103 S. Ct. at 3335. The Court in }{\i Marsh}{ cited this record of debate and opposition as evidence that the "subject was considered carefully and the action not taken thoughtlessly." }{\i Id.}{

The relationship between the first amendment and the practice of legislative prayer in the thought of the first amendment draftsmen was thus fully illuminated in the record before the Court in }{\i Marsh}{.

\par In striking contrast, there is no evidence that the Framers ever considered the question whether the recess appointment clause applied to judicial appointments. The clause was adopted without debate, and the provision of the South Carolina constitution upon which it was modeled did not apply to judicial vacancies. In }{\i Marsh}{, the Court states that it "accept

[s] the interpretation of the First Amendment draftsmen" regarding the practice of legislative prayer and the establishment clause. }{\i Id.}{

We have no comparable record of explicit interpretation and debate before us. Mute acquiescence is clearly distinguishable from the affirmative contemporaneous construction of the first amendment available to the Court in }{\i Marsh}{.

\par \par }\pard \qj\widctlpar\adjustright {- - - - -End Footnotes- - - - - [**35]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {We recognize that the only other court to consider the question we decide today reached a result contrary to ours. In }{\i United States v. Allocco}{ , 305 F.2d 704 (2d Cir. 1962), the Second Circuit held that article III does not require the exclusion of judicial offices from the scope of the recess appointment clause.

It based this conclusion in part on historical practice and in part on the need for governmental efficiency. }{\i Id.}{ at 708-709. But }{\i INS v. Chad

ha}{, U.S. at , 103 S. Ct. at 2780, decided over two decades after }{\i Al
locco}{
, makes it clear that even consistent acceptance of a practice over many years
will not suffice to render an unconstitutional action constitutional. In addit
ion, other recent Supreme Court cases demonstrate that the article III
requirement of judicial independence outweighs arguments made in the name of ef
ficiency. }{\i See Northern Pipeline Construction Co. v. Marathon Pipeline Co.
}{, 102 S. Ct. at 2865-2866; }{\i Glidden Co. v. Zdanok}{, 370 U.S. at 533, 82
S. Ct. at 1463.

\par We believe the }{\i Allocco}{ decision also reflects a misapplication of a
ccepted principles of statutory [**36] and constitutional construction. The S
econd Circuit's opinion implies that the general language of the recess appoint
ment

clause takes precedence over the specific language of article III. }{\i Unite
d States v. Allocco}{, 305 F.2d at 708. Precedent is to the contrary. The unus
ually specific language of article III must supersede the general language of t
he
article II recess appointment clause, which does not mention the judicial offic
e at all. }{\i See supra}{ slip op. at 5732-33, at\~\~ .

\par Finally, }{\i Allocco}{ rests on an overly limited view of the historical
record. The Second Circuit commented that "the evils of legislative and execut
ive coercion which petitioner foresees have no support in our nation's history.
" }{\i

United States v. Allocco}{, 305 F.2d at 709. In fact, the Framers themselves we
re profoundly influenced by the sorry history of a colonial judiciary which lac
ked the most basic requisites of judicial independence. The Frame
rs based their judgments regarding the protections required in article III on t
he experience of the colonies and of England. It is precisely because of their
command in article III

that the "coercion" which the Second Circuit [**37] finds absent in more recen
t history has generally not troubled the federal judiciary. }{\i See supra}{ sl
ip op. at 5733, at\~\~ .

\par Thus, we reject the holding of }{\i Allocco}{ and find that a recess appoi
ntee to the federal bench cannot exercise the judicial power of the United Stat
es. n6

\par
\par }{\pard \qj\widctlpar\adjustright {- - - - -Footn
otes- - - - -

\par }{\pard \qj\fi360\sb120\widctlpar\adjustright {n6 The issue of whether our
holding should be applied retroactively or merely prospectively is not properly
before us and should not be decided today. We leave that issue for another day
. }{\i

See, e.g., Michigan v. Payne}{, 412 U.S. 47, 93 S. Ct. 1966, 36 L. Ed. 2d 736 (
1973) (determining whether or not to give retroactive effect to a rule formulat
ed in an earlier decision); }{\i Robinson v. Neil}{, 409 U.S. 505, 93 S. Ct. 87
6, 35 L. Ed. 2d
29 (1973) (same); }{\i Stovall v. Denno}{, 388 U.S. 293, 87 S. Ct. 1967, 18 L.
Ed. 2d 1199 (1967) (same); }{\i Tehan v. Shott}{, 382 U.S. 406, 86 S. Ct. 459,
15 L. Ed. 2d 453 (1965) (same); }{\i Johnson v. New Jersey}{
, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966) (same); }{\i Linkletter
v. Walker}{, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1964) (same).

\par
\par }{\pard \qj\widctlpar\adjustright {- - - - -End Foo

tnotes-----[**38]

\par }\pard \qj\fi360\sb120\widctlpar\adjustright {The conviction is VACATED and the case remanded to the United States District Court for the District of Hawaii.

\par \sect }\sectd \sbknone\linex0\sectdefaultcl {\header \pard\plain \widctlpar\adjustright \f6\fs20 {\fs24

\par }}\pard\plain \widctlpar\adjustright \f6\fs20 {

\par }}===== END ATTACHMENT 2 =====

===== ATTACHMENT 3 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert NARMS201:[ATTACH.D8]ARMS22000FBDK.003 to ASCII,

The following is a HEX DUMP:

===== END ATTACHMENT 3 =====

October 20, 2000

The Honorable Carolyn Miller Parr
United States Tax Court
400 Second Street, NW
Washington, DC 20217

Dear Judge Parr,

On behalf of the President, I would like to thank you for your many years of service to the country as a United States Tax Court Judge. Your commitment to public service is to be commended.

Your 15-year term expires November 25, 2000. Given the late date and the fact that Congress will soon go on recess, please be advised that President Clinton will not be in a position to re-nominate you before he leaves office.

On behalf of the President, I wish you the very best in the years to come.

Sincerely yours,

Beth Nolan
Counsel to the President

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: lee vermillion <kevinleev97@yahoo.com> (lee vermillion <kevinleev97@yahoo.com> [UNKNOWN])

CREATION DATE/TIME: 1-NOV-2000 14:43:45.00

SUBJECT: Fwd: FW: [Fwd: GI JOE]

TO: Katie Windham <kate@windhamdesigns.com> (Katie Windham <kate@windhamdesigns.com> [UNKNOWN])
READ:UNKNOWN

TO: Angela Worrell <aworrell@n2.com> (Angela Worrell <aworrell@n2.com> [UNKNOWN])
READ:UNKNOWN

TO: Elizabeth Morgan <Elizabeth.Morgan@wpni.com> (Elizabeth Morgan <Elizabeth.Morgan@wpni.com> [UNKNOWN])
READ:UNKNOWN

TO: Mary Morrison (CN=Mary Morrison/OU=WHO/O=EOP [WHO])
READ:UNKNOWN

TO: Jennifer Nash <jnash@uu.net> (Jennifer Nash <jnash@uu.net> [UNKNOWN])
READ:UNKNOWN

TO: Chris Ogburn <chris.ogburn@compaq.com> (Chris Ogburn <chris.ogburn@compaq.com> [UNKNOWN])
READ:UNKNOWN

TO: Adam Ranzer <adamranzer@yahoo.com> (Adam Ranzer <adamranzer@yahoo.com> [UNKNOWN])
READ:UNKNOWN

TO: Langdon Reid <lreid@cfw.com> (Langdon Reid <lreid@cfw.com> [UNKNOWN])
READ:UNKNOWN

TO: Doug Salazar <Douglas.Salazar@pepsi.com> (Doug Salazar <Douglas.Salazar@pepsi.com> [UNKNOWN])
READ:UNKNOWN

TO: Doug and Shannon Salazar <Sksallyl@aol.com> (Doug and Shannon Salazar <Sksallyl@aol.com> [UNKNOWN])
READ:UNKNOWN

TO: "Dad ;and ;Mom Thompson" <pault@msn.com> ("Dad ;and ;Mom Thompson" <pault@msn.com> [UNKNOWN])
READ:UNKNOWN

TO: Granddad Vermillion <Bovb25@aol.com> (Granddad Vermillion <Bovb25@aol.com> [UNKNOWN])
READ:UNKNOWN

TO: Missy Walker <Missywalkerl@cs.com> (Missy Walker <Missywalkerl@cs.com> [UNKNOWN])
READ:UNKNOWN

TO: Matt and Jennifer Ankrum <Ankrum@msn.com> (Matt and Jennifer Ankrum <Ankrum@msn.com> [UNKNOWN])
READ:UNKNOWN

TO: Julie Barmak <barmakj@saic.com> (Julie Barmak <barmakj@saic.com> [UNKNOWN])
READ:UNKNOWN

TO: Tanya Booth <tldb69@hotmail.com> (Tanya Booth <tldb69@hotmail.com> [UNKNOWN])
READ:UNKNOWN

TO: Joe Casey <JCasey2095@aol.com> (Joe Casey <JCasey2095@aol.com> [UNKNOWN])
READ:UNKNOWN

TO: Garnett Clymer <Gcclymer@aol.com> (Garnett Clymer <Gcclymer@aol.com> [UNKNOWN])
READ:UNKNOWN

TO: Laura Cross <cross18@aol.com> (Laura Cross <cross18@aol.com> [UNKNOWN])
READ:UNKNOWN

TO: Carla Custis <ccustis@trigon.com> (Carla Custis <ccustis@trigon.com> [UNKNOWN])
READ:UNKNOWN

TO: Alexis Grier <agrier@mbc.edu> (Alexis Grier <agrier@mbc.edu> [UNKNOWN])
READ:UNKNOWN

TO: Jim Hewitt <botporl@aol.com> (Jim Hewitt <botporl@aol.com> [UNKNOWN])
READ:UNKNOWN

TO: Penny Jenkins <pjenkins@gettysburg.edu> (Penny Jenkins <pjenkins@gettysburg.edu> [UNKNOWN])
READ:UNKNOWN

TO: Ashley Lowrey <Ashley_Lowrey@GMACCM.com> (Ashley Lowrey <Ashley_Lowrey@GMACCM.com> [UNKNOWN])
READ:UNKNOWN

TO: Brooke Blackwell Marker <blackweb@frederick.k12.va.us> (Brooke Blackwell Marker <blackweb@frederick.k12.va.us> [UNKNOWN])
READ:UNKNOWN

TO: Dave Martin <DSM4283@aol.com> (Dave Martin <DSM4283@aol.com> [UNKNOWN])
READ:UNKNOWN

TO: Steve May <Farriersupplies@compuserve.com> (Steve May <Farriersupplies@compuserve.com> [UNKNOWN])
READ:UNKNOWN

TO: Amy Memory <AMemory@MEDCOST.com> (Amy Memory <AMemory@MEDCOST.com> [UNKNOWN])
READ:UNKNOWN

TEXT:

Note: forwarded message attached.

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Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	From Lee Vermillion to Many Recipients Re: Fwd: FW: [Fwd: GI JOE] [partial] (1 page)	11/01/2000	b(7)(C), b(7)(F), b(6)

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([War Powers])
OA/Box Number: 500000

FOLDER TITLE:

[10/11/2000 - 11/04/2000]

2019-0154-F

jn602

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Received: from smtp-hub.mrf.mail.rcn.net (207.172.4.107) by
mta469.mail.yahoo.com with SMTP; 01 Nov 2000 11:15:56 -0800 (PST)
Received: from smtp01.mrf.mail.rcn.net ([207.172.4.60]) by
smtp-hub.mrf.mail.rcn.net with esmtp (Exim 3.16 #1) id 13r3Kr-0001tn-00
for kevinleev97@yahoo.com; Wed, 01 Nov 2000 14:14:09 -0500
Received: from signature-stewart.erols.com ([216.164.109.6]
helo=sigstewpdc.supersettlements.com) by smtp01.mrf.mail.rcn.net with
esmtp (Exim 3.16 #1) id 13r3Kp-0001in-00 for kevinleev97@yahoo.com; Wed,
01 Nov 2000 14:14:08 -0500
Received: by SIGSTEWPCD with Internet Mail Service (5.5.2448.0) id
<WB3F95Y7>; Wed, 1 Nov 2000 14:16:22 -0500
Date: Wed, 1 Nov 2000 14:16:21 -0500
From: Lee Vermillion <lee@supersettlements.com>
Subject: FW: [Fwd: GI JOE]
To: "kevinleev97@yahoo.com" <kevinleev97@yahoo.com>
Message-id: <5114F93F0A5CD411A85D0050040E5FCA0158B8@SIGSTEWPCD>
MIME-version: 1.0
X-Mailer: Internet Mail Service (5.5.2448.0)
Content-type: multipart/mixed;
boundary="Boundary_(ID_jrveD22ABkClebpFxQ7fNQ)"
Content-length: 8092
X-Apparently-To: kevinleev97@yahoo.com via web3506.mail.yahoo.com
X-Track: 1: 40

> -----Original Message-----

> From: Ashley Vermillion [SMTP:avermill@UU.NET]
> Sent: Wednesday, November 01, 2000 1:11 PM
> To: lee@supersettlements.com; tvermill@ora.fda.gov;
bovb25@aol.com;

> (b)(6), (b)(7)c, (b)(7)f

> Subject: [Fwd: GI JOE]

[001]

>

>

>

>

>

>

>

>> You might find this of interest.

>>>

>>>>

>>>> Oct. 26 falls on a Thursday this year.

>>>> Ask the significance of the date, and you're likely to draw some

> puzzled

>>>> looks-five more days to stock up for Halloween?

>>>>

>>>> It's a measure of men like Col. Mitchell Paige that they wouldn't
> have

>>>> had it any other way. What they did 58 years ago, they did

> precisely so

>>>> their grandchildren could live in a land of peace and plenty.

>>>>

>>>> Whether we've properly safeguarded the freedoms such men fought to

> leave

>>>> us, may be a discussion better left for another day. Today we

> struggle

>>> to
>>>> envision-or remember-how the world must have looked on Oct. 26,
>>>> 1942.
>>>>
>>>> A few thousand lonely American Marines had been put ashore on
>>>> Guadalcanal, a god-forsaken jungle island which just happened to
lie
>>> like
>>> a
>>>> speed bump at the end of the long blue-water slot between New
Guinea
> and
>>> the
>>>>
>>>> Bismarck Archipelago-the very route the Japanese Navy would have to
> take
>>> to
>>>> reach Australia.
>>>>
>>>> World War II is generally calculated from Hitler's invasion of
> Poland in
>>>> 1939. But that's a eurocentric view. The Japanese had been
> limbering
>>>> up in Korea and Manchuria as early as 1931, and in China by 1934.
> By
>>> late
>>>> 1942 they'd devastated every major Pacific military force or
> stronghold
>>> of
>>>> the great pre-war powers: Britain, Holland, France, and the United
>>> States.
>>>> The bulk of America's proud Pacific fleet lay beached or rusting on
> the
>>>> floor of Pearl Harbor.
>>>>
>>>> As Mitchell Paige-then a platoon sergeant-and his rifle platoon of
>>>> 30-odd men were sent out to establish a last, thin, defensive line
> on a
>>>> ridge line southwest of the tiny American bridgehead at Henderson
> Field
>>> on
>>>> Guadalcanal on Oct. 25, it's unlikely anyone thought they'd
finally
>>>> provide a definitive answer to the question: How many able-bodied
> U.S.
>>>> Marines
>>>> does it take to hold a hill against 2,000 desperate and motivated
>>> attackers?
>>>>
>>>> The Japanese Army had not failed in an attempt to seize any major
>>>> objective since the Russo-Japanese War of 1895. But in preceding
> days,
>>>> Marine commander Vandegrift had defied War College doctrine,
> "dangling"

>>> his
>>>> men in exposed positions to draw Japanese attacks, then springing
> his
>>> traps
>>>> "with the steel vise of firepower and artillery," in the words of
> Naval
>>>> historian David Lippman.
>>>>
>>>> The Japanese regiments had been chewed up. Still, American
> commanders
>>>> had so little to work with that Paige's men had only four
30-caliber
>>>> Browning
>>>> machine guns on the one ridge through which the Japanese opted to
> launch
>>>> their final assault against Henderson Field, that fateful night of
> Oct.
>>> 26.
>>>>
>>>> By the time the night was over, there were 98 Japanese dead on the
> hill
>>>> and 200 more sprawled in the gully just below, historian Lippman
>>> reports.
>>>> "The American estimate of 2,200 Japanese dead is probably too low."
>>>>
>>>> Among the 90 American dead and wounded that night were all the men
> in
>>>> Mitchell Paige's platoon. Every one. As the night wore on, Paige
> moved
>>>> up and down his line, pulling his dead and wounded comrades back
> into
>>> their
>>>> foxholes and firing a few bursts from each of the four Brownings in
>>>> turn, convincing the Japanese forces down the hill that the
> positions
>>> were
>>>> still manned.
>>>>
>>>> The citation for Paige's Congressional Medal of Honor adds: "When
> the
>>>> enemy broke through the line directly in front of his position,
> P/Sgt.
>>>> Paige, commanding a machine gun section with fearless
determination,
>>>> continued to direct the fire of his gunners until all his men were
>>>> either killed or wounded. Alone, against the deadly hail of
> Japanese
>>>> shells,
>>>> he fought with his gun and when it was destroyed, took over
another,
>>> moving
>>>> from gun to gun, never ceasing his withering fire." In the end,
Sgt.
>>> Paige

>>>> picked up the last of the 40-pound, belt-fed Brownings-the same
> design
>>>> which John Moses Browning famously fired for a continuous 25
minutes
>>> until
>>>> it
>>>> ran out of ammunition in its first U.S. Army trial-and walked down
> the
>>>> hill with it, firing as he went. The weapon did not fail.
>>>>
>>>> Coming up at dawn, battalion executive officer Maj. Odell M.
> Conoley
>>>> first discovered the answer to our question: How many able-bodied
>>> Marines
>>>> does
>>>> it take to hold a hill against 2,000 desperate and motivated
> attackers?
>>>> Mitchell Paige alone sat upright behind his 30-caliber Browning,
> waiting
>>>> to see what the new dawn would offer. And that was the second
> problem.
>>> Part
>>>>
>>>> of the American line had fallen to the last Japanese attack. "In
> the
>>> early
>>>> morning light, the enemy could be seen a few yards off, and vapor
> from
>>> the
>>>> barrels of their machine guns was clearly visible," reports
> historian
>>>> Lippman. "It was decided to try to rush the position."
>>>>
>>>> For the task, Maj. Conoley gathered together "three enlisted
>>> communication
>>>> personnel, several riflemen, a few company runners who were at the
>>>> point, together with a cook and a few messmen who had brought food
> to
>>> the
>>>> position the evening before." Joined by Paige, this ad hoc force of
> 17
>>>> Marines counterattacked at 5:40 a.m., discovering that "the
> extremely
>>> short
>>>> range allowed the optimum use of grenades," and that "The element
of
>>>> surprise
>>>> permitted the small force to clear the crest." And that's where the
>>>> unstoppable wave of Japanese conquest finally crested, broke, and
> began
>>> to
>>>> recede. Because of a handful of U.S. Marines, one of whom (now 82)
>>> lives
>>>> out

>>>> a
>>>> quiet retirement in La Quinta, Calif.
>>>>
>>>> When the Hasbro Toy Co. called up some years back, asking
> permission to
>>> put
>>>> the retired colonel's face on some kid's doll, Mitchell Paige
> thought
>>> they
>>>> must be joking. But they weren't. That's his mug, on the little
> Marine
>>> they
>>>>
>>>> call "GI Joe."
>>>>
>>>> And now you know. Wishing you all a peaceful Veterans Day 2000.
>>>>
>>>>
>>>>

>>>> <<thomas_alexis32.vcf>> <<ATT00015.txt>>

- thomas_alexis32.vcf - ATT00015.txt===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:
begin:vcard
n:Thomas;Alexis
tel;work:(703)902-5750
x-mozilla-html:FALSE
org:Booz-Allen & Hamilton
adr;;;;;;
version:2.1
email;internet:thomas_alexis
title:Management Analyst
fn:Alexis Thomas
end:vcard

===== END ATTACHMENT 1 =====

===== ATTACHMENT 2 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:
Ashley Vermillion
Vendor Development Account Manager
UUNET, a WorldCom Company
22001 Loudoun County Parkway- C2-3-511A
Ashburn, VA 20147
Voice- 703-886-7816
Fax- 703-886-0651
Pager- 888-452-1605, avermill-pager@uu.net
Email- avermill@uu.net
<http://www.uu.net>

===== END ATTACHMENT 2 =====

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Arkansasdub@aol.com (Arkansasdub@aol.com [UNKNOWN])

CREATION DATE/TIME: 4-NOV-2000 20:22:34.00

SUBJECT: Fwd: AUTUMN, 1942: IT CAME DOWN TO ONE MARINE, AND ONE SHIP

TO: jtbarker@atlantic.net (jtbarker@atlantic.net [UNKNOWN])
READ:UNKNOWN

CC: Tom12840@aol.com (Tom12840@aol.com [UNKNOWN])
READ:UNKNOWN

CC: dchocho@excite.com (dchocho@excite.com [UNKNOWN])
READ:UNKNOWN

CC: vfox@worldnet.att.net (vfox@worldnet.att.net [UNKNOWN])
READ:UNKNOWN

CC: paxplace@olg.com (paxplace@olg.com [UNKNOWN])
READ:UNKNOWN

CC: Donald R. Goodwin (CN=Donald R. Goodwin/OU=WHO/O=EOP [WHO])
READ:UNKNOWN

CC: SNGDLG@aol.com (SNGDLG@aol.com [UNKNOWN])
READ:UNKNOWN

CC: Vehaz@aol.com (Vehaz@aol.com [UNKNOWN])
READ:UNKNOWN

CC: homera@efortress.com (homera@efortress.com [UNKNOWN])
READ:UNKNOWN

CC: Greercontracting@aol.com (Greercontracting@aol.com [UNKNOWN])
READ:UNKNOWN

CC: WILHOPE@cs.com (WILHOPE@cs.com [UNKNOWN])
READ:UNKNOWN

CC: garmar@dellepro.com (garmar@dellepro.com [UNKNOWN])
READ:UNKNOWN

CC: churchkey91792@yahoo.com (churchkey91792@yahoo.com [UNKNOWN])
READ:UNKNOWN

CC: robert_jones@sprynet.com (robert_jones@sprynet.com [UNKNOWN])
READ:UNKNOWN

CC: opcrm@yahoo.com (opcrm@yahoo.com [UNKNOWN])
READ:UNKNOWN

CC: DrKen1240@aol.com (DrKen1240@aol.com [UNKNOWN])
READ:UNKNOWN

CC: chmjr2000@yahoo.com (chmjr2000@yahoo.com [UNKNOWN])
READ:UNKNOWN

CC: flipo@directlynx.net (flipo@directlynx.net [UNKNOWN])
READ:UNKNOWN

CC: DSPINE@ualr.edu (DSPINE@ualr.edu [UNKNOWN])
READ:UNKNOWN

CC: troberts@dnai.com (troberts@dnai.com [OA])
READ:UNKNOWN

CC: gshare@micro.com (gshare@micro.com [UNKNOWN])
READ:UNKNOWN

CC: AnStaley@aol.com (AnStaley@aol.com [UNKNOWN])
READ:UNKNOWN

CC: bruce_streett@hotmail.com (bruce_streett@hotmail.com [UNKNOWN])
READ:UNKNOWN

CC: JDLow@aol.com (JDLow@aol.com [UNKNOWN])
READ:UNKNOWN

TEXT:

Return-path:

Date: Sat, 4 Nov 2000 11:26:19 EST

From: Kcmoneyman@aol.com

Subject: AUTUMN, 1942: IT CAME DOWN TO ONE MARINE, AND ONE SHIP

To: curtw@gvi.net, Hartopks@aol.com, baf_66067@yahoo.com,

Arkansasdub@aol.com, GClarke72@aol.com

Message-id:

MIME-version: 1.0

X-Mailer: Windows AOL sub 114

Content-type: text/plain; charset=US-ASCII

Content-transfer-encoding: 7BIT

Full-name: Kcmoneyman

>>AUTUMN, 1942: IT CAME DOWN TO ONE MARINE, AND ONE SHIP

>>by Vin Suprynowicz

>>

>>Oct. 26 falls on a Thursday this year.

>>

>>Ask the significance of the date, and you're likely to draw some

>>puzzled looks -- five more days to stock up for Halloween?

>>

>>It's a measure of men like Col. Mitchell Paige and Rear Adm. Willis

>>A. "Ching Chong China" Lee that they wouldn't have had it any other

>>way. What they did 58 years ago, they did precisely so their

>>grandchildren could live in a land of peace and plenty.

>>

>>Whether we've properly safeguarded the freedoms they fought to leave

>>us, may be a discussion best left for another day. Today we struggle
>>to envision -- or, for a few of us, to remember -- how the world must
>>have looked on Oct. 26, 1942. A few thousand lonely American Marines
>>had been put ashore on Guadalcanal, a god-forsaken malarial jungle
>>island which just happened to lie like a speed bump at the end of the
>>long blue-water slot between New Guinea and the Bismarck Archipelago
>>-- the very route the Japanese Navy would have to take to reach
>>Australia.
>>
>>On Guadalcanal the Marines built an air field. And Japanese commander
>>Isoroku Yamamoto immediately grasped what that meant. No effort would
>>be spared to dislodge these upstart Yanks from a position that could
>>endanger his ships during any future operations to the south. Before
>>long, relentless Japanese counterattacks had driven supporting U.S.
>>Navy from inshore waters. The Marines were on their own.
>>
>>World War Two is generally calculated from Hitler's invasion of
>>Poland in 1939. But that's a eurocentric view. The Japanese had been
>>limbering up their muscles in Korea and Manchuria as early as 1931,
>>and in China by 1934. By 1942 they'd devastated every major Pacific
>>military force or stronghold of the great pre-war powers: Britain,
>>Holland, France, and the United States. The bulk of America's proud
>>Pacific fleet lay beached or rusting on the floor of Pearl Harbor. A
>>few aircraft carriers and submarines remained, though as Mitchell
>>Paige and his 30-odd men were sent out to establish their last, thin
>>defensive line on that ridge southwest of the tiny American
>>bridgehead on Guadalcanal on Oct. 25, he would not have been much
>>encouraged to know how those remaining American aircraft carriers
>>were faring offshore.
>>
>>(The next day, their Mark XV torpedoes -- carrying faulty magnetic
>>detonators reverse-engineered from a First World War German design --
>>proved so ineffective that the United States Navy couldn't even
>>scuttle the doomed and listing carrier Hornet with eight carefully
>>aimed torpedoes. Instead, our forces suffered the ignominy of leaving
>>the abandoned ship to be polished off by the enemy ... only after
>>Japanese commanders determined she was damaged too badly to be
>>successfully towed back to Tokyo as a trophy.)
>>
>>As Paige -- then a platoon sergeant -- and his riflemen set about
>>carefully emplacing their four water-cooled Brownings, it's unlikely
>>anyone thought they were about to provide the definitive answer to
>>that most desperate of questions: How many able-bodied U.S. Marines
>>does it take to hold a hill against 2,000 desperate and motivated
>>attackers?
>>
>>The Japanese Army had not failed in an attempt to seize any major
>>objective since the Russo-Japanese War of 1905. Their commanders
>>certainly did not expect the war to be lost on some God-forsaken
>>jungle ridge manned by one thin line of Yanks in khaki in October of
>>1942.
>>
>>But in preceding days, Marine commander Vandegrift had defied War
>>College doctrine, "dangling" his men in exposed positions to draw

>>Japanese attacks, then springing his traps "with the steel vise of
>>firepower and artillery," in the words of Naval historian David
>>Lippman.
>>
>>The Japanese regiments had been chewed up, good. Still, the American
>>forces had so little to work with that Paige's men would have only
>>the four 30-caliber Brownings to defend the one ridge through which
>>the Japanese opted to launch their final assault against Henderson
>>Field, that fateful night of Oct. 25.
>>
>>By the time the night was over, "The 29th (Japanese) Infantry
>>Regiment has lost 553 killed or missing and 479 wounded among its
>>2,554 men," historian Lippman reports. "The 16th (Japanese)
>>Regiment's losses are uncouncted, but the 164th's burial parties
>>handle 975 Japanese bodies. ... The American estimate of 2,200
>>Japanese dead is probably too low."
>>
>>Among the 90 American dead and wounded that night were all the men in
>>Mitchell Paige's platoon. Every one. As the night wore on, Paige
>>moved up and down his line, pulling his dead and wounded comrades
>>back into their foxholes and firing a few bursts from each of the
>>four Brownings in turn, convincing the Japanese forces down the hill
>>that the positions were still manned.
>>
>>The citation for Paige's Congressional Medal of Honor picks up the
>>tale: "When the enemy broke through the line directly in front of his
>>position, P/Sgt. Paige, commanding a machinegun section with fearless
>>determination, continued to direct the fire of his gunners until all
>>his men were either killed or wounded. Alone, against the deadly hail
>>of Japanese shells, he fought with his gun and when it was destroyed,
>>took over another, moving from gun to gun, never ceasing his
>>withering fire."
>>
>>In the end, Sgt. Paige picked up the last of the 40-pound, belt-fed
>>Brownings -- the same design which John Moses Browning famously fired
>>for a continuous 25 minutes until it ran out of ammunition at its
>>first U.S. Army trial -- and did something for which the weapon was
>>never designed. Sgt. Paige walked down the hill toward the place
>>where he could hear the last Japanese survivors rallying to move
>>around his flank, the gun cradled under his arm, firing as he went.
>>
>>The weapon did not fail.
>>
>># # #
>>
>>Coming up at dawn, battalion executive officer Major Odell M. Conoley
>>first discovered the answer to our question: How many able-bodied
>>Marines does it take to hold a hill against two regiments of
>>motivated, combat-hardened infantrymen who have never known defeat?
>>
>>On a hill where the bodies were piled like cordwood, Mitchell Paige
>>alone sat upright behind his 30-caliber Browning, waiting to see what
>>the dawn would bring.
>>

>>One hill: one Marine.
>>
>>But that was the second problem. Part of the American line _had_
>>fallen to the last Japanese attack. "In the early morning light, the
>>enemy could be seen a few yards off, and vapor from the barrels of
>>their machine guns was clearly visible," reports historian Lippman.
>>"It was decided to try to rush the position."
>>
>>For the task, Major Conoley gathered together "three enlisted
>>communication personnel, several riflemen, a few company runners who
>>were at the point, together with a cook and a few messmen who had
>>brought food to the position the evening before."
>>
>>Joined by Paige, this ad hoc force of 17 Marines counterattacked at
>>5:40 a.m., discovering that "the extremely short range allowed the
>>optimum use of grenades." In the end, "The element of surprise
>>permitted the small force to clear the crest."
>>
>>And that's where the unstoppable wave of Japanese conquest finally
>>crested, broke, and began to recede. On an unnamed jungle ridge on an
>>insignificant island no one had ever heard of, called Guadalcanal.
>>Because of a handful of U.S. Marines, one of whom, now 82, lives out
>>a quiet retirement with his wife Marilyn in La Quinta, Calif.
>>
>>But while the Marines had won their battle on land, it would be
>>meaningless unless the U.S. Navy could figure out a way to stop
>>losing night battles in "The Slot" to the northwest of the island,
>>through which the Japanese kept sending in barges filled with
>>supplies and reinforcements for their own desperate forces on
>>Guadalcanal.
>>
>>The U.S. Navy had lost so many ships in those dreaded night actions
>>that the waters off Savo were given the grisly sailor's nickname by
>>which they're still known today: Ironbottom Sound.
>>
>>So desperate did things become that finally, 18 days after Mitchell
>>Paige won his Congressional Medal of Honor on that ridge above
>>Henderson Field, Admiral Bull Halsey himself broke a stern War
>>College edict -- the one against committing capital ships in
>>restricted waters. Gambling the future of the cut-off troops on
>>Guadalcanal on one final roll of the dice, Halsey dispatched into the
>>Slot his two remaining fast battleships, the USS South Dakota and the
>>USS Washington, escorted by the only four destroyers with enough fuel
>>in their bunkers to get them there and back.
>>
>>In command of the 28-knot battlewagons was the right man at the right
>>place, gunnery expert Rear Adm. Willis A. "Ching Chong China" Lee.
>>Lee's flag flew aboard the Washington, in turn commanded by Captain
>>Glenn Davis.
>>
>>Lee was a nut for gunnery drills. "He tested every gunnery-book rule
>>with exercises," Lippman writes, "and ordered gunnery drills under
>>odd conditions -- turret firing with relief crews, anything that
>>might simulate the freakishness of battle."

> >
> ># # #
> >
> >As it turned out, the American destroyers need not have worried about
> >carrying enough fuel to get home. By 11 p.m. on Nov. 13, outnumbered
> >better than three-to-one by a massive Japanese task force driving
> >down from the northwest, every one of the four American destroyers
> >had been shot up, sunk, or set aflame, while the South Dakota --
> >known throughout the fleet as a jinx ship -- managed to damage some
> >lesser Japanese vessels but continued to be plagued with electrical
> >and fire control problems.
> >
> >"Washington was now the only intact ship left in the force," Lippman
> >writes. "In fact, at that moment Washington was the entire U.S.
> >Pacific Fleet. She was the only barrier between (Admiral) Kondo's
> >ships and Guadalcanal. If this one ship did not stop 14 Japanese
> >ships right then and there, America might lose the war. ...
> >
> >"On Washington's bridge, Lieutenant Ray Hunter still had the conn. He
> >had just heard that South Dakota had gone off the air and had seen
> >(destroyers) Walke and Preston "blow sky high." Dead ahead lay their
> >burning wreckage, while hundreds of men were swimming in the water
> >and Japanese ships were racing in.
> >
> >"Hunter had to do something. The course he took now could decide the
> >war. 'Come left,' he said, and Washington straightened out on a
> >course parallel to the one on which she (had been) steaming.
> >Washington's rudder change put the burning destroyers between her and
> >the enemy, preventing her from being silhouetted by their fires.
> >
> >"The move made the Japanese momentarily cease fire. Lacking radar,
> >they could not spot Washington behind the fires. ...
> >
> >"Meanwhile, Washington raced through burning seas. Everyone could see
> >dozens of men in the water clinging to floating wreckage. Flag
> >Lieutenant Raymond Thompson said, "Seeing that burning, sinking ship
> >as it passed so close aboard, and realizing that there was nothing I,
> >or anyone, could do about it, was a devastating experience.'
> >
> >"Commander Ayrault, Washington's executive officer, clambered down
> >ladders, ran to Bart Stoodley's damage-control post, and ordered
> >Stoodley to cut loose life rafts. That saved a lot of lives. But the
> >men in the water had some fight left in them. One was heard to
> >scream, 'Get after them, Washington!' "
> >
> >Sacrificing their ships by maneuvering into the path of torpedoes
> >intended for the Washington, the captains of the American destroyers
> >had given China Lee one final chance. The Washington was fast,
> >undamaged, and bristling with 16-inch guns. And, thanks to Lt.
> >Hunter's course change, she was also now invisible to the enemy.
> >
> >Blinded by the smoke and flames, the Japanese battleship Kirishima
> >turned on her searchlights, illuminating the helpless South Dakota,
> >and opened fire. Finally, standing out in the darkness, Lee and Davis

> > could positively identify an enemy target.
> >
> > The Washington's main batteries opened fire at 12 midnight precisely.
> > Her new SG radar fire control system worked perfectly. Between
> > midnight and 12:07 a.m., Nov. 14, the "last ship in the U.S. Pacific
> > Fleet" stunned the battleship Kirishima with 75, 16-inch shells. For
> > those aboard the Kirishima, it rained steel.
> >
> > In seven minutes, the Japanese battleship was reduced to a funeral
> > pyre. She went down at 3:25 a.m., the first enemy sunk by an American
> > battleship since the Spanish-American War. Stunned, the remaining
> > Japanese ships withdrew. Within days, Yamamoto and his staff reviewed
> > their mounting losses and recommended the unthinkable to the emperor
> > -- withdrawal from Guadalcanal.
> >
> > But who remembers, today, how close-run a thing it was -- the ridge
> > held by a single Marine, the battle won by the last American ship?
> >
> > In the autumn of 1942.
> >
> > When the Hasbro Toy Co. called up some years back, asking permission
> > to put the retired colonel's face on some kid's doll, Mitchell Paige
> > thought they must be joking.
> >
> > But they weren't. That's his mug, on the little Marine they call "GI
> > Joe."
> >
> > And now you know.