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WHAT IS IT GOOD FOR? WAR POWER, JUDICIAL REVIEW, AND CONSTITUTIONAL DELIBERATION

J. RICHARD BROUGHTON*

I. Introduction

Alexis de Tocqueville recognized that in America all political questions ultimately become judicial questions.1 The effect of this phenomenon, he observed, is that the American constitutional system invests American courts with significant political power, but a power that is nonetheless mitigated by the use of judicial, rather than political, procedures.2 For Tocqueville, then, this power of judicial review "is . . . one of the most powerful barriers ever erected against the tyranny of political assemblies."3 Still, Tocqueville conceded that judicial review "cannot cover all laws without exception, for there are some laws which can never give rise to that sort of clearly formulated argument called a lawsuit."4 Such circumstances therefore serve to limit the courts' power to attack the constitutionality of the laws, thereby restricting their ability to venture beyond the judicial sphere and exercise powers committed properly and constitutionally to the political branches.

The Framers recognized these limitations, too. They approved a constitutional text that limited the judiciary's province to "cases" and "controversies," and explicitly delineated the specific types of matters to which the federal judicial power extends.5 And both Publius6 and the Philadelphia Convention delegates

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2. Id. at 102.
3. Id. at 104.
4. Id. at 103.
5. U.S. CONST. art III, § 2.
6. See THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."); id. at 466 (describing the importance of an independence in limiting the judiciary's power); id. at 469 ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."); THE FEDERALIST NO. 80, at 480-81 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing limits on the jurisdiction of the federal courts); THE FEDERALIST NO. 83, at 497 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot exercise their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive
carefully described the delicate and circumscribed role of the courts in the federal system. Madison, for example, responded to a proposal to extend judicial power to all cases arising under the Constitution by contemplating whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

Madison, moreover, explained that the political branches themselves have a significant role to play in deliberating upon, and deciding, the meaning of constitutional provisions. He argued, during a debate concerning presidential removal power, that

[t]he great objection drawn from the source to which the last arguments would lead us is, that the Legislature itself has no right to expound the Constitution; that wherever its meaning is doubtful, you must leave it to take its course, until the Judiciary is called upon to declare its meaning. I acknowledge, in the ordinary course of Government, that the exposition of the laws and Constitution devolves upon the Judiciary. But I beg to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments? The Constitution is the charter of the people to the Government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the Constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.
Marshall, too, recognized this limitation in an early speech as a House member, arguing that "[i]f the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act."10 Marshall continued, "[T]he division of power ... could exist no longer, and the other departments would be swallowed up by the judiciary."11 Thus, the power of judicial review is limited not simply by the Constitution's textual requirement of "cases and controversies," but also by prudence, reflected in the text, that both restrains the judiciary and empowers the political branches as the instruments of popular will.12 This view, captured most eloquently in Madison's and Marshall's statements, therefore recognizes two concepts: first, that some constitutional controversies are ill-suited to judicial resolution (the performance of which would upset the constitutional balance and separation of powers), a recognition that today informs our law of justiciability in federal courts;13 and second, that both

(describing Madison's position on congressional constitutional deliberation and concluding that the only limitation upon Congress's role in expounding upon the Constitution is that Congress cannot exercise judicial power in a case or controversy, nor can it deprive the judiciary of complete control over judicial functions).


11. Id. This statement anticipated the explicit limits on judicial review that Marshall outlined in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 169-70 (1803).

12. See Orrin G. Hatch, Modern Marbury Myths, 57 U. CIN. L. REV. 891, 894 (1989) ("It is clear that James Madison intended the 'case or controversy' requirement to limit the Supreme Court to 'cases of a judiciary nature' as opposed to cases susceptible to political resolution or cases without concrete injuries to specific parties."); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1576, at 381 (Thomas M. Cooley ed., 1873) (1833) (explaining the limited powers of the judiciary). As Justice Story explains, "[T]he judiciary must decide upon the constitutionality of the acts and laws of the general and State governments, so far as they are capable of being made the subject of judicial controversy." Id. (emphasis added).

13. See 2 STORY, supra note 12, § 1576, at 381. These doctrines, which have grown out of the "case or controversy" requirement and the separation of powers, include standing, ripeness, mootness, the prohibition on advisory opinions, the political question doctrine, and jurisdiction. See, e.g., Spencer v. Kemna, 523 U.S. 1, 18 (1998) (stating that "mootness ... deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so"); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733 n.7 (1997) (holding that the "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction") (quoting Reno v. Catholic Soc. Servs. Inc., 509 U.S. 43, 57 n.18 (1993)); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (requiring plaintiffs to allege a personal injury that is particularized, concrete, and otherwise judicially cognizable, and explaining that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III"); Burke v. Barnes, 479 U.S. 361, 363 (1987) (holding that "Article III of the Constitution requires that there be a live case or controversy at the time a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing") (emphasis added); Allen v. Wright, 468 U.S. 737, 751-52 (1984) (stating that Article III courts lack jurisdiction over a suit unless the plaintiff has suffered "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" and that "the law of Art. III standing is built on a single basic idea — the idea of separation of powers"); Powell v. McCormack, 395 U.S.
Congress and the President play an important role in determining the Constitution's meaning when deliberating upon various matters of federal law, particularly those matters that are ultimately beyond the judicial ken.  

Constitutional war power is one such matter, and the War Powers Resolution of 1973\(^1\) is the law that most clearly demonstrates this point. Passed amid the political turbulence that marked the Vietnam Era,\(^2\) and over President Nixon's

486, 518 (1969) (stating that "federal courts will not adjudicate political questions."); Flast v. Cohen, 392 U.S. 83, 95 (1968) (holding that "no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action."); Baker v. Carr, 369 U.S. 186, 217 (1962) (describing the political question doctrine and its roots in the separation of powers); see also Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881, 890-99 (1983) (arguing that the standing doctrine serves important structural purposes).

14. See Jonathan L. Entin, Separation of Powers, the Political Branches, and the Limits of Judicial Review, 51 OHIO ST. L.J. 175, 214-218 (1990) (arguing that "the status of the Supreme Court as sole expositor of the Constitution has not been universally accepted" and giving examples); Louis Fisher, Constitutional Interpretation by Members of Congress, 63 N.C. L. REV. 707, 718 (1985) (explaining that being the "ultimate interpreter" is different from being the "exclusive interpreter" of the Constitution and that "reforms of recent decades also have increased the capability of members to participate in constitutional debate and to honor their commitment to support the Constitution"); Scott E. Gant, Judicial Supremacy and Nonjudicial Interpretation of the Constitution, 24 HASTINGS CONST. L.Q. 359, 421 (1997) (expressing the "desire to have Congress engage in more systematic and thoughtful debate about the bearing of the Constitution on their work as legislators"); Eugene W. Hickok, Jr., The Framers' Understanding of Constitutional Deliberation in Congress, 21 GA. L. REV. 217, 218 (1986) ("The Framers' . . . understanding of representation included serious scrutiny of the Constitution.").

For a more recent and quite compelling account of legislative branch constitutional deliberation, see Neal Kumar Katyal, Legislative Constitutional Interpretation, 50 DUKE L.J. 1335 (2001). Professor Katyal offers a detailed analysis of constitutional supremacy and offers a number of suggestions to Congress for playing a more influential role in the process of making and interpreting the law. Id.

15. 50 U.S.C. §§ 1541-1548 (2001). The literature on the War Powers Resolution is vast, with most of the debate focusing upon the constitutional allocation of war powers and the Resolution's implications for making and conducting foreign policy. For some good examples of the literature, see Eileen Burgin, Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf War, 21 J. LEGIS. 23 (1995); Stephen L. Carter, The Constitutionality of the War Powers Resolution, 70 VA. L. REV. 101 (1984); John Hart Ely, Suppose Congress Wanted a War Powers Act That Worked, 88 COLUM. L. REV. 1379 (1988); J. Terry Emerson, The War Powers Resolution Tested: The President's Independent Defense Power, 51 NOTRE DAME L. REV. 187 (1975); Michael J. Glennon, Too Far Apart: Repeal the War Powers Resolution, 50 U. MIAMI L. REV. 17 (1995); Louis Henkin, War Powers "Short of War," 50 U. MIAMI L. REV. 201 (1995); Bennett C. Rushkoff, A Defense of the War Powers Resolution, 93 YALE L.J. 1330 (1984). The purpose of this article is not to revisit the debate over the propriety of the Resolution, as others more knowledgeable and capable have done so repeatedly. Rather, the purpose here is to treat an aspect of the war powers debate that has seldom received substantial attention: the judiciary's role in cases involving disputes about the allocation of constitutional war power.

16. Compare 134 CONG. REC. E3559 (1988) (statement of Rep. Broomfield) (stating the Resolution "was intended to address the issues resulting from the entanglement of U.S. Armed Forces in the Indochinese Conflict"), with LOUIS FISHER, PRESIDENTIAL WAR POWER 128 (1995) (explaining that "it is tempting to view [the Resolution] solely as a response to the Vietnam War. . . . The resolution is better described as a slow, evolutionary culmination of institutional struggles and constitutional debate than as a narrow preoccupation with the Vietnam War.").

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constitutionally based veto,\textsuperscript{17} the War Powers Resolution was Congress's effort to assert its powers pursuant to the Declare War Clause of Article I, Section 8.\textsuperscript{18} The statute requires the "collective judgment" of the political branches before American troops are sent into hostilities;\textsuperscript{19} requires that if the President commits troops into hostilities, he must inform Congress within forty-eight hours and remove them within sixty days absent congressional approval (although the President may extend the period for thirty additional days to protect and remove the troops);\textsuperscript{20} and requires the President to report to Congress throughout the period and consult with Congress before taking action.\textsuperscript{21}

Since its enactment, no President has explicitly approved of the War Powers Resolution and all have disputed its constitutionality in light of the Commander in Chief Clause.\textsuperscript{22} Furthermore, while some members of Congress over the past three decades have insisted upon its usefulness and argued for presidential adherence,\textsuperscript{23} many others have rejected it as unworkable or unconstitutional,\textsuperscript{24} and many have simply ignored it in times of military involvement. Indeed,

\textsuperscript{17} See Richard Nixon, in 1973 PUBLIC PAPERS OF THE PRESIDENTS § 311, at 893 (communicating to Congress the veto of the War Powers Resolution and arguing that the "only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force").

\textsuperscript{18} U.S. CONST. art. I, § 8, cl. 11.


\textsuperscript{20} Id. §§ 1543(a), 1544(b).

\textsuperscript{21} Id. §§ 1543-1544.

\textsuperscript{22} See ELY, supra note 16, at 49-52 (giving examples of President Reagan's and President Bush's rejections of the Resolution); Jonathan A. Bush, The Binding of Gulliver: Congress and Courts in an Era of Presidential Warmaking, 80 VA. L. REV. 1723, 1747 (1994) (reviewing ELY, supra note 16, and stating, "Every President since 1973 has insisted that the Resolution impinged on his constitutional prerogatives and has treated the Resolution with institutional contempt.").

\textsuperscript{23} See, e.g., 139 CONG. REC. H1901 (1993) (statement of Rep. Gonzales) (stating that it is Congress's duty "to uphold the law of the land and the War Powers Resolution is the law of the land"); 138 CONG. REC. E3135 (1992) (statement of Rep. Fascell) ("The War Powers Resolution is in perfect working order."); 136 CONG. REC. S13,481 (1990) (statement of Sen. Hatfield) ("I want to be on the record here today saying that I will continue to call for full implementation of both the spirit and the letter of the War Powers Resolution."); 134 CONG. REC. E3741 (1988) (statement of Rep. Fascell) ("[T]he War Powers Resolution remains a worthy vehicle for this coparticipation in the warmaking process. It is a living document whose importance in the conduct of U.S. foreign policy cannot be dismissed, discounted, or denied.").

\textsuperscript{24} See, e.g., 144 CONG. REC. H1262 (1998) (statement of Rep. Jackson-Lee) ("The War Powers Act [sic] has never been utilized; and frankly, I think the irony of this vote may send it to the courts and the courts rule it unconstitutional."); 141 CONG. REC. S18,681 (1995) (statement of Sen. Nunn) ("I voted for the War Powers Resolution. I wish now I had not because it will never work. It is not sensible."); 140 CONG. REC. S13,002 (1994) (statement of Sen. Feingold) (criticizing the Resolution as unworkable and flawed and stating, "I do not think ... the War Powers Resolution is consistent with either the intent of the Framers of our Constitution or with most Presidential practice prior to the cold war. So we must do better."); 134 CONG. REC. S6173 (1988) (statement of Sen. Byrd) ("[T]he War Powers Resolution, as presently written, is unworkable and needs to be changed.").
Congress has repeatedly acquiesced in presidential decision making regarding the use of American troops in hostilities around the globe. A few attempts have even been made in Congress to repeal the Resolution, but those attempts have thus far failed. More importantly, few serious debates concerning its constitutionality have ensued between members of Congress or between the political branches since its passage. Rather, challengers have often resorted to the courts, using both the Resolution and the War Powers Clause as vehicles, in hopes that the judiciary would resolve the question of whether a particular presidential action violated the statute and the Constitution (thus implicating, at least as a background matter, the constitutionality of the Resolution itself). This most recently occurred in a hardly recognized but crucial case, Campbell v. Clinton, involving President Clinton's use of airstrikes in Kosovo. Indeed, many prominent episodes of presidential military deployment in recent years have prompted lawsuits designed to invoke a judicial determination concerning the applicability of the War Powers Resolution and the constitutional allocation of foreign affairs powers.

Historically, and especially in the Vietnam and post-Vietnam eras, the courts have largely demurred in deciding war powers questions. As this article explains, courts have compelling reasons for doing so that serve our constitutional structure of separate and distinct powers. First and foremost, the text of the


27. See Abner J. Mikva, The Political Question Revisited: War Powers and the "Zone of Twilight," 76 Ky. L.J. 329, 335 (1987) (stating that "[t]he disputes over the Vietnam War left a second important legacy in the war powers area; the lawsuit, often filed with at least one Congressman as a plaintiff, asking the courts to intervene in limiting a President's use of the war power").


30. See Bush, supra note 22, at 1753 ("[N]o one can say that the courts have not made exceedingly clear their distaste for judging the constitutionality of an ongoing or imminent war."); Entin, supra note 14, at 177 ("[T]he judiciary has served as a bystander throughout the controversy over the War Powers Resolution."); Mikva, supra note 27, at 336 ("Over the years, the political question doctrine has had particular resiliency in cases involving foreign policy."). But see Major Geoffrey S. Corn, Presidential War Power: Do the Courts Offer Any Answers?, 157 Mil. L. Rev. 180 (1998) (contending that history proves that courts have already been continuously engaged in deciding war and foreign affairs questions and have not proven reluctant to do so and that their reluctance has been limited to specific legal questions or based on specific legal difficulties, such as standing or mootness problems).

31. See infra Part IV and accompanying notes. Admittedly, much of the literature on this question (sparse though it is) is contrary. See, e.g., Ely, supra note 16, at 54-67 (arguing that courts should decide war powers cases on the merits and remand the matter to Congress, thus, as Dean Ely puts it, inducing Congress to do its job); Bush, supra note 22, at 1754 (agreeing with Dean Ely that the courts
Constitution commits decisions about the conduct of war and of foreign, military, and diplomatic affairs to the political branches, thus implicating the constitutionally proper and prudent political question doctrine.\textsuperscript{32} Second, in particular cases, other existing constitutional doctrines of justiciability may preclude judicial intervention.\textsuperscript{33} That is, many war powers cases are brought by improper litigants to the suit, are brought by litigants with an insufficient stake in the matter, or contain questions too abstract or hypothetical; thus, these cases lend themselves to resolution that comes either prematurely or too late. Finally, the premise of many such lawsuits — that resort must be had to the courts as an alternative to political branch inaction or as a remedy for deadlock in the political branches\textsuperscript{34} — is itself troubling. It ignores not merely the Constitution's commitment of such matters to the political branches alone, but it also undermines constitutional deliberation in the political branches by encouraging political actors to wait comfortably on the constitutional sidelines while the judiciary plays the game.

This article thus addresses this crucial issue regarding judicial review of constitutional war powers disputes, an issue that has been, with a few notable and important exceptions, placed largely on the back burner of the extensive legal

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have compiled a "sorry record" of avoiding decisions in war powers disputes; Corn, supra note 30, at 181 (stating that "under the right circumstances a war power controversy between the President and Congress may necessitate judicial resolution"); cf. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 181-84 (1990) (advocating a limited judicial role and concluding that Congress should adopt a statute authorizing such suits by concerned citizens acting as private attorneys general or members of Congress); J. Gregory Sidak, To Declare War, 41 DUKE L.J. 27, 114-15 (1991) (arguing that, although the determination of whether war exists is justiciable, courts will have difficulty in fashioning an appropriate remedy and must also contend with doctrines of ripeness and mootness that will "foreclose the possibility, at any time, of the judiciary's competent monitoring and enforcement of an injunction against the President's use of offensive military force").

\textsuperscript{32} See Baker v. Carr, 369 U.S. 186, 217 (1962). Baker explains that a political question is one involving:

- a textually demonstrable Constitutional commitment of the issue to a coordinate political department; or
- a lack of judicially discoverable and manageable standards for resolving it; or
- the impossibility of deciding without an initial policy determination of a kind clearly foreclosed by nonjudicial discretion; or
- the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
- an unusual need for unquestioning adherence to a political decision already made; or
- the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

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\textit{Id.; see also} John C. Yoo, The Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 CAL. L. REV. 167, 288 (1996) (explaining that "[i]ncluding war powers in the arena of politics, the Framers would have viewed inter-branch disputes in the area as unsuitable for judicial resolution"). Professor Yoo's work on this subject (as on others) is compelling and persuasive, and this article relies upon much of Yoo's work.

\textsuperscript{33} See Jonathan L. Entin, The Dog That Rarely Barks: Why the Courts Won't Resolve the War Powers Debate, 47 CASE W. RES. L. REV. 1305, 1307-13 (1997) (explaining that "there are various procedural and jurisdictional obstacles to litigating over war powers and foreign affairs").

\textsuperscript{34} See ELY, supra note 16, at 56 (arguing that, although courts should not be in the habit of dictating American war making, they should "be enlisted in inducing Congress to answer" questions regarding the allocation of war powers).

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scholarship in the war powers arena. Part II explores the various important cases that the Supreme Court and lower federal courts have decided that are relevant to war powers and foreign affairs disputes. Part III gives particular attention to *Campbell*, decided by the United States Court of Appeals for the District of Columbia Circuit last year but rejected on certiorari by the Supreme Court, which provides an important piece in the wall separating the courts from war powers controversies. Finally, Part IV concludes that, based on constitutional text, structure, history, and precedent, the courts would do well to remain disengaged in this area. Indeed, leaving this dispute to the political branches serves two important values that Madison recognized: First, it best preserves the constitutional order of separated powers by leaving questions about the give and take of foreign affairs, war, and diplomacy to those uniquely situated (and most competent) to address them; and second, it encourages the President and Congress to fulfill their important public duties to deliberate seriously about constitutional powers.

**II. Judicial Review in Foreign and Military Affairs: A Historical Perspective**

The Constitution states that Congress "shall have Power to . . . declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." It also empowers Congress to

raise and support Armies . . . To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress. The Constitution also states, however, that the President "shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States." In addition, the Constitution vests in the President the authority to make treaties (with Senate advice and consent) and appoint ambassadors, other public ministers, and consuls. The cases analyzed in this section implicate the tension between these institutional powers and serve as exemplars of the role the judiciary has played in many of our nation's most significant foreign affairs controversies.

36. Id.
37. Id. art. II, § 2, cl. 1.
38. Id. art. II, § 2, cl. 2.
A. Early Cases: The French and the Rebels

Not long after the adoption of the new Constitution, the Republic faced its first critical military and diplomatic decision, a decision that ultimately implicated these apparently conflicting clauses concerning the scope of foreign relations authority in each of the political branches. In 1793, President Washington declared American neutrality in the war between France and England, provoking debate — including the famed Pacificus-Helvidius debate between Hamilton and Madison — as to whether the President could do so without congressional approval. Prior to his action, though, President Washington, through a letter from Secretary of State Jefferson, asked the Supreme Court to intervene and render an opinion on the separation of powers issues that the neutrality controversy implicated. The Supreme Court declined the President's request, thus beginning a custom of refusing to render advisory opinions or decide merely abstract questions of law. In addition, the letter from Chief Justice Jay and his colleagues had the practical effect of leaving decisions about the propriety of

39. See Alexander Hamilton, The First Letter of "Pacificus," in THE POWER OF THE PRESIDENCY 53 (Robert S. Hirschfield ed., 3d ed. 1982). Hamilton contended that the executive branch had the power to establish foreign policy and that the exercise of such power influenced congressional determinations regarding the use of its war power. He stated that the power of effectuating foreign relations must then of necessity belong to the executive department . . . when a proper case for it occurs.

It appears to be connected with that department in various capacities: As the organ of intercourse between the nation and foreign nations; as the interpreter of the national treaties, in those cases in which the judiciary is not competent, that is, between government and government; as the power, which is charged with the execution of the laws, of which treaties form a part: as that which is charged with the command and disposition of the public force.

Id. at 54.

Madison responded. See James Madison, The First Letter of "Helvidius," in THE POWER OF THE PRESIDENCY, supra, at 59. Madison contended, [I]t must be evident, that although the executive may be a convenient organ of preliminary communications with foreign governments, on the subjects of treaty or war; and the proper agent for carrying into execution the final determinations of the competent authority; yet it can have no pretensions, from the nature of the powers in question compared with the nature of the executive trust, to that essential agency which gives validity to such determinations. It must be further evident, that if these powers be not in their nature purely legislative, they partake so much more of that, than of any other quality, that under a Constitution leaving them to result to their most natural department, the legislature would be without rival in its claim.

Id. at 61.

42. See id. The Chief Justice's letter explained, "[T]he lines of separation drawn by the Constitution between the three departments of the government . . . and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to." Id.
unilateral presidential assertions of power in foreign affairs to the political branches.43

In Bas v. Tingy,44 however, the Court took a more assertive role. Captain Tingy of the U.S.S. Ganges sought statutorily authorized compensation after recapturing an American merchant ship from the French.45 One statute authorized compensation for recapture of ships from the "French," while another authorized higher compensation for recapture from an "enemy."46 The Court unanimously, through separate opinions from each Justice, held that Tingy was entitled to the higher amount because, although undeclared, a state of war existed between France and the United States. Justice Washington explained that "hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war."47 Justice Washington further concluded that France was an "enemy" because a "contention by force" existed between it and the United States.48 Justice Chase agreed, explaining that while the war between the United States and France was only a "partial" one absent a general declaration by Congress, it was nevertheless "public" because "of the public authority from which it emanates."49 Bas thus represents the Court's first major foray into the field of international relations. Importantly, however, Bas involved an interpretation not of war powers under the Constitution, but of a federal statute. The Bas Court offered no opinion as to Congress's constitutional authority to adopt the statute, nor did it determine whether a "war" existed in the constitutional sense of the term; rather, the Court merely determined whether conditions existed to permit application of a particular statutory scheme, a determination that bore directly on Captain Tingy's vested rights.

In Talbot v. Seeman,50 the U.S.S. Constitution's captain seized a merchant ship flying a French flag on orders from President Jefferson. Upholding the legality of the seizure, the Court concluded that Congress had the power to authorize the seizure that justified the captain's move.51 Congress, the Court said, "may authorize general hostilities . . . or partial hostilities."52 Congress having done so, the presidential order was appropriate to the commander in chief. Again, though, Talbot did not referee an interbranch dispute as to who holds constitutional war powers. It merely recognized what is obvious from the face of the text: that Congress may declare war and thus Congress may choose how it

43. See id.
44. 4 U.S. (4 Dall.) 37 (1800).
45. Id. at 37-38.
46. Id. at 39 (Moore, J.).
47. Id. at 40 (Washington, J.).
48. Id.
49. Id. at 43 (Chase, J.).
50. 5 U.S. (1 Cranch) 1 (1801).
51. Id. at 35 ("[T]his power [of recapture] is supposed to exist as an incident growing out of the state of war, and the right to salvage produced by that power is regulated in the act.").
52. Id. at 28.
does so. As Chief Justice Marshall explained, "The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this enquiry."53

The Court in *Little v. Barreme*54 ventured somewhat further into the war powers morass. In this case, the owner of a Danish merchant ship sued a navy captain who had seized the ship on orders from President Adams.55 The Court ultimately found the captain liable for damages because Congress had specifically limited the scope of the President's authority to seize vessels going from American to French ports.56 Here, however, President Adams ordered seizure of a vessel sailing to or from France. Chief Justice Marshall, troubled by the prospect of allowing military personnel to be held personally liable for following orders from their commander in chief,57 nevertheless found that the President's "instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."58 Significantly, then, *Little* recognized Congress's ability to limit presidential, commander in chief authority.59 Notably, though, the Court again was not called upon to determine whether the seizure statute was an unconstitutional exercise of Congress's power to declare war, nor was it called upon to decide the constitutionality of President Adams' instructions. Rather, it was asked to determine whether liability would lie given that Congress had already declared its position on national relations with France in the form of the seizure statute.60 President Adams' discretion, the Court seemed to recognize, was exhausted once the statute went into effect, a

53. *Id.* (emphasis added).
54. 6 U.S. (2 Cranch) 170 (1804).
55. *Id.* at 176-77.
56. *Id.* at 178.
57. *Id.* at 179. Chief Justice Marshall in fact stated,

I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. . . . That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me to strongly imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. . . . But I have been convinced that I was mistaken . . .

*Id.; see also* Fisher, * supra* note 16, at 19 (explaining that Chief Justice Marshall "admitted that the case gave him much difficulty").
59. See Ely, * supra* note 16, at 55 (noting *Little*'s significance as an example of judicial review of war powers controversies); Corn, * supra* note 30, at 210 (stating that *Little*'s "conclusion that Congress is vested with the authority to set limitations on the conduct of military operations during an undeclared war, limits not even the President may transgress, is undeniably significant").
60. Interestingly, Congress in 1807 passed a private bill to reimburse Captain Little for the damages awarded against him, concluding that he should not have been held liable for following a presidential directive. See Fisher, * supra* note 16, at 19.
statute enacted pursuant to an explicit grant of congressional power (the power to "make Rules concerning Captures on . . . Water").

_Bas, Talbot, and Little_, then, are only modest forays into the realm of foreign relations, for they did not involve the Court in explicit interbranch disputes concerning constitutional war powers. As Professor Yoo states,

Commentators have placed great store in these opinions, particularly _Little_, as contemporaneous evidence showing that courts can exercise jurisdiction over war power cases. However, none of these cases called upon the Supreme Court to decide that the President was waging war in violation of the Constitution, or that Congress had failed to declare that a state of war existed, or that courts could step in to adjudicate inter-branch disputes over war.

Thus, the Court's involvement could be justified on three grounds: (1) that the cases involved maritime and admiralty jurisdiction explicitly vested to federal courts by Article III, (2) that deciding questions concerning liability for damages resulting from alleged statutory violations is a common function of courts and one in which the courts alone have expertise (and one not committed to the other branches); and (3) as the Court has stated, that it need not avoid cases that merely touch upon foreign affairs (as cases arising from admiralty and maritime matters may often do) merely because the power to determine the course of those affairs lies with the political branches. As Professor Yoo describes it, the issues in the quasi-war cases "did not involve the power of going to war, but rather the domestic and legal effects of war once it had begun." Indeed, the Court, the argument goes, merely decided upon the rights of individuals in private lawsuits, consistent with the dictates of _Marbury_. Still, no matter how limited the holdings were in these early cases, the Court's willingness to decide issues such as when the conditions of war exist and whether military leaders may be held liable for following presidential orders contrary to an act of Congress, raises the question of how much further the Court will go to intervene in discretionary foreign affairs decisions of political actors.

Importantly, other early opinions of the Marshall Court explicitly indicate the prudence of a more limited role for the judiciary in questions involving foreign affairs decision making. In _United States v. The Schooner Peggy_, the Court refused to become involved in a case concerning the United States' alleged violation of a treaty with France when it seized a ship near Haiti. The Chief

61. U.S. CONST. art. I, § 8, cl. 11.
62. Yoo, _supra_ note 32, at 293.
63. See U.S. CONST. art. III, § 2 cl. 1.
64. See Baker v. Carr, 369 U.S. 186, 211 (1962) (disavowing previous "sweeping statements to the effect that all questions touching foreign relations are political questions").
65. Yoo, _supra_ note 32, at 293.
66. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (stating that the Court's province is "solely to decide on the rights of individuals").
67. 5 U.S. (1 Cranch) 103 (1801).
Justice, no posterboy for judicial restraint during his tenure, explained that "if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation." Then came Marbury. Of course, Marbury enunciates that the Court possesses the power of judicial review, the power to declare acts of Congress unconstitutional. But Chief Justice Marshall's Marbury opinion, sweeping though it surely does, does not ignore the limited role of the courts in the constitutional system and particularly in questions of foreign affairs. In an important statement, Marshall explained,

The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Marbury did not directly involve foreign affairs; however, Chief Justice Marshall's explication of the political question doctrine, though not invoked in Marbury, bears directly on courts' authority to intervene in military and diplomatic disputes involving the President and Congress because the Constitution vests foreign affairs discretion to those branches. As Professor Rostow states,

68. Id. at 110.
69. Marbury, 5 U.S. (1 Cranch) at 177.
70. Id. at 169-70.
71. See Mikva, supra note 27, at 336 (stating that "[o]ver the years, the political question doctrine has had particular resiliency in cases involving foreign policy" and that "the doctrine retains particular force in the military context"). But see Ely, supra note 16, at 55 (remarking that it was the same John Marshall of Marbury's political question doctrine dicta that subsequently decided the issue in Little, and questioning whether the doctrine still exists).

For another early case that implicated Marbury's "political question" problem, see Luther v. Borden, 48 U.S. (7 How.) 1 (1849), which involved a plaintiff who sought damages for trespass of his home in Rhode Island during the Dorr Rebellion of 1842. Defendants, who contended the plaintiff was a
Marbury's description of the political question doctrine applies to various decisions about foreign affairs: whether to act under a treaty; whether to aid an ally that has been invaded or threatened; and whether a war has been "declared" or whether it is merely imperfect. These "all are matters peculiarly within the discretion entrusted to the President, or to Congress, or to both, under our constitutions and laws and, therefore, 'political' questions within the meaning of Marbury v. Madison."73

Chief Justice Marshall's admonition notwithstanding, The Prize Cases74 tested the scope of judicial involvement in war powers disputes. These cases challenged President Lincoln's blockade of southern ports before Congress had formally declared war against the Confederate States of America.75 Ships taken as a result of the blockade were claimed as prizes.76 The Court upheld the blockade.77 Importantly, the Court did not determine whether a war existed, nor did it attempt to define the boundaries of possible presidential or congressional action. Rather, it deferred to President Lincoln's determination that the nation was at war and recognized the President's authority to repel invasions even without prior congressional authorization.78 Most importantly, the Court refused to intervene in determining what measures the President could take absent a formal declaration of war.79 As the Court explained, the level of force necessary to repel an invasion or meet a crisis is a determination only the President can make.80 Thus, The Prize Cases, like their early counterparts that decided predominantly narrow questions of liability for private damages, demonstrated the Court's reluctance to

participant in the rebellion, claimed they acted on authority of the state government in entering the home. Id. at 34-38. Plaintiff countered, however, that the government under which the authority was claimed (Rhode Island's charter government) was not the lawful government of Rhode Island, and asked the court to decide whether the rebellion was justified. Id. The Supreme Court refused to enter the dispute. The Court stated that only Congress had authority to determine whether an established state government was a "republican" government under the Guarantee Clause. Id. at 42; see also J. Peter Mulhern, In Defense of the Political Question Doctrine, 137 U. PA. L. REV. 97, 104 (1988) (stating that "with the Luther opinion, Chief Justice Marshall's Marbury dictum distinguishing political and legal questions became the basis for an ill-defined exception to the scope of judicial authority Marbury claimed for the courts").

73. Id.
74. 67 U.S. (2 Black) 635 (1863).
75. Id. at 640-43.
76. Id.
77. Id. at 671.
78. Id. at 670.
79. Id.
80. Id. Justice Grier explained,

Whether the President, in fulfilling his duties, as Commander in-chief, in suppressing an insurrection has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.

Id.
offer sweeping judgments about the allocation of constitutional war power, even though allocation issues were certainly the subtext of many of these early cases.

B. Early Modern Developments

From the quasi war with France to the Civil War, the post-Founding cases demonstrate the Supreme Court's interest in resolving disputes involving liability of government actors for private damages, but do not suggest the Court's willingness to resolve broader questions concerning constitutional allocations of power in military and diplomatic affairs. In the early 1900s, the Court transformed this reluctance into an outright refusal to decide matters touching national security when it declared, in Oetjen v. Central Leather Co., "[W]hat may be done in the exercise of this political power [foreign policy power] is not subject to judicial inquiry or decision." The Court's absolutist pronouncement was, as it should have been, short lived, for the Court's important opinion on the political question doctrine in Baker v. Carr expressly disavowed Oetjen's language. Nonetheless, while the Court did, in the early modern era, as it did in the formative years of the Republic, review and decide cases that touched the powers of foreign policy, those cases (like their early counterparts) have not stood to encourage greater intervention by the federal courts in modern constitutional controversies over those powers. Rather, as demonstrated by the next subsection, the courts often used the tools of justiciability to leave matters of war and peace in the hands of political actors, particularly during and after the Vietnam War.

Two cases show important wrinkles in the fabric of this jurisprudence. First, in United States v. Curtiss-Wright Export Corp., the Court considered whether Congress had unconstitutionally delegated legislative power to the President when it enacted a statute permitting the President to declare an arms embargo in South America. Upholding the statute became the least important part of Justice Sutherland's opinion for the Court. Rather, Justice Sutherland went beyond the narrow delegation question at issue and rendered an explanation of expansive presidential authority in foreign affairs. The President, the opinion concluded, is the "sole organ" of foreign affairs. Reminiscent of Hamilton's argument both as Pacificus and as Publius in The Federalist, Justice Sutherland wrote that

81. 246 U.S. 297, 302 (1918).
82. Baker v. Carr, 369 U.S. 186, 211 (1962) (disavowing previous "sweeping statements to the effect that all questions touching foreign relations are political questions").
83. See infra Part II.C, II.D and accompanying notes.
84. 299 U.S. 304 (1936).
85. See id. at 319.
86. Id. (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall)).
87. See Hamilton, supra note 39, at 53-55.
88. THE FEDERALIST No. 70, at 423-24 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (urging "[e]nergy in the executive" and stating that "[t]he ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers"); THE FEDERALIST No. 72, at 435-36 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that "[t]he actual conduct of foreign negotiations[,] . . . the arrangement of the army and navy, [and] the direction of the operations of war" are activities that fall within the administration of government, which is "the province of the
the presidency was by nature the institution best suited for the management of the "important, complicated, delicate, and manifold problems" of foreign relations. To meet the demands of the external realm, then, the President must be fortified with authority to act in this realm even without the approval of the Congress. Although the opinion has received extensive criticism, it is often cited today as authority for broad assertions of presidential power. Still, the Court's holding was limited to the delegation question. Justice Sutherland's dictum concerning presidential foreign relations power notwithstanding.

Second, the Court reviewed a case arising out of President Truman's decision ordering the Secretary of Commerce to seize the nation's steel mills during the Korean War to ensure the production of weapons and war materials. The Court in *Youngstown Sheet & Tube Co. v. Sawyer*, split six to three, rejected the President's claims of inherent constitutional authority based on emergency circumstances. The opinions of the plurality — Justices Frankfurter, Jackson, Burton, and Clark — did not, however, insist upon specific constitutional or statutory authority in responding to emergencies. Justice Jackson's concurrence, arguably the most famous opinion drawn from the case, identified three circumstances of presidential action: (1) those taken pursuant to express or implied congressional authorization (at which executive authority is at its height); (2) those taken where Congress has specifically discouraged or prohibited the action (at which executive power is at its lowest level); and (3) those actions taken in the "zone of twilight" in which the President and Congress share authority and in which Congress's own conduct may tend to invite — even unwillingly — presidential action. "[O]nly Congress itself," Justice Jackson
wrote, "can prevent power from slipping through its fingers." As Louis Fisher points out, Justice Jackson's concurrence offered a crucial caveat for Congress to "invoke the institutional tools at its command rather than expect assistance from the federal judiciary." Thus, The Steel Seizure Case and Curtiss-Wright, like the early cases, show judicial intervention in questions arising out of military and diplomatic affairs (though Steel Seizure demonstrates a somewhat higher level of judicial involvement while Curtiss-Wright proved more deferential). Neither, however, attempted to precisely define the boundaries of congressional and presidential foreign affairs powers, ostensibly leaving disputes over this particular matter to the political branches.

C. The Vietnam War and the Rise of Judicial Deference

The Vietnam Era and its aftermath brought an unparalleled sequence of lawsuits explicitly challenging presidential assertions of war power. These cases, if pursued on the merits, would have forced the federal courts to expressly determine issues concerning the precise allocation of constitutional war power, issues that the federal judiciary had been able to avoid in past cases because the cases did not sufficiently raise the question or were disposed of on other grounds. In so doing, these cases would have challenged the limits of judicial review and Article III authority, as well as the entire constitutional doctrine of the separation of powers. In case after case, however, the federal courts used their own institutional tools to place the matter back in the political branches and the republican process.

The cases shifting decision-making power back to the political branch are numerous, but a representative sampling adequately makes the point. In Orlando v. Laird, Army servicemen ordered to Vietnam challenged the executive branch's authority to engage in hostilities there and sought injunctive relief prohibiting Secretary of Defense Melvin Laird and Secretary of the Army Stanley R. Resor from enforcing the troop-deployment orders. The United States Court of Appeals for the Second Circuit, which in an earlier case involving one of the same servicemen had held that the claim met general standards of justiciability but had remanded for consideration under the political question...
doctrine, concluded that the political question doctrine did not foreclose the question of whether Congress could participate mutually in a war. The evidence clearly showed mutual participation. The political question doctrine did, however, foreclose judicial consideration of the means by which Congress participated. Such means are "outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such action."

The First Circuit reached a similar conclusion in Massachusetts v. Laird, in which the plaintiffs sought a judicial declaration that the war in Vietnam was unconstitutional and a prohibition on deploying Massachusetts residents to Vietnam in the absence of a congressional declaration of war. The court found that the judiciary "must have some license to construe the Constitutional framework." It concluded, however, that, pursuant to Baker's textual-commitment criterion, where a case involves

the power to conduct undeclared hostilities beyond emergency defense, we are inclined to believe that the Constitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation.

The court conceded that, in disposing of the case on textual-commitment grounds, it had offered comments in dicta that analyzed the division of constitutional war powers and implicitly addressed the issue concerning the allocation of those powers. The panel ultimately concluded, though, that because the executive and legislative branches did not oppose one another, it need not actually resolve the allocation question.

In DaCosta v. Laird, the Second Circuit faced a different factual scenario from the one presented in Orlando, but one that nevertheless challenged the constitutionality of a presidential military order. DaCosta, an Army Specialist stationed in Vietnam as a machine gunner, questioned whether the President could order mining of the ports and harbors in North Vietnam. While the court conceded that scholarly commentary regarding the political question doctrine was

103. Orlando, 443 F.2d at 1042.
104. Id.
105. Id. at 1043.
106. Id. at 1043-44.
107. 451 F.2d 26 (1st Cir. 1971).
108. Id. at 32.
109. Id. at 33.
110. Id.
111. Id. at 34.
112. 471 F.2d 1146 (2d Cir. 1973).
113. Id. at 1147-48.

https://digitalcommons.law.ou.edu/olr/vol54/iss4/2
divided, the court, bound by word from the Supreme Court, again found that the case presented a nonjusticiable political question squarely within Baker's meaning because the court could find no judicially discoverable or manageable standards for resolving the issue.

A still different issue faced the District of Columbia Circuit in Mitchell v. Laird. There, unlike other prominent Vietnam-era cases in which the plaintiffs were active or former members of the Armed Forces, thirteen members of the House of Representatives, led by Rep. Parren Mitchell of Maryland, sought to enjoin the President from further prosecuting the war in Vietnam and Laos. The Congressmen claimed that the President's continued prosecution of the war was unconstitutional and that, absent a congressional declaration, continued prosecution of the hostilities impaired the members' rights to decide whether the United States should engage in war. Despite President Nixon's decision to cease military hostilities in Vietnam and Laos, the court first rejected the government's mootness argument because hostilities continued in Cambodia. The court also rejected the government's claim that the members lacked standing. A judicial determination of whether the President's continued military engagements in Cambodia violated the Constitution, the court concluded, might bear directly upon the House's decision of whether to serve the President with articles of impeachment.

The Mitchell court ultimately dismissed the case, however, for two reasons: (1) the government did not consent to the suit, and thus sovereign immunity attached; and (2) the case presented a political question. The panel con-

114. Id. at 1152-53.
115. Id. at 1155.
117. Id. at 613.
118. Id.
119. Id.
120. Id. at 614. The doctrine of congressional standing, obviously important in the area of foreign affairs, has had a bizarre and controversial history in the law of the District of Columbia Circuit, Mitchell's holding notwithstanding. See, e.g., Chenoweth v. Clinton, 181 F.3d 112, 122 (D.C. Cir. 1999) (holding that members of Congress lacked standing to challenge an executive order because the dispute was susceptible to political resolution); see also Moore v. U.S. House of Representatives, 733 F.2d 946, 951 (D.C. Cir. 1984) (finding standing based on the infringement of a legislator's right to participate and vote); id. at 959 (Scalia, J., concurring) (arguing that courts exist to decide upon individual rights, and that legislators do not have private, cognizable interests in their public duties as lawmakers); Vander Jagt v. O'Neill, 699 F.2d 1166, 1168 (D.C. Cir. 1983) (holding that congressmen had standing because they could soundly assert that their votes had been diluted); id. at 1177 (Bork, J., concurring) (finding that no legislative standing can exist without the nullification of a plaintiff-legislator's vote). For an analysis of congressional standing jurisprudence, see Neal Devins & Michael A. Fitts, The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations, 86 GEO. L.J. 351 (1997). See also Robert H. Bork, Erosion of the President's Power in Foreign Affairs, 68 WASH. U. L.Q. 693, 703 (1990) (criticizing congressional standing as an "invention" of the D.C. Circuit, never intended by the Framers).
121. Mitchell, 488 F.2d at 614.
122. Id. at 613.
123. Id. at 616.
ceded, contrary to an earlier holding on the question,\textsuperscript{124} that in some cases courts may be competent to determine the allocation of constitutional war powers.\textsuperscript{125} This, however, was not such a case because there was not sufficient evidence to enable the court to determine whether President Nixon tried to cease all hostilities when he took office.\textsuperscript{126} Even if the court had such evidence, moreover, it "would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in case of a clear abuse amounting to bad faith."\textsuperscript{127}

\section*{D. The Lessons of Vietnam}

Although some courts deciding cases involving the Vietnam War were willing to find an avenue for judicial resolution of war powers controversies, the courts acted with caution and consistently determined that the plaintiffs in those lawsuits could not obtain judicial relief. Most often, some doctrinal form of justiciability prevented the success of such suits. This jurisprudential trend continued in the post-Vietnam-era cases involving military and diplomatic issues.

Again, a few examples illustrate this point.\textsuperscript{128} In \textit{Goldwater v. Carter},\textsuperscript{129} several members of Congress, led by Sen. Barry Goldwater of Arizona, challenged President Carter's termination of the Mutual Defense Treaty with Taiwan. President Carter made this decision after his administration announced in 1978 that it would begin recognizing the People's Republic of China as the sole Chinese government. The Supreme Court granted certiorari, and subsequently vacated and remanded the case to the District of Columbia Circuit.\textsuperscript{130} Four Justices, however, wrote separate opinions discussing the various questions of justiciability that the case presented. Justice Powell argued that the case was not ripe because Congress had not yet acted to counter the President.\textsuperscript{131} Thus, no actual confrontation existed between the executive and legislative branches.\textsuperscript{132} Justice Powell disagreed with Justice Rehnquist, who argued that the case presented a nonjusticiable political question.\textsuperscript{133} In Justice Powell's view, the Constitution did not textually commit the power to terminate treaties to the President, nor did courts lack judicially discoverable and

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\textsuperscript{124} See Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir. 1967).
\textsuperscript{125} Mitchell, 488 F.2d at 614.
\textsuperscript{126} Id. at 616.
\textsuperscript{127} Id.
\textsuperscript{128} For other examples relevant to the subject matter here, see Ange v. Bush, 752 F. Supp. 509, 511 (D.D.C. 1990), disposing, on political question grounds, of a challenge by a National Guard officer who was ordered to the Persian Gulf and was claiming a violation of the Declare War Clause and the War Powers Resolution; and Lowry v. Reagan, 676 F. Supp. 333, 334 (D.D.C. 1987), rejecting a challenge by 110 members of Congress to military operations in the Persian Gulf as a violation of the War Powers Resolution.
\textsuperscript{129} 444 U.S. 996 (1979).
\textsuperscript{130} Id. at 996.
\textsuperscript{131} Id. at 957 (Powell, J., concurring in the judgment).
\textsuperscript{132} Id. at 998 (Powell, J., concurring in the judgment).
\textsuperscript{133} Id. at 1002 (Rehnquist, J., concurring in the judgment). Justice Rehnquist's opinion was joined by Chief Justice Burger, Justice Stewart, and Justice Stevens. Id.
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manageable standards for resolving the question. Justice Rehnquist, however, argued that the case was nonjusticiable "because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." For Justice Rehnquist, the fact that the case involved foreign relations compelled its disposition on political question grounds, although he gave little explanation for that conclusion short of a citation to Curtiss-Wright. In fact, in his dissent, Justice Brennan took Justice Rehnquist to task, finding that Rehnquist had "misapprehended" the political question doctrine by assuming that it raised an issue of political discretion rather than constitutional law. For Justice Brennan, the case was more properly decided on textual-commitment grounds because the "Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes." Thus, although Goldwater issued no majority opinion and no affirmative holding, the separate opinions provided an important glimpse into the minds of the Justices concerning judicial review of certain questions of foreign relations. Chief Justice Burger and Justices Stewart, Powell, Rehnquist, Stevens, and Brennan all argued for disposition of the case on nonjusticiability grounds under one doctrine or another. Only Justices Blackmun and White would have set the case for argument and considered the merits.

War powers, rather than treaty powers, were before the United States District Court for the District of Columbia in Crockett v. Reagan. There, twenty-nine members of Congress sued President Reagan, Secretary of Defense Caspar W. Weinberger, and Secretary of State Alexander Haig, claiming that the executive branch leaders violated the War Powers Clause, the War Powers Resolution, and the Foreign Assistance Act of 1961 when they supplied military equipment and aid to

134. Id. at 998-99 (Powell, J., concurring in the judgment).  
135. Id. at 1002 (Rehnquist, J., concurring in the judgment). Justice Rehnquist also argued that Steel Seizure did not command a different conclusion here because that case involved the assertion of private rights by a private plaintiff whereas the instant case involved public officials with political weapons at their disposal, a fact that counseled strongly in favor of finding a political question to exist here but not in Steel Seizure. Id. at 1004 (Rehnquist, J., concurring in the judgment). As Professor Mulhern points out, "[T]his argument has strong roots in our constitutional tradition." Mulhern, supra note 71, at 167 n.263; see also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) (stating that it is the judiciary's role to "solely, to decide on the rights of individuals"); Moore v. U.S. House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring) (citing Marbury's language and recognizing the distinction between private plaintiffs and legislative plaintiffs); THE FEDERALIST NO. 51 at 321-22 (James Madison) (Clinton Rossiter ed., 1961) (stating that each branch has the "constitutional means and personal motives to resist encroachments of the others"). But see Linda Champlin & Alan Schwarz, Political Question Doctrine and Allocation of the Foreign Affairs Power, 13 Hofstra L. Rev. 215, 248 n.138 (1985) (stating that the intended effect of Rehnquist's argument "might have been different.... These weapons remain intact no matter who the plaintiff is in a particular lawsuit.").  
136. Goldwater, 444 U.S. at 1004-05 (Rehnquist, J., concurring in the judgment).  
137. Id. at 1006 (Brennan, J., dissenting).  
138. Id. at 1007 (Brennan, J., dissenting).  
139. Id. at 1006 (Blackmun, J., dissenting in part).  
the government of El Salvador amidst that country's civil war. Judge Green dismissed the case, holding that, the court's inability to conduct competent factfinding, which would require inquiry into "sensitive military matters" for which Congress possessed the better resources and expertise, precluded judicial review under the political question doctrine. The District of Columbia Circuit agreed, affirming the dismissal of the case on the same grounds.

Similarly, in Sanchez-Espinoza v. Reagan, the District of Columbia Circuit affirmed dismissal of a case in which various members of Congress, Nicaraguan citizens, and Florida residents sued President Reagan and various executive officials for giving support to the Nicaraguan Contras in violation of several statutes, including the War Powers Resolution. Then-Judge Scalia, citing Crockett, concluded that the political question doctrine required dismissal of the congressional plaintiffs' war powers claim. As in Crockett and Mitchell, the members of Congress asserted that they had been deprived of their right to participate in war-making decisions by the executive branch's action.

Finally, Dellums v. Bush presented the district court in the District of Columbia with a challenge brought by fifty-four members of Congress, led by Rep. Ronald Dellums of California. The congressmen, amidst the height of tensions in the Persian Gulf after Iraq's 1990 invasion of Kuwait, sought an injunction preventing the first President Bush from attacking Iraq without a congressional declaration of war or other such authorization. Judge Greene offered a substantial analysis of the President's political question argument, but rejected it, asserting that courts "do not lack the power and ability to make the factual and legal determination of whether the nation's military actions constitute war for purposes of the constitutional War Powers Clause." Having held that a court could conclude that a "war" in the constitutional sense existed, Judge Greene next considered whether the doctrine of standing prevented the suit. Again, he rejected the arguments of the President's lawyers, concluding that the injury was more than speculative because there existed a very real possibility that the President would go to war in Iraq without first seeking congressional approval. Finally, however, Judge Greene determined that the ripeness doctrine precluded a decision on the merits. He wrote:

141. Id. at 895.
142. Id. at 898-99.
143. 720 F.2d 1355 (D.C. Cir. 1983).
144. 770 F.2d 202 (D.C. Cir. 1985).
145. Id. at 210.
147. Id. at 1144.
148. Id. at 1146 (citing Mitchell v. Laird, 488 F.2d 611, 614 (D.C. Cir. 1973)).
149. Id. at 1145.
150. Id. at 1147-48.
151. Id. at 1152; see also Ange v. Bush, 752 F. Supp. 509, 515 (D.D.C. 1990) (concluding that the lawsuit filed by a National Guard sergeant against President Bush was not ripe because it called for speculation as to whether the President would send troops to war in the Persian Gulf). Judge Lamberth in Ange, however, more forcefully employed the political question doctrine in rejecting the suit at issue.
The principle that courts shall be prudent in the exercise of their authority is never more compelling than when they are called upon to adjudicate on such sensitive issues as those trenching upon military and foreign affairs. Judicial restraint must, of course, be even further enhanced when the issue is one — as here — on which the other two branches may be deeply divided. 152

Citing Justice Powell's Goldwater concurrence, Judge Greene concluded that the case was not ripe because (1) a majority of Congress was not party to the suit, and only a majority of Congress can declare war; 153 and (2) the executive branch "has not shown a commitment to a definitive course of action sufficient to support ripeness." 154

E. Campbell v. Clinton: A Contemporary Version of an Old Favorite

Since 1998, the United States and other North Atlantic Treaty Organization (NATO) member countries have been engaged in a diplomatic enterprise in the Federal Republic of Yugoslavia to resolve an ongoing conflict between ethnic Albanians in Kosovo, a region of Serbia, and ethnic Serbs led by Slobodan Milosevic. 155 By March 1999, however, negotiations — enhanced earlier by an interim peace agreement proposed in Rambouillet, France — stalled. 156 Milosevic subsequently intensified Serb aggression, driving thousands of ethnic Albanians from their homes, executing them, and destroying their villages. 157 After another diplomatic effort failed, the United States Senate authorized a concurrent resolution permitting President Clinton to conduct airstrikes against Serbia and Montenegro in Yugoslavia. 158

On March 24, 1999, the day the Senate Resolution passed, President Clinton commenced the airstrikes, using both American and NATO forces. 159 Two days

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153. *Id.* at 1150-51; *see also* Ely, *supra* note 16, at 58 (questioning Judge Greene's conclusion on this count and stating, "[M]aybe Greene just worded it the wrong way around. If it takes a majority of Congress to declare war, it also takes a majority to block one."). Dean Ely further stated, "[T]he fact that a majority can block a war by refusing to vote yes still should not imply a power on the part of the president to go forward unless a majority can organize itself to vote (or sue) no." *Id.* at 59.
156. *Campbell*, 52 F. Supp. 2d at 37.
157. *Id.*
158. *See S. Con. Res. 21, 106th Cong. (1999).*
159. *Campbell*, 52 F. Supp. 2d at 37.
later he detailed the operation in a letter to Rep. Dennis Hastert of Illinois, the Speaker of the House, and Sen. Strom Thurmond of South Carolina, the President pro tempore. The letter stated that the President had taken the military action "pursuant to [his] authority . . . as Commander in Chief." The President sent another letter to Speaker Hastert and Senator Thurmond on April 7, in an effort to keep the Congress apprised of the operation. On April 28, the House refused to declare war with Yugoslavia and rejected the concurrent resolution that the Senate had passed in March. The House also defeated a measure that would have directed the President to withdraw troops from the region, and passed a bill that prohibited Department of Defense funds for the use of American ground forces in Yugoslavia without congressional authorization. On May 20, however, Congress approved an appropriations bill to support the operation, but it did not state in the legislation that it authorized the operation within the meaning of the War Powers Resolution. The conflict between NATO forces and Yugoslavia ended on June 10, when Yugoslavia agreed to withdraw forces from Kosovo and permit a NATO-led peacekeeping mission.

Prior to termination of the conflict, however, thirty-one members of Congress, led by Rep. Tom Campbell of California, filed suit in the United States District Court for the District of Columbia seeking a declaratory judgment that President Clinton's commencement and continuation of the airstrikes violated the War Powers Clause and the War Powers Resolution. The plaintiffs claimed that their votes against authorizing the operation were effectively nullified by the President's actions. Judge Friedman, however, ordered the case dismissed for lack of standing. The opinion cited Raines v. Byrd, which held that members of Congress lacked standing to challenge the Line Item Veto Act, and Coleman v. Miller, which found that twenty members of the Kansas Senate had standing to challenge the Kansas Lieutenant Governor's deciding vote on a federal constitutional amendment, which the Senators had voted against. Judge Friedman found that, although Raines

160. Id. at 37-38.
161. Id. at 38.
166. See Campbell, 52 F. Supp. 2d at 39.
167. See id.
168. 521 U.S. 811, 818-30 (1997). The Raines Court stated that the legislators' claims did not involve injury to themselves as individuals, but rather institutional injury that was "wholly abstract and widely dispersed." Id. at 829. Thus, without showing that their votes had been nullified, they lacked a sufficient "personal stake" in the outcome. Id. at 830. Interestingly, Justice Souter's concurrence examined a problem that the majority opinion raised and that was evident from Justice Rehnquist's separate opinion in Goldwater v. Carter, 444 U.S. 996, 1004 n.1 (1979) (Rehnquist, J., concurring), concerning the distinction between personal and official injury. Raines, 521 U.S. at 830-31 (Souter, J., concurring in the judgment). "[I]t is at least arguable," Justice Souter stated, "that the official nature of the harm here does not preclude standing." Id. at 831 (Souter, J., concurring in the judgment). For an analysis of Raines' application to war powers disputes, see Entin, supra note 33, at 1308-10.
created a "Coleman exception," which grants standing to legislators where "their votes have been 'completely nullified'" or "virtually held for naught," the plaintiffs in this case could not sufficiently establish such an injury in the absence of "a true 'constitutional impasse' or 'actual confrontation' between the legislative and executive branches." Congress did not issue a directive to withdraw troops that the President ignored, nor did the President spend funds that the Congress refused to appropriate. Indeed, as the court described, none of the votes on which the members of Congress based their claim "required the President to do anything or prohibited him from doing anything." Thus, the court held, "resort to the [judiciary was] inappropriate."

The United States Court of Appeals for the District of Columbia Circuit affirmed on the same grounds. As to the War Powers Resolution claim, Judge Silberman's opinion for the court conceded that Coleman's use of the word "nullified" was ambiguous, but concluded, after examining Raines, that Coleman nullification hinged on the irreversibility of the constitutional amendment at issue in that case. The Kansas legislators did not possess the political remedy that the Raines plaintiffs did — the legislators could simply have repealed the statute that they were challenging, a much easier task than changing a constitutional provision. Thus, the Campbell plaintiffs "fail[ed] because they continued, after the votes, to enjoy ample legislative power to have stopped prosecution of [that] 'war.'" As to the War Powers Clause claim, the congressmen fared no better. Again, the court explained, Raines recognized that the availability of "political self-help" undermines...

170. Campbell, 52 F. Supp. 2d at 42.
171. Id. at 43 (quoting Raines, 521 U.S. at 823).
172. Id. (quoting Coleman, 307 U.S. at 438).
173. Id. Judge Friedman noted that the "mere availability of a legislative alternative is not sufficient to defeat standing; if it were, a legislator would never have standing since Congress always has the option of impeaching and removing the President." Id. at 45 n.11. One response to this is: exactly. See Moore v. U.S. House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring). But another response is that, even if we accept the constitutional legitimacy of legislative standing (as we must after Raines) where there has been nullification, Congress may only impeach for treason, bribery, or other high crimes and misdemeanors. Thus, if Congress, as the sole expositor of the Impeachment Clause, determined that a particular presidential action did not fall into a category of impeachable offenses, then impeachment is not an option and standing could not be defeated on that ground alone. Judge Friedman, though, accounts for this when he discusses actions that Congress "actually took." Campbell, 52 F. Supp. 2d at 45 n.11.
175. Id. at 43.
176. Id. at 45; see also Major Geoffrey Corn, Campbell v. Clinton: The "Implied Consent" Theory of Presidential War Power Is Again Validated, 161 MIL. L. REV. 202, 214 (1999) (arguing that the "case confirms a consistent course followed by the judiciary when asked to adjudicate the legality of presidential decisions to engage the United States Armed Forces in hostilities: focus on whether such a challenge presents a truly ripe issue"). Major Corn's piece was published prior to the District of Columbia Circuit's decision on appeal.
178. Id. at 22-23.
179. Id. at 23.
180. Id.
the claim to congressional standing.\textsuperscript{181} These members of Congress thus could not challenge the presidential action "because they may 'fight again tomorrow.'"\textsuperscript{182} The Supreme Court subsequently denied certiorari in the case, without additional comment, during the 2000-2001 Term.\textsuperscript{183}

Perhaps the most interesting portion of \textit{Campbell} in the circuit court, however, is not found in the majority opinion at all, though the holding certainly represents a crucial element of \textit{Campbell}'s long-term importance. All three panel judges offered separate concurring opinions, which the judges used to debate various justiciability issues related to war powers lawsuits. Judges Silberman and Tatel, agreeing that \textit{Raines} deprived the congressmen of standing, nevertheless engaged in an illuminating discussion of the political question doctrine. Judge Randolph took the opportunity to reexamine the majority's use of the standing doctrine and to implicate the mootness doctrine as an alternative ground for disposing of the case.\textsuperscript{184}

Judge Silberman began his concurrence with the observation that "no one is able to bring this challenge because the two claims are not justiciable. We lack 'judicially discoverable and manageable standards' for addressing them, and the War Powers Clause claim implicates the political question doctrine."\textsuperscript{185} First, Judge Silberman argued, the War Powers Resolution claim was unsuited for judicial resolution because the statute's triggering mechanism is too imprecise and calls for the exercise of political, not judicial, judgment.\textsuperscript{186} Thus the plaintiffs' argument —

\begin{quote}
\textsuperscript{181} \textit{Id.} at 24. \textit{But see} Recent Cases, D.C. Circuit Holds That Members of Congress May Not Challenge the President's Use of Troops in Kosovo, 113 HARV. L. REV. 2134, 2136 n.26 (2000) (arguing that the \textit{Campbell} majority's "general reading of \textit{Raines} is strained").
\textsuperscript{182} \textit{Campbell}, 203 F.3d at 24 (quoting Judge Randolph's opinion concurring in the judgment).
\textsuperscript{183} \textit{Campbell} v. Clinton, 531 U.S. 815 (2000).
\textsuperscript{184} Judge Randolph avoided the debate concerning application of the political question doctrine. Instead, he claimed that the majority had offered the wrong analysis of \textit{Raines} and the standing issue. \textit{Campbell}, 203 F.3d at 28 (Randolph, J., concurring in the judgment). As for the constitutional claim, Judge Randolph explained, much as did Judge Friedman in the District Court, that "plaintiffs' votes . . . were not for naught" because the President did not take an action, despite the House vote, that would have been authorized only in the midst of a declared war. \textit{Id.} at 31 (Randolph, J., concurring in the judgment). As for the War Powers Resolution claim, the plaintiffs were essentially arguing that the President ignored not their votes, but those of the Congress that approved the War Powers Resolution, an insufficient basis for permitting litigation by members of Congress. \textit{Id.} In addition, Judge Randolph argued that the majority misstated \textit{Raines} by illogically concluding that the plaintiffs lacked standing because they could "fight again tomorrow." \textit{Id.} at 32 (Randolph, J., concurring in the judgment). He argued that the majority opinion essentially eviscerated legislative standing in the course of misreading both the Supreme Court's and the D.C. Circuit's precedents. \textit{Id.} Finally, Judge Randolph concluded that the court could dispose of the case on mootness grounds. \textit{Id.} at 28 (Randolph, J., concurring in the judgment). Although the plaintiffs claimed the case was one "capable of repetition, yet evading review," Judge Randolph noted that "offensive wars initiated without congressional approval" do not present cases that evade review. \textit{Id.} at 33 (Randolph, J., concurring in the judgment). Nor was the case "capable of repetition," as it was unlikely that President Clinton would engage in the same action during the same plaintiff's period in office. \textit{Id.} at 34 (Randolph, J., concurring in the judgment).
\textsuperscript{185} \textit{Id.} at 24-25 (Silberman, J., concuring).
\textsuperscript{186} \textit{Id.} at 25 (Silberman, J., concurring).
\end{quote}
that a "war" indisputably existed here — was inapposite.\textsuperscript{187} Second, no principled judicial standard exists for defining a "war" for purposes of constitutional interpretation.\textsuperscript{188} Although Judge Tatel agreed with the plaintiffs that the United States was obviously engaging in acts of war,\textsuperscript{189} Judge Silberman replied, "Even if this court knows all there is to know about the Kosovo conflict, we still do not know what standards to apply to those facts."\textsuperscript{190}

Judge Tatel responded by citing the early and modern foreign affairs cases, in which the Supreme Court and various lower federal courts willingly exercised the judicial power vested in them by Article III.\textsuperscript{191} From \textit{Bas, Talbot, and The Prize Cases} through the Vietnam-era decisions, "standards for answering these questions [which involve constitutional terms that are not self-defining] have evolved, as legal standards always do, through years of judicial decisionmaking. Courts have proven no less capable of developing standards to resolve war powers challenges," Judge Tatel wrote.\textsuperscript{192} Judge Tatel noted that, throughout the case law, courts had routinely determined and defined the conditions of war when examining the Constitution, statutes, and even insurance policies and other contracts that implicate "war."\textsuperscript{193} In addition, Judge Tatel explained, judicial resolution of the constitutional question would not, as the President and Judge Silberman would have it, involve the court in political decision making.\textsuperscript{194} Rather, the questions presented on the merits, though their answers surely would have political effects, would be "purely legal" ones.\textsuperscript{195} Thus, in an appropriate case where other questions of justiciability (standing, ripeness, and mootness) were met, the court would have a duty to determine whether the President had exceeded the bounds of the Constitution by conducting such a military operation, even if such a determination produced "short-term confusion."\textsuperscript{196}

In his own reply, Judge Silberman explained that the cases upon which Judge Tatel relied either (1) did not attempt to define "war" in the constitutional sense (such as \textit{Bas}), (2) did not question the level of force that the President could use in commencing a military action (such as \textit{The Prize Cases}), or (3) ultimately found a political question to exist (such as \textit{Massachusetts v. Laird}).\textsuperscript{197} Finally, Judge Silberman expressed the pragmatic concern that a judicial decision invalidating a presidential decision to commit troops — a decision made on national television and in concert with leaders from other nations — may have the undesirable political

\textsuperscript{187} Id.
\textsuperscript{188} Id. at 24-25 (Silberman, J., concurring).
\textsuperscript{189} Id. at 40 (Tatel, J., concurring).
\textsuperscript{190} Id. at 26 (Silberman, J., concurring).
\textsuperscript{191} Id. at 37-39 (Tatel, J., concurring).
\textsuperscript{192} Id. at 37 (Tatel, J., concurring).
\textsuperscript{193} Id. at 39 (Tatel, J., concurring).
\textsuperscript{194} Id. at 40 (Tatel, J., concurring).
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 41 (Tatel, J., concurring).
\textsuperscript{197} Id. at 25 n.1, 26-27 (Silberman, J., concurring).
effect of straining America's relations with its allies.\textsuperscript{198} Precedent and prudence, Judge Silberman seemed to suggest, dictated the conclusion that "whether the President has intruded on the war-declaring authority of Congress fits squarely within the political question doctrine."\textsuperscript{199}

Campbell represents an important strand in the long line of war powers cases. It provides an original, post-Raines perspective on the ways in which the doctrine of standing serves to further restrict the judiciary's role when called upon to referee interbranch disputes concerning the allocation of war powers. The holding and the intersection of standing with the separation of powers, however, is only a small piece of Campbell's artifice. Most importantly, the separate opinions provide useful insight into the varying theories of judicial competence and responsibility in this area, theories that have evolved from the post-Revolution cases through the Vietnam and contemporary eras. Although incomplete, as none of the opinions dealt comprehensively with the textual commitment of the issue to the political branches or with questions about the nature and desirability of political branch constitutional deliberation, each opinion provided a rationale for disposing of the case that avoided judicial resolution of the war powers question and worked to preserve the separation of powers. Thus, whether we accept Judge Silberman's political question doctrine argument (a doctrine developed to preserve the separation of powers),\textsuperscript{200} Judge Randolph's mootness argument (another doctrine that serves the separation of powers by limiting the judiciary to resolution of cases where an actual remedy is available, thus avoiding a mere advisory decision),\textsuperscript{201} or the standing arguments of all three (standing being "founded in concern about the proper — and . . . limited — role of the courts in a democratic society"),\textsuperscript{202} we see that Campbell stands firm with a long line of modern cases. Those cases, borne of concerns that arose during the Washington administration, use the various constitutional doctrines of justiciability that operate to preclude judicial review of questions implicating the allocation of constitutional war powers.\textsuperscript{203}


\textsuperscript{199} See Spencer v. Kemna, 523 U.S. 1, 18 (1998) ([M]ootness . . . deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do so.").

\textsuperscript{200} See also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473-74 (1982) (explaining that standing is a "precondition" to "[t]he exercise of judicial power [that] affects relationships between the coequal arms of the National Government").

\textsuperscript{201} But see Recent Cases, supra note 181, at 2139 (criticizing Campbell and stating that "[a]fter Campbell, future legislatures and executives face multiple levels of uncertainty about war powers questions"). Perhaps, though, this uncertainty will encourage more thoughtful deliberation and more careful political consideration of the alternatives available in the constitutional system.
The sampling of cases analyzed in this section sufficiently demonstrate the prevailing trend in the federal courts to use the doctrinal tools of justiciability — ripeness, mootness, standing, and the political question doctrine — to ensure that only members of the political branches guide American foreign relations, given the expertise, resources, and alternatives available to legislators and executive branch officials. Of course, courts have, from the earliest days of the federal judiciary, decided cases that touched upon foreign relations and that involved usurpation of one of the political branches by the other. The judiciary, however, has largely (though perhaps not exclusively) stopped short of officiating disputes between the political branches regarding the proper allocation of war and diplomatic powers, thanks, in significant measure, to the justiciability doctrines borne of the separation of powers. In this sense, the judiciary has helped to maintain a prudent separation of powers by limiting the judge's role and by encouraging political branch resolution of complex issues of war and foreign policy.

III. Constitutional Deliberation in the Political Branches: Back Where the War Powers Belong

Despite the judiciary's occasional foray into the arena of war and peace, the separation of powers counsels that disputes specifically concerning the allocation of constitutional authority under the War Powers Clause and the War Powers Resolution are best left for disposition in the political branches. As this section explains, there are two primary reasons for this, each of which is consonant with our constitutional text and traditions. First, the various doctrines of justiciability, which are necessary for, and a prudent means of, effectuating a meaningful constitutional separation of powers, preclude judicial intervention in war powers disputes. And second, judicial abstention in such disputes encourages constitutional deliberation among the political branches, which have an independent and equally important duty to consider the Constitution's meaning.

A. War Powers Controversies and Justiciability

Interbranch disputes concerning the allocation of war powers implicate the political question doctrine because the resolution of such disputes is textually committed to the political branches.204 A few of the cases have mentioned this concept but, unfortunately, have barely discussed it.205 Instead, the cases have focused upon the lack of standards for judicial resolution or upon the possibility that a judicial decision will interfere unduly with the conduct of foreign relations,206

204. See Baker v. Carr, 369 U.S. 186, 217 (1962); cf. Robert J. Pushaw, Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 CORNELL L. REV. 393, 451 (1993) (arguing that constitutional history demonstrates that "the presumption favoring judicial review could be rebutted only by a showing that the Constitution committed a question entirely to the political branches — for example, the President's decisions about ... foreign affairs ... and Congress's power to declare war").
205. See, e.g., DaCosta v. Laird, 471 F.2d 1146, 1153 (2d Cir. 1973).
both of which also provide compelling justifications for invoking the doctrine. But
those arguments, both within the scope of Baker's political question definitional
analysis, have their roots in the Constitution's textual commitment of the issue to
the Congress and the President. Courts often lack "judicially discoverable and
manageable standards" because the Constitution recognizes that the expertise and
resources for managing military and diplomatic affairs rest with the political
branches. And undue judicial interference in foreign policy matters is a concern
precisely because the Constitution does not vest courts with any power to determine
foreign policy; intrusion would thus negatively affect the practical governance of the
nation in this area. Therefore, Baker's "textually demonstrable commitment"
element of the political question doctrine must ultimately lie at the heart of judicial
abstention in war powers controversies. This conclusion is consistent both with
Marbury's statements of the role of the courts (echoed in Marshall's comments
concerning the limits of judicial power), which expressly denounce judicial
involvement in "political questions," and with Madison's statement that the
courts were to have jurisdiction only in cases "of a Judiciary Nature," which
clearly recognizes that some suits are ill suited for resolution in the federal courts.

Article I, recall, vests in Congress (and only in Congress, as the Court recognized
as early as Talbot) the power to "declare" war. By authorizing Congress to
"declare" war, the Constitution recognizes that Congress alone must determine when
the conditions of war exist. On this matter, Professor Yoo provides excellent
insight. As he has persuasively explained, this power is essentially an adjudicatory
or quasi-judicial power, for in making such judgments about the "current status
of relations," Congress performs a function "which involves a capacity for judgment
in the manner of a court, rather than the enactment of positive law in the style of
a legislature." This is no linguistic accident; the Constitution vests judicial-type
powers to the political branches in other places, too, where the Framers believed
the political nature of the matters at issue was best suited to the judgment of politically
accountable actors. The House's power to impeach and the Senate's power to try

207. See David E. Marlon, The State of the Canon in Constitutional Law: Lessons from the
that Madison and Marshall were statesmen who recognized the importance of practical governance,
eschewing utopian models of political life. In particular, he notes Madison's belief that "we should not
overlook the practical demands of effective governance, among which is the need to allow the political
departments to do their work free of excessive judicial intrusion." Id.

208. See Marshall, supra note 10, at 95.


210. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 8, at 430.

211. See Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801).

212. Although Professor Yoo describes this as a "judicial" function, this article uses the phrase
"adjudicatory or quasi-judicial" to emphasize that the act is not a judicial act in the "case or controversy
sense" (which Madison seems to give it in Federalist No. 47), but rather it is simply akin to the kind of
act that a judge would perform. See THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter
ed., 1961) (explaining that "[t]he entire legislature can perform no judiciary act except the removal of
judges and the trial of impeachments in the Senate).

213. Yoo, supra note 32, at 248-49.

214. See U.S. CONST. art. I, § 2, cl. 15 ("The House of Representatives . . . shall have the sole
impeachments are suitable examples. The Framers, moreover, invested the President with some powers that appear, by their nature, legislative: the President can veto legislation, make treaties with Senate advice and consent, and recommend legislation to Congress. True, the Constitution generally recognizes separate and distinct powers in the three branches, and, generally, one branch may not exercise a category of power reserved to another branch, except where the Constitution by its own terms mixes those powers in a few specific and enumerated areas. "Ambition," we see, was "made to counteract ambition," even if this included vesting one category of power (e.g., judicial power) in a branch that otherwise would hold a different category of power (e.g., legislative power). Thus, "[b]ecause the Constitution has vested Congress with the entire judicial power to decide whether the United States is in a state of war, no role for the courts is warranted."

Compare Congress's declaratory war powers (as well as its related enumerated powers such as raising and supporting the armed forces and granting letters of marque and reprisal) with the President's power as commander in chief. As such, the President alone must make determinations about how to conduct military operations. This, too, is a decisional function committed only to the executive branch. Courts have conceded that they may not determine the level of force the President may use, nor may they attempt to define the scope of military missions. But any attempt to define the boundaries of commander in chief power in the context of a civil lawsuit would pose the risk of doing just that, of limiting the President's ability to determine the course of military operations during war or warlike conditions. Of course, the Constitution does not permit the President to exceed his boundaries, but for courts to use this as a reason for judicial intervention begs the question. For it is not the judiciary that enforces the limits of presidential
war power, but the Congress, through its declaratory powers, its related foreign affairs functions, and its power to define "high crimes and misdemeanors," which could conceivably include conducting military operations without congressional approval.223 In turn, the President can lodge a legally cognizable constitutional objection to congressional action by exercising his veto power. Indeed, President Nixon vetoed the War Powers Resolution precisely because, by his interpretation of the Constitution, the resolution interfered with his exclusive power to act as commander in chief.224 Thus, once we consider congressional and executive powers in the military and foreign relations context, we see that no room remains for judicial involvement. Any dispute over boundaries can be resolved by a political branch determination. Madison's statement about the powers of the political branches to determine constitutional boundaries lends even greater credibility to this conclusion,225 as does his argument, followed by Marshall, that the courts were to have authority only in cases "of a judiciary nature."226

This conclusion also serves to discountenance Justice Brennan's statement in Goldwater that "[t]he issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts."227 Justice Brennan's logic implies first, that all questions of constitutional law are properly the subject of judicial review, and second, that questions of constitutional law cannot also be matters of political discretion. But this, as we have seen in examining the constitutional text, is not so. Questions concerning the constitutional meaning of "high crimes and misdemeanors," for example, are clearly matters of constitutional law committed also to political discretion (and hence are left to the House and not the courts).228 Similarly, the question of whether America is at war in the constitutional sense of the term is a question of both constitutional interpretation and political judgment (particularly if we follow Clausewitz's maxim that war is "politics by other means"). Yet that question is committed solely to the Congress and thus is not within the

223. For an excellent inquiry into impeachment generally and a discussion of the standards that might be used to determine whether such an act would be impeachable, see CHARLES L. BLACK JR., IMPEACHMENT (1974). Although Congress should not use impeachment merely for political reasons, it may use impeachment as a political weapon where an executive political act has amounted to an abuse of power, has undermined the functioning of a coordinate branch, or is a serious violation of the public trust that undermines confidence in the President's ability to do his job. Cf. J. Richard Broughton, Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?, 21 WHITTIER L. REV. 797, 833-35 (2000) (arguing that Congress could impeach the President for refusing to comply with a congressional investigation if such refusal falls into one of the above categories and is used merely as a political weapon, divorced from any serious constitutional harm).

224. See Veto of the War Powers Resolution, 1973 PUB. PAPERS 893 (Oct. 24, 1973) (communicating to Congress the veto of the War Powers Resolution and arguing that the "only way the constitutional powers of a branch of the Government can be altered is by amending the Constitution — and any attempt to make such alterations by legislation alone is clearly without force").


226. See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 8, at 430.


competence of the courts. Justice Brennan's attempt to distinguish constitutional law proper from politics, while perhaps appropriate in some areas of constitutional adjudication, is therefore inappropriate in the context of constitutional war powers, which the Framers deliberately placed in the political arena.\(^\text{229}\)

Another compelling element of the Constitution's textual commitment of war powers disputes to the political branches is the availability of remedies in the form of political self-help. As noted above, the President can veto legislation that he believes intrudes upon his war powers.\(^\text{230}\) Even more powerful, Congress has the power to withdraw funding for military operations, and it can impeach and remove the President if it believes he has committed a "high crime or misdemeanor" within the meaning of the Constitution. Justice Rehnquist recognized this in his *Goldwater* concurrence when he noted the difference between private plaintiffs and legislative plaintiffs,\(^\text{231}\) and Judge Silberman reiterated it in his *Campbell* opinion concerning legislative standing.\(^\text{232}\) Having such alternatives helps to provide a remedy to potential litigants that is not normally available in constitutional litigation.

Arguments from the Founding, bolstered by the constitutional text, lend support to this position in the area of the appropriations power.\(^\text{233}\) The Constitution separates the powers of the sword and of the purse, leaving the latter exclusively to Congress, notably, in the area of military appropriations.\(^\text{234}\) This enables Congress to check presidential war power with its powers of the purse. To the Framers, this arrangement, which allows no judicial role, promoted safe government. In Professor Yoo's words, "[T]he Framers seem to have expected the branches to pursue their war goals by relying on their own constitutional powers to check each other. Congress would control the executive initiative in war with its power over funding, just as Parliament and the colonial and state legislatures had done."\(^\text{235}\)

Similarly, impeachment is an important factor that, for example, Judge Wyzzanski's opinion overlooked in *Mitchell*, even though it ultimately found a political question to exist. The opinion stated, "[A] court would not substitute its judgment for that of the president, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear

\(^{229}\) See Yoo, *supra* note 32, at 288 ("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. Such disputes would not constitute an Article III 'Case,' because no party could make a claim of right enforceable in court.").

\(^{230}\) See Veto of the War Powers Resolution, *supra* note 224, at 893 (vetoing the War Powers Resolution as a violation of the Commander in Chief Clause).

\(^{231}\) *Goldwater*, 444 U.S. at 1004 (Rehnquist, J., concurring in the judgment).


\(^{233}\) See John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1206-07 (1999). Professor Yoo invokes Madison's and other Federalists' statements at the time of the Founding to indicate that "the Constitution vested the purse and the sword in the national government, but that did not place them in the same hands. . . . Federalists understood Congress's power of the purse as the primary check on presidential use of the military." Id.

\(^{234}\) See U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . To raise and support Armies . . . To provide and maintain a Navy.").

\(^{235}\) Yoo, *supra* note 233, at 1207.
abuse amounting to bad faith."\textsuperscript{236} If, however, the President \textit{did} clearly abuse his power in bad faith, this would be an appropriate situation for the House to consider impeachment. Thus, judicial resolution would be precluded in any event because the Constitution provides that only the House and Senate have a role in the impeachment process. Indeed, to borrow from Burke, impeachment is the preferred remedy where the legislature believes that the executive has abused his authority.\textsuperscript{237} For, as Professor Amar has explained, impeachment (as opposed to a civil lawsuit) is national, it is public, it is political and thus connected to the citizenry, and it is final, with no possibility of judicial review.\textsuperscript{238} As an aside, though, Congress should be careful in these situations not to use the impeachment power merely for political reasons, such as its disapproval of presidential policy preferences. Instead, the impeachment decision must be anchored by some serious, identifiable harm that a presidential act of war has caused to the state and the institutions of government.\textsuperscript{239} The possibility of resorting to self-help, then, be it presidential veto, commander in chief power, or congressional appropriations or impeachment power, counsels against judicial involvement in war powers disputes and in favor of leaving the political branches to their own substantial devices.

Finally, aside from the political question doctrine's existence as a safeguard of the separation of powers, we know that courts still would be unlikely to referee interbranch war powers controversies because of the existence of other doctrines of justiciability that also preserve the separation of powers.\textsuperscript{240} As the law of justiciability evolved in the latter part of the twentieth century — an evolution that has operated appropriately to limit the role of the judicial branch under Article III\textsuperscript{241} —

\begin{thebibliography}

\bibitem{236} Mitchell v. Laird, 488 F.2d 611, 616 (D.C. Cir. 1973).
\bibitem{237} See Edmund Burke, Speeches in the Impeachment of Warren Hastings, Esquire, Late Governor of Bengal, \textit{in EDMUND BURKE, SELECTED WRITINGS AND SPEECHES} 399 (Peter J. Stanlis ed., Gateway Editions 1963) (stating that "no man . . . has a right to arbitrary power").
\bibitem{238} See Akhil Reed Amar, \textit{In Praise of Impeachment}, 20 AM. LAW. 92, 94 (1998).
\bibitem{239} See Broughton, \textit{supra} note 223, at 835 (advising Congress to avoid impeachment merely because it disagrees with the President, lest the impeachment power become one akin to the parliamentary system); see also \textit{BLACK, supra} note 223, at 27-28 (highlighting the debate over impeachment in the Constitutional Convention). Professor Black points to a moment during the Constitutional Convention when George Mason offered to include the phrase "maladministration" in the Impeachment Clause. \textit{Id}. Madison objected, saying that the term would "be equivalent to a tenure during the pleasure of the Senate." \textit{Id}. at 28. Mason subsequently offered the phrase "other high crimes and misdemeanors," which the Convention adopted. \textit{Id}.
\bibitem{240} See Entin, \textit{supra} note 33, at 1307 (stating that cases deciding war powers questions are unusual because "there are various procedural and jurisdictional obstacles to litigating over war powers and foreign affairs"); Louis Henkin, \textit{Preface, The Constitution for Its Third Century: Foreign Affairs}, 83 AM. J. INT'L L. 713, 714 (1989) (stating that "courts have not contributed to the law of foreign affairs as they have to constitutional jurisprudence generally, if only because few issues can overcome the hurdles to adjudication set up by requirements of case or controversy, standing to sue, [and] justiciability"); Mikva, \textit{supra} note 27, at 339 ("Clearly if a court wishes to avoid deciding a war powers question, it has the doctrinal tools to do so.").
\bibitem{241} See Spencer v. Kemna, 523 U.S. 1, 18 (1998) (stating that "mootness . . . deprives us of our power to act; there is nothing for us to remand, even if we were disposed to do so"); Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 733 n.7 (1997) (holding that the "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise

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so too did its application in foreign affairs cases.242 The Vietnam and post-Vietnam-era cases, most recently Campbell, indicate that judges have numerous tools to use in leaving war powers allocation disputes to the political branches, from the law of standing to the timing doctrines of ripeness and mootness.243 Indeed, the cases indicate that these doctrines have served as the judiciary's first line of defense, so to speak, with the political question doctrine usually operating only as a last resort. Thus, once we combine the major doctrines of justiciability — standing, ripeness, mootness, and the political question doctrine — with an analysis of the constitutional text, structure, and tradition that those doctrines help to reinforce, we see that the resolution of war powers disputes belongs to the political branches, not the judiciary. If left there, we inch closer to effectuating Madison's belief, as Professor Marion describes it, "that we should not overlook the practical demands of effective departments, among which is the need to allow the political branches to do their work free of excessive judicial intrusion."244

B. The Political Branches and Constitutional Deliberation

Judicial abstention from war powers disputes between the Congress and the President does more than preserve the separation of powers, although that is its primary virtue.245 It also promotes constitutional deliberation in the political

jurisdiction") (quoting Reno v. Catholic Soc. Servs. Inc., 509 U.S. 43, 57 n.18 (1993)); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (requiring plaintiffs to allege a personal injury that is particularized, concrete, and otherwise judicially cognizable, and holding that "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III"); Burke v. Barnes, 479 U.S. 361, 363 (1987) ("Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case, it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing.") (emphasis added); Allen v. Wright, 468 U.S. 737, 751 (1984) (stating that Article III courts lack jurisdiction over a suit unless the plaintiff has suffered "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief" and that "the law of Article III standing is built on a single basic idea — the idea of separation of powers"); cf. Pushaw, supra note 204, at 436-51 (describing the early Supreme Court's approach to justiciability and its relationship to the separation of powers).

242. See supra Part II. C, D, & E; see also Henkin, supra note 240, at 714 (noting that justiciability requirements have led the Supreme Court to contribute less to foreign affairs than other areas of constitutional law).


244. Marion, supra note 207, at 416; cf. JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (arguing that courts should not intrude in questions of constitutional structure except where necessary to protect individual rights). Dean Choper's theory is sound when applied to the war powers context because war powers issues (as this article contends) must be resolved in the political branches. Although beyond the scope of this article, Dean Choper's theory is more problematic when applied to other structural constitutional questions (such as federalism), where the answer to those disputes is not committed to the political branches by the Constitution.

245. See Pushaw, supra note 204, at 451-52 (explaining the relationship between the justiciability doctrine and the separation of powers).
branches, which have an independent, indeed critical, duty to consider prudently the Constitution's meaning.246 After all, though many view courts as having primary responsibility for interpreting the Constitution, one must not confuse primacy with exclusivity. Even Marbury does not, by its terms, preclude constitutional decision-making in the legislative and executive departments. So long as political actors do not perform a judicial power that is solely within the province of Article III institutions, the Constitution permits the doing of constitutional law in the political branches, too.247

Members of Congress begin their term in office by taking an oath to "support and defend the Constitution,"248 an oath prescribed by statute and authorized by Article VI of the Constitution.249 Similarly, every president begins his administration by taking an oath, for which the Constitution itself provides, to "preserve, protect and defend the Constitution."250 By requiring political actors, as well as judges, to take a solemn oath to defend the Constitution, the Constitution surely imparts some significant responsibility on the part of these actors to independently consider the Constitution's meaning.251

If that were not enough, though, the scheme of representation that the Constitution creates also supports the idea of constitutional deliberation outside the courts. In Federalist No. 10, Madison reminds us that the representative has a duty to "refine and enlarge the public view."252 By eschewing the delegation model and

246. See Broughton, Boerne Down the House, supra note 9, at 360-61; Fisher, supra note 14, at 708 ("Congress . . . shares with the executive and the judiciary the duty of constitutional interpretation."); Hickok, supra note 14, at 218 (arguing that the Framers wanted legislators involved in constitutional discourse); see also Paul Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 STAN. L. REV. 585, 589 (1975) (arguing that Congress "must learn not only to interpret the Constitution, but also to interpret judicial decisions interpreting the Constitution"); Mark Tushnet, Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies, 50 DUKE L.J. 1395, 1418 (2001) (arguing that "[c]ontroversies concerning the constitutional allocation of the power to make war between Congress and the President come close to satisfying the criteria for evaluation of congressional constitutional interpretation").

247. See Broughton, Boerne Down the House, supra note 9, at 321 (stating Congress may not "deprive the judiciary of complete control over judicial functions," those committed to the judiciary by Article III and not otherwise granted to other branches); Katyal, supra note 14, at 1351 ("Congress . . . should exert a larger role in bridging the gap between ordinary and higher lawmaking by inserting itself into interpretive questions and self-consciously trying to find consensus on the abstract value and lessons of different constitutional moments.").

249. U.S. CONST. art. VI.
250. Id. art. II, § 1.
251. See Entin, supra note 14, at 216 ("Faithfulness to their oath necessarily requires members of Congress and the President to consider the constitutionality of proposed policies as an important aspect of performing their duties."); Fisher, supra note 14, at 718-22 ("The duty and oath to support and defend the Constitution are not cancelled by claims of institutional incompetence or personal uncertainty."); Hon. John N. Hostettler & Thomas W. Washburne, The Constitution's Final Interpreter: We the People, 8 REGENT U. L. REV. 13 (1997) ("The President, the Congress, and the Supreme Court are all bound by their oaths to uphold the Constitution, and each branch is forced to form an initial interpretation and then decide whether its proposed actions would be appropriate.").

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favoring the representation model, Madison recognized that sound representative government required the exercise of independent judgment by legislators who would be part of a deliberative institution, motivated by the public good, and moderated by the forces of competing interests. That judgment included deliberation upon the Constitution generally, and upon structural constitutional issues specifically. Indeed, as we have seen, such structural constitutional deliberation could also exist in court- or judge-like form, as when the Congress "declares" war or when the Senate conducts trials on impeachment. Historical practice, moreover, provides a telling example. Members of the early Congresses deliberated significantly upon the powers of the executive and judicial branch, and upon the limits of their own powers. Recall Madison's statement during the early debates on presidential removal power, "beg[ging] to know, upon what principle it can be contended" that one branch has greater authority to decide the bounds of constitutional power than the others. The legislators also debated the necessity of preserving rights, and considered the need for (and ultimately adopted) a national Bill of Rights. These debates quite rightly reflected the serious task of representation. As Hickok explains,

Understanding the obligations of representation was the first task of a member of Congress in 1789, and engaging debate over questions of constitutional significance was very much a part of achieving that understanding. Before members could represent the people, they had to determine, each one for himself, exactly what representation entailed. Before they could govern the nation, they had to determine, each one for himself, what governing a nation entailed.

Thus, only by seriously engaging in the process of scrutinizing the Constitution could Congress, a national assembly governing a single nation, effectuate the representative government that the Constitution envisions.

253. See id.; see also Edmund Burke, A Letter to John Farrow and John Harris, Esqs., Sheriffs of the City of Bristol on the Affairs of America 1777, in EDMUND BURKE, SELECTED WRITINGS AND SPEECHES 187 (Peter J. Stanlis ed., 1963) (defending the notion of representation, stating that "[y]our representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion").

254. See Hickok, supra note 14, at 271. Hickok explains,

The debates during the Constitutional Convention in Philadelphia produced a Congress in which representation would combine with deliberation to produce responsible government. The arguments mounted in the Federalist Papers emphasized the degree to which the national legislature was designed to be a deliberative assembly. When the First Congress convened, the members argued for a congressional responsibility to interpret the Constitution. These arguments were for deliberation of a very particular sort: deliberation on constitutional issues.

Id.

255. See id. at 260-71.


257. See, e.g., id. at 368-71 (statement of Rep. Boudinot) (concerning the establishment of the executive departments).

258. Hickok, supra note 14, at 271.
Text, structure, and history also support executive branch constitutional
deliberation.259 Presidents from Washington to Clinton have long used the veto
to strike legislation, as President Nixon did with the War Powers Resolution, to defend
constitutional prerogatives.260 Presidents, moreover, have considered their own
theories of constitutional jurisprudence and meaning when appointing federal judges,
especially because Supreme Court Justices' views of constitutional law are often scrutinized for conformity with that of the President that appoints them.261 Even
exercising authority under the Commander in Chief Clause itself requires
constitutional deliberation, for, as we have seen, many recent presidents have
considered whether the act of deploying troops in the absence of a congressional
authorization was constitutionally appropriate (and concluded that it was).262 These
functions, among others,263 thus require some degree of serious deliberation by the

259. See Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional
Interpretation, 81 IOWA L. REV. 1267 (1996). Lawson and Moore provide a thorough comparison of
judicial constitutional interpretation and executive constitutional interpretation. They give particular
attention to the textual sources of presidential interpretational authority, including the President's power
to faithfully execute the laws (the Take Care Clause), the pardon power, the veto power, and the
Presentment Clause. Id. at 1279-1312. Lawson and Moore consider how each of these provisions allows
the President to render an independent legal (and constitutional) judgment about legislation and the nature
of his own powers. Id. The authors admit their task is "strictly descriptive rather than prescriptive," and
also conclude that, while our constitutional system is sure to produce "chaos and conflict," nevertheless,
"when viewed through the lens of this system, a power of independent presidential review does not seem
so strange or threatening." Id. at 1271, 1330.

260. See Gerard N. Magliocca, Veto! The Jacksonian Revolution in Constitutional Law, 78 NEB. L.
REV. 205, 213-20 (1999). Magliocca provides several historical examples of presidential vetoes that were
used for constitutional reasons. For example, President Washington vetoed an apportionment bill because
"he thought [the bill] would violate the constitutional requirement that there be at least one representative
for every thirty thousand people." Id. at 214-15. In addition, Madison used his first two vetoes to reject
legislation that he believed would violate the Establishment Clause. Id. at 215; see also, e.g., President's
Message to the House of Representatives Returning Without Approval the National Defense
Clinton's view that the legislation would "infringe[] on the President's constitutional authority as
Commander in Chief").

Whether presidents are supposed to use their veto power only to safeguard constitutional powers and
rights — and not merely for political or policy-based reasons — is a question of some import, but one
beyond the scope of this article. See DiClerico, supra note 40, at 38 (noting the constitutional nature
of President Nixon's veto of the War Powers Resolution); Cass R. Sunstein, An Eighteenth Century
goal was to allow the President to veto laws on constitutional, rather than policy, grounds."); THE
FEDERALIST NO. 51, at 323 (James Madison) (Clintom Rossiter ed., 1961) (discussing the executive veto
power as a means of defending the President against legislative encroachments upon executive power);
THE FEDERALIST NO. 73, at 442-43 (Alexander Hamilton) (Clintom Rossiter ed., 1961) (explaining the
necessity of the veto to defend executive constitutional authority).

261. See generally Henry J. Abraham, Justices, Presidents, and Senators (1999) (providing
a comprehensive account of the appointment process for Supreme Court Justices and referring to
the political and constitutional considerations that attended the nominations).

262. See Bush, supra note 22, at 1747 ("[E]very President since 1973 has insisted that the
Resolution impinged on his constitutional prerogatives and has treated the Resolution with institutional
contempt.").

263. See Lawson & Moore, supra note 259, at 1279-1312.

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President in ascertaining the Constitution's meaning. As with Congress, then, constitutional deliberation by the President aids immeasurably in the performance of presidential duties.264

Constitutional history and design, which envision constitutional deliberation in every branch as a corollary of sound government, have, however, yielded to a bizarre mindset of judicial exclusivity that lacks constitutional foundation and distorts republican government. As the role of the federal judiciary in deciding constitutional questions has expanded, the role of the political branches in engaging in thoughtful constitutional debate has unfortunately subsided. Presidents, for example, now often use the veto power for purely political reasons, divorced from considerations of constitutional structure or rights. Congress, as Judge Mikva has noted, no longer conducts serious and thoughtful constitutional debate, but rather "for the most part the legislators are motivated by a desire to enact any particular piece of legislation that fits the perceived needs of the moment."265 This has led Judge Mikva to conclude that Congress is institutionally incapable of adequately engaging in constitutional decision making.266 Professor Tushnet describes this phenomenon as the judicial overhang.267 Political actors, he asserts, now simply leave difficult constitutional questions to the courts.268 The judicial overhang thus ultimately promotes irresponsibility, distorts legislation, distorts legislative discussion, and misleads legislators.269 Although Professor Tushnet takes the provocative (but ultimately imprudent) view of replacing judicial review with majoritarian constitutional interpretation altogether,270 the premise of his theory —

264. One question that scholars raise, but that is beyond the scope of this article, is whether, in connection with the President's interpretational powers, he is authorized to ignore final decisions of the Supreme Court when he disagrees with the Court. See, e.g., Edwin Meese III, The Law of the Constitution, 61 Tul. L. Rev. 979 (1987) (arguing that the President has direct "access" to the Constitution and may at times refuse to be bound by the Supreme Court's explication of constitutional law); Michael Stokes Paulsen, The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation, 15 Cardozo L. Rev. 81, 86-87 (1993) (characterizing the "competing strand of constitutional theory" that does not accept judicial supremacy in constitutional interpretation); Michel Rosenfeld, Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers, 15 Cardozo L. Rev. 137, 173 (1993) (concluding that "[p]reservation of the constitutional order and of fundamental values inherent in constitutionalism require that there be no absolute power over constitutional interpretation," but that ultimate authority should rest with the judiciary and "in the executive branch only as an exception under highly unusual circumstances"); David A. Strauss, Presidential Interpretation of the Constitution, 15 Cardozo L. Rev. 113, 116-17 (1993) ("I am mostly concerned, however, with refuting a particular view that has been asserted by presidents from time to time . . . : that the President is sometimes entitled to claim direct access to 'the Constitution,' unmediated by constitutional law as the courts have developed it"); see also Lawson & Moore, supra note 259, at 1319 (analyzing the debate over independent presidential review and presidential authority to review courts' judgments).


266. See id. at 609-11.

267. See Mark Tushnet, Taking the Constitution Away from the Courts 57-65 (1999); Tushnet, supra note 246, at 1419.

268. See Tushnet, supra note 267, at 57-65.

269. See id.

that the constitutional system recognizes a vital role for political branch constitutional decision making — is persuasive.

Judicial abstention from war powers disputes can mitigate the effects of the judicial overhang by encouraging Congress and the President to think more seriously about constitutional structure.211 In the Vietnam era, for example, Congress enacted the War Powers Resolution to assert its own constitutional prerogatives only after the courts had consistently refused to intervene. Perhaps this was no accident. Without resort to the judiciary, Congress was forced to take responsibility for using its Article I powers in its own defense. Whatever the other flaws of the War Powers Resolution, it at least represents Congress's assertiveness in attempting to define the boundaries of constitutional war power, as the Constitution provides. (Whether Congress got it right is a separate matter, beyond the scope of this article.) Similarly, rather than resort to the courts to challenge the constitutionality of the Resolution, presidents since Nixon have simply deployed troops at their discretion, forcing Congress to either authorize the action, reject such authorization, withdraw funding, or, perhaps as a last resort, impeach the President. Thus, the modern trend of cases leaving war powers controversies to the political branches has produced somewhat more responsible political institutions, though much work must still be done to truly effectuate the Constitution's vision of prudent and reasoned constitutional discourse among the Congress and the White House.212 In keeping therefore with constitutional history and design, political actors best serve republican government when they give careful attention to constitutional boundaries and constitutional weapons in the course of adopting military and foreign policy. Political actors will be more likely to do so if they have only themselves, and not the courts, to do the work.

IV. Conclusion

There is much we can learn from Madison and Marshall, statesmen who understood the value of prudent constitutional reasoning to the practical governance of a large republic. Importantly, not all such reasoning occurs in the courts, nor

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211. See Tushnet, supra note 246, at 1419 (noting the "ambiguous status of the judicial overhang" in war powers controversies but concluding that "[t]he ambiguities generated by [the law of standing] mean that members of Congress might think that they have judicial review available to them. This mistaken belief might distort the way in which members consider war-powers questions."). Cf. ELY, supra note 16, at 56 (arguing that courts should play a greater role in war powers controversies). Dean Ely urges greater responsibility on the part of Congress in asserting its constitutional prerogatives. He argues, however, that courts can "induce" Congress to do its job by playing a more aggressive role in resolving war powers disputes. Id.

212. See Entin, supra note 14, at 226 ("[T]he Constitution derives its meaning not only from judicial interpretation but also from shared understandings that emerge from governance and politics."); Marion, supra note 207, at 414-17 (encouraging sober and moderate constitutional discourse in the tradition of Madison and Marshall).
should it. Those matters not "of a judiciary nature," in Madison's words, must find resolution in other fora. Controversies between Congress and the President regarding the Constitution's allocation of war powers are among this class of disputes. This is not to say that courts must leave all cases involving foreign affairs to the vicissitudes of political institutions; the Constitution explicitly vests the judiciary with authority over admiralty and maritime cases, as well as cases affecting ambassadors, public ministers, and consuls, all of which may invariably touch upon foreign relations. War powers disputes are constitutionally unique, however, because the Constitution itself commits the resolution of those disputes to legislators and the chief executive. The courts have, for the most part, appropriately left these disputes where they belong, in the hands of the political branches. Through the doctrine of justiciability, courts have helped to preserve the separation of powers by recognizing both the limits on their Article III authority and the broad prerogatives that the Constitution grants to political actors who are charged with making and effecting American military and foreign policy. By continuing this trend, as the District of Columbia Circuit did in Campbell, the judiciary can encourage deliberation about constitutional structure in the political branches, as Madison and Marshall envisioned.