

Covert Wars and Presidential Power: Judicial Complicity in a Realignment of Constitutional Power

Introduction

Presidents, particularly in recent years, have frequently conducted hostile actions against foreign governments without first seeking congressional approval. In some cases, such as has occurred in Grenada, the Dominican Republic, Vietnam, and elsewhere, American troops have been used directly against foreign nations.¹ In other situations, such as with the Nicaraguan Contras, the overthrow of Chile's Allende government, and the unsuccessful Cuban Bay of Pigs invasion, the President has used "covert" actions to commit the United States to hostilities against a foreign sovereign.²

The Constitution allocates the power to declare war to the legislative branch of government.³ The executive branch, however, often uses hostile force against foreign sovereigns without congressional action, or with minimal congressional participation.⁴ By declining to decide cases which challenge presidential authority to use hostile force against a sovereign nation, the judiciary has aided presidential excesses in the use of force.⁵

Many cases concerning the Vietnam War, for example, were not de-

1. Use of American troops abroad is not uncommon. For an account of the United States invasion of Grenada, see *NEWSWEEK*, Nov. 7, 1983, at 52-58. Other uses of American troops abroad are discussed at length in A. THOMAS, *THE WAR-MAKING POWERS OF THE PRESIDENT* 13-30 (1982).

2. The Nicaraguan Contras are United States supported guerrillas fighting the Nicaraguan government. One of the earliest published reports concerning the Contras can be found in *NEWSWEEK*, Nov. 8, 1982, at 42. An early 1987 discussion of Contra activities can be found in *N.Y. Times*, Mar. 10, 1987, at 1, col. 3. The Central Intelligence Agency's involvement in the violent overthrow of the Chilean government is discussed in *TIME*, Sept. 30, 1974, at 16. Similarly, United States involvement in an attempt to overthrow the Cuban government is discussed in *U.S. NEWS & WORLD REPORT*, Mar. 18, 1963, at 82.

3. U.S. CONST. art. I, § 8, cls. 1 & 11.

4. See *supra* notes 1-2 and accompanying text.

5. The judiciary has used procedural mechanisms of judicial abstention to avoid decisions on the merits. The primary procedural mechanism courts use to avoid constitutional issues is the political question doctrine, but other procedural devices are also used. See *infra* notes 122-185 and accompanying text.

cided on the merits but dismissed on procedural grounds.⁶ Since then, courts have refused to address such issues as the President's ability to terminate a mutual defense treaty with the Republic of China,⁷ the President's military support of government forces in the civil war in El Salvador,⁸ and the President's military and financial support of antigovernment guerilla forces in Nicaragua.⁹

This realignment of war powers raises several questions. First, assuming courts are willing to resolve these controversies, are these presidential actions legitimate under the Constitution? Second, should the judiciary decide on the merits cases challenging presidential authority to engage in the use of force against a sovereign nation?

This Note examines the constitutional allocation of war and war-related foreign policy powers, and judicial complicity in increasing the concentration of those powers in the executive branch. Part I discusses two contemporary cases dealing with the President's foreign and military policy decisions in Central America. Part II provides an overview of constitutional law in the area of foreign affairs powers and the President's ability to use military force abroad. Part III discusses the procedural mechanisms used by the judiciary to abstain from reviewing the constitutionality of presidential uses of force. Part IV applies the law to the Central American cases. This Note concludes that Presidents regularly exceed their constitutional authority in foreign affairs and war-making with the implied consent of the judiciary.

I. Cases Challenging the Constitutionality of Presidential Foreign Policy and Military Actions in Central America

Two of the more significant cases brought to limit President Reagan's foreign policy and military actions in Central America are *Crockett*

6. A large number of cases came to the courts concerning the Vietnam War. *See, e.g.*, *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Mora v. McNamara*, 389 U.S. 934 (1967); *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir.), *aff'd*, 414 U.S. 1304 (1973); *Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); *Drinan v. Nixon*, 364 F. Supp. 853 (D. Mass. 1973); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972); *Davi v. Laird*, 318 F. Supp. 478 (W.D. Va. 1970).

7. *Goldwater v. Carter*, 444 U.S. 996 (1979).

8. *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

9. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd on other grounds*, 770 F.2d 202 (D.C. Cir. 1985) (without disapproving the basis for the district court's dismissal of the case, the appellate court chose to rely on other grounds for dismissal).

*v. Reagan*¹⁰ and *Sanchez-Espinoza v. Reagan*.¹¹ In *Crockett v. Reagan*, twenty-nine members of Congress brought suit against the Reagan Administration for violations of the War Powers Resolution¹² and the Foreign Assistance Act of 1961.¹³ The plaintiffs alleged the Administration's supply of financial aid, military equipment, and military advisors to the government of El Salvador violated federal law.¹⁴ Without ever reaching the merits of these claims, the court dismissed the War Powers Resolution cause of action as presenting a nonjusticiable political question,¹⁵ and also dismissed the Foreign Assistance Act cause of action under the doctrine of equitable discretion.¹⁶

Sanchez-Espinoza v. Reagan was a suit by members of Congress, citizens and residents of Nicaragua, and residents of Florida. In this case, the district court dismissed alleged violations of the War Powers Resolution, the National Security Act,¹⁷ and the Boland Amendment¹⁸ as nonjusticiable political questions.¹⁹ Similarly, the court also dismissed tort allegations by the Nicaraguan defendants seeking relief from terrorist attacks and torture as nonjusticiable political questions.²⁰ The nuisance action brought by the Florida residents seeking to close paramilitary training camps was dismissed for lack of federal jurisdiction.²¹ Without approving or disapproving the district court's finding that these claims presented nonjusticiable political questions, the court of appeals upheld the lower court's dismissal of the suit on a variety of other procedural grounds.²²

10. 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

11. 568 F. Supp. 596 (D.D.C. 1983), *aff'd on other grounds*, 770 F.2d 202 (D.C. Cir. 1985).

12. 50 U.S.C. §§ 1541-1548 (1982 & Supp. 1985).

13. 22 U.S.C. § 2304 (1961).

14. 558 F. Supp. at 896.

15. *Id.* at 896-901.

16. *Id.* at 902-03.

17. 18 U.S.C. §§ 956-970 (1982).

18. Boland Amendment, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982). The Boland Amendment to the 1983 Department of Defense Appropriations Act prohibited the Defense Department and the Central Intelligence Agency from using funds provided under the Act for military activities leading to the overthrow of the Sandinista government in Nicaragua.

19. 568 F. Supp. at 600. *See infra* notes 122-144 and accompanying text.

20. 568 F. Supp. at 601-02.

21. *Id.* at 602.

22. 770 F.2d 202 (D.C. Cir. 1985). *See infra* notes 178-182 and accompanying text.

II. Substantive Restraints on Waging War

A. The Constitutional Allocation of Foreign Affairs and War Powers

1. *The Framers' Intent*

The allocation of distinct powers to different branches of government—the separation of powers—is one of the principal underlying theories of the Constitution.²³ The Framers used separation of powers to allow for a strong Executive while preventing an excessive concentration of power in the Executive or any other branch of government.²⁴ The doctrine was designed particularly to avoid the types of excesses attributed to the British monarch.²⁵

The Constitution states, “[t]he Congress shall have Power . . . [t]o declare war”²⁶ It was not by accident that the Framers granted to a legislative body, and not the Executive, the power to initiate wars. The Constitution also delegates other significant foreign affairs and war powers to the legislative branch: (1) granting letters of marque and reprisal;²⁷ (2) raising and supporting an army and navy;²⁸ (3) regulating commerce with foreign nations;²⁹ and (4) making all laws “necessary and proper” to carry out its assigned powers.³⁰ The Constitution also requires Senate ratification of treaties negotiated by the executive branch, Senate confirmation of executive appointments, and Senate approval of ambassadors to foreign nations.³¹

The Constitution does grant the executive branch specific powers in the arena of foreign affairs and war-making: first, the President is the Commander-in-Chief of the armed forces;³² second, the President is authorized to negotiate treaties;³³ third, the President has vested in him or

23. Courts have recognized that the separation of powers is one of the major foundational elements of the system of government under the Constitution. *See, e.g.,* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

24. *See infra* notes 26-35 and accompanying text.

25. Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, in 3 *THE VIETNAM WAR AND INTERNATIONAL LAW: THE WIDENING CONTEXT* 521, 560-61 (R. Falk ed. 1972) [hereinafter *VIETNAM: THE WIDENING CONTEXT*].

26. U.S. CONST. art. I, § 8, cls. 1, 5, & 11.

27. U.S. CONST. art. I, § 8, cl. 11. Letters of marque and reprisal were a means of providing private persons with government authority to capture ships and cargo of foreign citizens.

28. U.S. CONST. art. I, § 8, cls. 12 & 13. Raising and supporting an army refers to both financial support and conscription.

29. U.S. CONST. art. I, § 8, cl. 3. Regulating commerce with foreign nations refers to the managing of trade relationships and the initiation of trade embargoes.

30. U.S. CONST. art. I, § 8, cl. 18. The Necessary and Proper Clause is an expansive provision giving Congress broad authority to implement the provisions of the Constitution.

31. U.S. CONST. art. II, § 2, cl. 2.

32. U.S. CONST. art. II, § 2, cl. 1.

33. U.S. CONST. art. II, § 2, cl. 2.

her all executive powers;³⁴ and fourth, the President must faithfully execute the laws of the land.³⁵ Some Presidents have argued that the combination of express and implied powers granted to the Executive by the Constitution gives them the power to use military force at will.³⁶

The Framers intended the initiation of force abroad to be made not by the President alone, but by the entire Congress prior to the occurrence of hostilities, subject to the President's signature or veto.³⁷ The President, however, would have the ability to defend the Nation without seeking congressional approval.³⁸ This desire to give the President sufficient authority to act swiftly to defend the Nation against attack led the Framers to amend the language of an earlier draft of the Constitution. The earlier draft gave Congress the power to *make* war; the phrase actually

34. The Executive Vesting Clause, U.S. CONST. art. II, § 1, cl. 1.

35. U.S. CONST. art. II, § 1, cl. 8.

36. Velvel, *The War in Vietnam: Unconstitutional, Justiciable and Jurisdictionally Attackable*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW, 651, 655-62. (R. Falk ed. 1969) [hereinafter THE VIETNAM WAR]. Professor Velvel commented that President Johnson believed the Constitution empowered Presidents to fight any war necessary to the Nation's foreign policy. President Truman, in sending troops to Korea, felt similarly. Truman's spokesperson said, "The President, as Commander-in-Chief of the Armed Forces of the United States, has full control over the use thereof." A. THOMAS, *supra* note 1, at 20-21.

37. Reveley, *supra* note 25, at 562. Justice Story wrote:

It should . . . be difficult in a republic to declare war, but not to make peace. The representatives of the people are to lay the taxes to support a war, and therefore should be consulted, as to its time, and the ways and means of making it effective. The co-operation of all the branches of legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all others. Indeed, there might be a propriety even in enforcing still greater restrictions, as by requiring a concurrence of two thirds of both houses.

J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 410-11 (1833), reprinted in A. THOMAS, *supra* note 1, at 38.

In 1848, when Congress censured President Polk for initiating the Mexican-American War without congressional authorization, then-Representative Abraham Lincoln said:

The provision of the Constitution giving the war-making power to Congress was dictated as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.

E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 451 n.7 (1957), reprinted in A. THOMAS, *supra* note 1, at 11. See also Velvel, *supra* note 36, at 653.

38. Alexander Hamilton wrote:

"The Congress shall have the power to declare war"; the plain meaning of which is that it is the peculiar and exclusive duty of Congress, *when the nation is at peace*, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only to go to war. But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory: it is at least unnecessary.

A. HAMILTON, WORKS OF ALEXANDER HAMILTON 249-50 (H. Lodge 2d ed. 1903), reprinted in A. THOMAS, *supra* note 1, at 37 (emphasis in original).

adopted gives Congress the power to *declare* war.³⁹

The Constitution's allocation of power to the Congress to grant "letters of marque and reprisal,"⁴⁰ a congressional authorization of the use of force by private parties in undeclared wars, indicates the Framers' intention to have Congress control the initiation of any hostilities against another nation.⁴¹ Moreover, as the Nation had neither a standing army nor a standing navy, and the Constitution vests in Congress the power to raise an army or call forth the militia,⁴² the Framers intended military action to require congressional approval. Thus, the Framers gave to Congress the authority to initiate all known methods of using force in all situations except the urgent defense of the Nation.

The above analysis is consistent with the Framers' intent. The Framers had recently survived the Revolutionary War. Blame for the war was placed on the British king, an executive with nearly absolute power to determine foreign policy and the use of military force.⁴³ The Articles of Confederation,⁴⁴ adopted immediately after the Revolutionary War, vested all power in the legislative body to avoid a strong Executive.⁴⁵ After a few years, however, "legislative despotism"⁴⁶ led national leaders such as Thomas Jefferson, John Adams, and James Madison to advocate having an executive as well as a legislative branch, with each keeping the abuses of the other in check.⁴⁷

Moreover, in a democratic society, an Executive should not be allowed to independently commit the Nation to hostile relations with an-

39. E. KEYNES, *UNDECLARED WAR* 35 (1982).

40. U.S. CONST. art. I, § 8, cl. 11.

41. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672, 694-702 (1972).

42. Note, *Congress, the President, and the Power to Commit Forces to Combat*, [hereinafter Note, *Power to Commit Forces*] in 2 *THE VIETNAM WAR* *supra* note 36, at 616, 621 n.29. See also U.S. CONST. art. I, § 8, cls. 12-16:

The Congress shall have Power . . . [t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; [t]o provide and maintain a Navy; [t]o make Rules for the Government and Regulation of the land and naval Forces; [t]o provide for calling forth the Militia, to execute the Laws of the Union, suppress Insurrections and repel Invasions; [t]o 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.

Professor Lofgren asserts that, "[t]aken together . . . the grants to Congress of power over the declaration of war and issuance of letters of marque and reprisal likely convinced contemporaries . . . that the new Congress would have nearly complete authority over the commencement of war." Lofgren, *supra* note 41, at 700.

43. A. THOMAS, *supra* note 1, at 37-38.

44. U.S. ART. OF CONFEDERATION.

45. E. KEYNES, *supra* note 39, at 28.

46. *Id.* at 18. Legislative despotism is a phrase used to describe the powerful and unchecked power of the legislative branch of government under the Articles of Confederation.

47. *Id.*

other country. When the people of the Nation will be called upon to make economic and physical sacrifices, such decisions should rest with the legislative body, which is more representative of the people than is a sole Executive.⁴⁸ Further, the use of force against another nation should require an expression of popular approval because of the moral and legal consequences.⁴⁹ Therefore, decisions to use hostile force against foreign sovereigns are better made by the legislative rather than the executive branch of government.

2. *Contemporary Interpretations*

The Constitution is somewhat vague on the allocation of foreign relations and war powers between the legislative and executive branches of government.⁵⁰ The federal judiciary has bolstered presidential claims to exclusive control over foreign affairs. In cases such as *United States v. Curtiss-Wright Export Corp.*,⁵¹ courts have argued that the executive branch has the primary responsibility for foreign policy decisions.⁵²

48. Note, *Power to Commit Forces*, *supra* note 42, at 620. Legislative bodies are more representative than sole Executives because they are composed of multiple members, and consequently, are more likely to represent the diversity of views held by the population at large.

49. *Id.*

50. E. KEYNES, *supra* note 39, at 33.

51. 299 U.S. 304 (1936).

52. *Id.* Justice Sutherland was building on the statement first made by then Congressman, later Chief Justice, Marshall in 1800 that "[t]he President is the sole organ of the nation in its external relations, and its sole representative." 10 ANNALS OF CONG. 613 (1800) (statement of Congressman Marshall). Although this view focuses on the President as the Nation's primary representative in foreign powers, it does not suggest that the executive branch is solely responsible for the determination of foreign policy.

The defendant, Curtiss-Wright Corporation, was charged with violating an arms embargo proclaimed by the President pursuant to a joint resolution of Congress that authorized such presidential action. Curtiss-Wright put forth the defense that the legislative branch had improperly delegated its powers to the President. The Supreme Court, however, held that the executive branch has more power in foreign than in domestic affairs, and found no constitutional violation.

Justice Sutherland, the author of the majority's opinion, first pointed out that the federal government, rather than the states, necessarily has foreign affairs powers. *Curtiss-Wright*, 299 U.S. at 315-18. Second, Justice Sutherland argued that the President, rather than Congress, had the primary responsibility for foreign affairs:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the

Justice Sutherland's opinion in *Curtiss-Wright*, expanding presidential powers in the field of foreign affairs, has been criticized⁵³ and has not been followed in subsequent decisions. In *Youngstown Sheet & Tube Co. v. Sawyer*,⁵⁴ for example, the Court ruled that the war powers conferred on the President were very limited.⁵⁵

Although it is sometimes argued that the Commander-in-Chief Clause⁵⁶ authorizes presidential plenary power over the military, the better view is that this Clause does not confer substantive power on the President to determine whether the Nation should initiate hostilities with foreign nations.⁵⁷ Professor Henkin has commented that if the Commander-in-Chief Clause grants the Executive unlimited power over the military, the armed forces would be the President's private army.⁵⁸ Professor Wormuth has argued that the Commander-in-Chief Clause does not grant Presidents the authority to use force against foreign sovereigns whenever *they* perceive a threat to the peace and security of the Nation.⁵⁹

international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. . . . This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed.

Id. at 319-22.

53. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 24-25, 45-65 (1972).

54. 343 U.S. 579 (1952).

55. In *Youngstown*, the President ordered the Secretary of Commerce to seize and operate the Nation's steel mills to prevent a strike during the Korean War. The Court stated that neither the President's position as Commander-in-Chief, nor the Vesting or Take-Care Clauses gave the President such broad powers; the Court held that the President cannot usurp the legislative functions assigned to Congress by the Constitution. *Id.* at 587-89.

56. U.S. CONST. art. II, § 2, cl. 1.

57. The argument that the Commander-in-Chief Clause authorizes Presidents to use the military at will eliminates the role of representative government and therefore amounts to a claim that military authority is supreme over civilian authority—a proposition contrary to the very foundations of United States government. Velvel, *supra* note 36, at 659-60.

The better view is that the President has the authority under the Commander-in-Chief Clause to determine war strategy, but may not unilaterally decide to initiate a war or use force against a foreign sovereign. Moreover, to be effective this limitation on the Commander-in-Chief Clause extends to foreign policy decisions which may lead to the use of force against a foreign sovereign. See A. THOMAS, *supra* note 1, at 70; L. HENKIN, *supra* note 53, at 53-54.

58. L. HENKIN, *supra* note 53, at 53-54.

59. Wormuth, *The Vietnam War: The President versus the Constitution* in 2 THE VIETNAM WAR, *supra* note 36, at 711, 715-16. Professor Wormuth has drawn an analogy to the commander of a submarine who believes that the peace and security of the Nation require him to fire nuclear missiles at the Soviet Union. Just as the commander of such a vessel would have no legal authority to make this decision, neither would the President as commander of the army and navy have this authority. This analogy does not, of course, conflict with presidential

The Supreme Court has interpreted the Commander-in-Chief Clause,⁶⁰ and the Executive Vesting Clause⁶¹ as limited grants of presidential power, because many functions, including lawmaking and declaring war, are exclusively within Congress' authority.⁶² In *Youngstown*, Justice Jackson expanded this notion to suggest that there are some areas in which the Executive has exclusive authority, some in which Congress has exclusive authority, and in other areas, there is a "zone of twilight" in which either the distribution of power is uncertain or the President and Congress have concurrent authority.⁶³ Some scholars have argued that foreign and military affairs necessarily fall into this zone of twilight.⁶⁴

During the Vietnam War, a prominent group of legal scholars drafted the *Yale Papers* for presentation to Congress.⁶⁵ Commenting on Justice Jackson's concurrent powers argument in the context of foreign

responsibility for defending the Nation; just as the submarine commander can use force to defend the submarine against attack, the President can use force when the United States is attacked.

60. U.S. CONST. art. II, § 2, cl. 1.

61. U.S. CONST. art. II, § 1, cl. 1.

62. 343 U.S. at 587-89. In his concurring opinion in *Youngstown*, Justice Jackson explained why he felt that executive powers must be limited:

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. Continental European examples were no more appealing. And if we seek instruction from our own times, we can match it only from the executive power in those governments we disparagingly describe as totalitarian. I cannot accept the view that [the Executive Vesting Clause] is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.

Id. at 641 (Jackson, J., concurring).

63. *Id.* at 637.

64. See *infra* notes 65-70 and accompanying text. Justice Jackson's twilight zone analysis, like Justice Sutherland's, viewed all foreign relations powers as belonging somewhere in the federal government:

The broad statement that the Federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the Federal government, leaving those not included in the enumeration still in the states And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.

299 U.S. at 315-16.

Justice Jackson viewed the total of foreign and military affairs powers which any nation has as being greater than the sum of those powers specifically granted to the Congress and President under our Constitution. Since there is no indication where those powers reside, they must be in his "twilight zone" of concurrent powers. *Indochina: The Constitutional Crises — Part II (The Yale Papers)*, 116 CONG. REC. 16,478 (1970).

65. 116 CONG. REC. 16,478 (1970).

affairs and war powers, these experts suggested an allocation of power between the legislative and executive branches on the basis of: "(1) the special competences of each; and (2) the probable internal consequences of external actions."⁶⁶ The President is capable of fast, efficient, and decisive action⁶⁷ whereas Congress' decisionmaking is rather ponderous.⁶⁸ Congressional decisions are arrived at more slowly than executive decisions because they reflect the diversity of views held by the people of the country and involve multiparty deliberation, compromise and consensus.⁶⁹ Consequently, only those foreign and military decisions that require speedy action should be made exclusively by the President; all other decisions fall within the realm of congressional power.⁷⁰

The Framers intended to vest most of the authority over war and other related foreign policy decisions in the legislative branch. The Framers provided for presidential use of force without congressional consent only when necessary to defend the Nation against attack.⁷¹ Moreover, although the Court is usually unwilling to limit the scope of presidential war powers, it has on occasion indicated that Presidents cannot usurp the legislative branch's role in determining the Nation's war and war-related policies.⁷²

3. *What Is War?*

Given that Congress has the power to declare war, the definition of war is important in determining which branch of government has the power to initiate armed conflicts. Not long after the Constitution was adopted Justice Washington wrote "that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war."⁷³ Furthermore,

66. *Id.* at 16,479. One example of an internal consequence of an external action was the social unrest which was created by the unpopularity of the Vietnam War.

67. The Executive is capable of making quick decisions, unlike the legislative branch, because there is no need to convene a large group of decisionmakers to reach a consensus or majority decision.

68. 116 CONG. REC. at 16,479.

69. *Id.*

70. *Id.* Applying this test, the report concluded:

(1) When a decision in foreign or military affairs demands speed and decisiveness, there is a presumption that it is within the exclusive power of the President. (2) *All other decisions* are within the power of Congress. . . . [W]hen the decision entails a significant commitment of the nation's human, physical, and moral resources, there is a presumption of congressional exclusivity. The presumption can be rebutted: The President can unilaterally commit a significant amount of the nation's human, physical, and moral resources; but he can do so *only if* there is a *clear need* for speed and decisiveness.

Id. (emphasis in original).

71. See *supra* notes 37-39 and accompanying text.

72. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 79 (1952).

73. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800).

in *Little v. Barreme*,⁷⁴ the Court held that President Jefferson did not have the authority to engage in even limited hostilities beyond those authorized by Congress.⁷⁵ In 1863, the Court held in *The Prize Cases*⁷⁶ that President Lincoln did not exceed his authority when he recognized that a state of war existed with the Confederacy several months before there was congressional action.⁷⁷ This ruling did not violate the Framers' views because the President was acting to defend the Nation against an insurrection by hostile forces.⁷⁸ *The Prize Cases*, therefore, do not stand for judicial approval of presidential use of hostile force on the basis that such an action does not constitute war.⁷⁹

Some Presidents have used hostile force abroad to protect United States citizens and property belonging to United States citizens.⁸⁰ President Taft, for example, argued that he had the power to initiate hostilities because as long as such force is neutral with respect to foreign political entities, it will not constitute war.⁸¹ It is pure fantasy to view the use of

74. 6 U.S. (2 Cranch) 170 (1804).

75. The Court ruled that President Jefferson had exceeded his authority when he ordered the seizure of a private French vessel. *Id.* at 177-79.

76. 67 U.S. (2 Black) 635 (1863).

77. *Id.* at 669-79.

78. In *The Prize Cases*, Justice Nelson argued in his dissent that only Congress could commit the United States to a legal state of war; without legislative action, hostilities might exist, but they could not have legal significance. *Id.* at 686 (Nelson, J., dissenting).

More than 30 years later in *The Three Friends*, 166 U.S. 1, 63-66 (1897), the Court agreed with Justice Nelson's view and distinguished between war in the legal sense and war in the material sense. Where Cuban insurgents were fighting the Spanish government the Court recognized the existence of hostilities without referring to the conflict as a war. *See also In re Debs*, 158 U.S. 564 (1895); *In re Neagle*, 135 U.S. 1, 59-64 (1890).

79. Wright, *The Power of the Executive to Use Military Forces Abroad*, in 3 VIETNAM: THE WIDENING CONTEXT, *supra* note 25, at 510-11.

To defend the Nation by repelling invasions, the Framers intended that the President need not take the time to obtain a congressional declaration of war. The President was intended to have "the responsibility to repel sudden attacks on the nation's territory and armed forces, protect citizens' lives and property, supervise military strategy, and superintend the armed forces that Congress provides, but the Framers did not envision the President's committing troops to foreign wars without prior congressional consent." E. KEYNES, *supra* note 39, at 20.

Some commentators argue that though the President has the power to respond to an attack, even those actions should not be disproportionate to the assault. Moreover, once the country is secure from imminent threats, further military action should occur only after congressional debate and authorization, otherwise the constitutionally mandated opportunity of Congress to weigh the potential gains and losses associated with a prolonged armed conflict would be nullified. *See, e.g., Reveley, supra* note 25, at 564-66.

80. Note, *Power to Commit Forces, supra* note 42, at 632-33. *See infra* note 81 and accompanying text; see also A. THOMAS, *supra* note 1, at 23-25, where the author discusses President Eisenhower's use of troops in Lebanon in 1958, and President Johnson's use of troops in the Congo in 1964 and again in the Dominican Republic in 1965, on the basis of the need to protect United States citizens or property.

81. President Taft, for example, justified his use of force in Nicaragua in 1912 by distinguishing between intervention, which includes interference in the political affairs of another state, and interposition, which is supposedly restricted to the protection of persons and prop-

force by the United States as neutral:⁸² certainly no one would view the use of force by another sovereign to protect its persons or property in the United States as a neutral act rather than an act of war.

It has also been argued that Presidents can use force to intervene at the request of a foreign government to help quell civil strife, as this allegedly does not constitute war.⁸³ The Framers, however, attempted to prevent the Executive from independently committing the Nation to the use of force abroad⁸⁴ and there is no reason to believe this concern should be treated differently because it aids a foreign government fighting its own people.

4. *Congressional Authorization of War*

Until the mid-nineteenth century, Presidents gave considerable deference to Congress in matters dealing with the use of military force.⁸⁵ For example, Congress debated the neutrality proclamation proposed by President Washington in 1798,⁸⁶ and Presidents Jefferson and Madison acknowledged that the President was bound to defer to Congress before using military force.⁸⁷ In 1799, the Supreme Court, in *Bas v. Tingy*,⁸⁸ approved a congressionally authorized use of force in a limited or partial war.

Before the Civil War, Presidents generally deferred to Congress' war powers. When President Polk provoked the war with Mexico in 1848, he was censured by Congress.⁸⁹ By the 1850's, however, the Executive became more assertive in the war powers arena as both Congress and the judiciary began to abdicate their constitutional responsibilities. In

erty. A. THOMAS, *supra* note 1, at 16, 151 n.22 (citing U.S. DEPT. OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES 23-34, 40, 44, 48 (3d rev. ed. 1934)).

82. In 1903, for example, President Roosevelt sent troops to Panama to make sure a government more favorably disposed towards the United States than Columbia controlled the Panamanian Isthmus. Since then, Presidents have used force to help particular political factions in many other countries, particularly Caribbean nations such as Haiti and the Dominican Republic. Note, *Power to Commit Forces*, *supra* note 42, at 634-35.

83. A. THOMAS, *supra* note 1, at 86. Moreover, intervention would probably be illegal under international law, as the existence of civil disorder calls into question the legitimacy of the government as the representative of the state. *Id.*

84. *See supra* note 43 and accompanying text.

85. A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 269-72 (1976).

86. A. THOMAS, *supra* note 1, at 9.

87. *Id.* at 32.

88. 4 U.S. (4 Dall.) 37 (1800). *Bas* involved the capture of ships during a period of limited hostilities between France and the United States. In a subsequent case dealing with the same limited war, Chief Justice Marshall held that the President must abide by Congress' instructions regarding the degree and manner in which this limited war was to be conducted. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

89. A. THOMAS, *supra* note 1, at 11.

Durand v. Hollins,⁹⁰ for example, a circuit court upheld an American attack on Nicaragua in 1854.⁹¹ Since the turn of the twentieth century, Presidents have increasingly used force without judicial condemnation.⁹²

Two of the most significant constitutional problems created by presidential use of force are: (1) whether a congressional resolution allowing the President to use force under limited conditions is an unconstitutional delegation of legislative branch responsibilities; and (2) whether resolutions can be valid when passed by a Congress facing a *fait accompli*.⁹³

Most congressional resolutions authorizing presidential uses of hostile force are extremely broad, allowing a wide latitude of presidential discretion over when to use armed force.⁹⁴ Arguably, these resolutions are unconstitutional declarations of war contingent on presidential discretion.⁹⁵ The wide latitude provided to Presidents puts them in the position of creating the standards and rules for when they will use force;

90. 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186).

91. *Durand* concerned a request by the United States for reparations for the destruction of property belonging to a United States company, and for an apology for insults to a United States consul. The court held that the 1854 bombardment of Greytown, Nicaragua was a legitimate exercise of the sovereign power to defend citizens and property, under customary international law as it then existed, even though there was no congressional sanction of the action.

92. Reveley, *supra* note 25, at 538-39. President Roosevelt used force in 1903 to help the rebels establish the nation of Panama. President Wilson sought, but did not obtain, congressional approval for the arming of merchant vessels prior to American entry into World War I; nevertheless, he ordered the vessels armed, knowing that it would lead to war. *Id.* at 540 n.55. Ignoring a number of neutrality statutes that existed prior to the entry of the United States into World War II, President Franklin Roosevelt in 1940 exchanged destroyers for British bases in the Western Atlantic. In 1941, President Roosevelt occupied Greenland and Iceland, ordered the Navy to convoy ships carrying supplies to Britain, and even declared an air and sea war against the Axis powers in the Atlantic. *Id.* at 538-39.

Use of military force in the Korean War, though pursuant to a resolution of the United Nations, was never authorized by Congress. *Id.* at 541 n.58.

93. In this context, the *fait accompli* problem refers to the difficulty Congress has in debating a declaration permitting the Presidential use of force when hostilities already exist. See *infra* text accompanying notes 97-98.

94. Reveley, *supra* note 25, at 541 n.59.

95. Wormuth, *supra* note 59, at 792. Professor Wormuth has argued that such resolutions fail to meet constitutional standards:

If Congress determines the general policy to be pursued, it may authorize the President to determine the facts which call the congressional policy into play, or to make detailed rules which apply the policy established by Congress to particular sets of facts. But Congress may not pass contingent legislation without specifying the circumstances in which it is to be invoked, nor may it authorize the President to make rules on a topic without supplying standards to guide him. To do either of these things would be to attempt to delegate legislative power.

Id. Professor Wormuth concludes that the Gulf of Tonkin Resolution, as well as other similar resolutions dealing with Formosa and the Middle East, were illegitimate delegations of legislative power: "Congress did not express a will as to war or peace. Not only the language of the resolutions but the debates show beyond doubt that Congress intended to transfer the power of decision to the President." *Id.* at 796.

but rulemaking activity is essentially legislative in nature and within the exclusive purview of the legislative branch of government.⁹⁶

Congress faces a *fait accompli* when the President has made foreign policy and military decisions without any delegation of authority by Congress: the President presents the legislative branch with a state of war, or a foreign policy leading to a state of war, prior to legislative debate and congressional policy determination.⁹⁷ *Fait accompli* situations effectively eliminate any meaningful decisionmaking by Congress. Congress frequently acquiesces to the Executive's initiation of force to maintain the country's reputation and to avoid the difficulty of mustering the effort to change an existing situation.⁹⁸

Some lower courts have found that certain congressional actions, such as joint or concurrent resolutions, appropriations of funds, and provisions for a military draft, may sufficiently authorize the use of hostile force to satisfy the constitutional requirement for a congressional declaration of war.⁹⁹ Courts hearing Vietnam cases, for example, often pointed to the Gulf of Tonkin Resolution as sufficient congressional authorization for the Vietnam War.¹⁰⁰

Despite these lower court holdings, the Supreme Court, in *Greene v. McElroy*,¹⁰¹ held that where the constitutionality of an action is questionable, congressional ratification must be explicit and demonstrate "careful and purposeful consideration by those responsible for enacting and implementing our laws."¹⁰² The *Greene* rule, which was recognized in some of the later Vietnam War cases,¹⁰³ requires legislation to identify

96. *Id.* at 792.

97. *See Note, Power to Commit Forces, supra* note 42, at 641.

98. *Id.* President Roosevelt presented Congress with a *fait accompli* when, after Congress denied him the funds to send the navy on a tour across the Pacific, he sent the navy across the Pacific and told Congress that they would have to appropriate more funds if they wanted to get the navy back to the United States. *See* L. HENKIN, *supra* note 53, at 109. More recently, Congress found it difficult to extricate the United States from the Vietnam War once a full-scale war was already in existence. Note, *Power to Commit Forces, supra* note 42, at 641.

99. *See, e.g., Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973); *Berk v. Laird*, 317 F. Supp. 715, 728 (E.D.N.Y. 1970) ("The entire course of legislation shows that Congress knew what it was doing, and that it intended to have American troops fight in Vietnam.").

100. In *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971), the court stated:

[The resolution] was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia, and as might be required in the future "to prevent further aggression."

101. 360 U.S. 474 (1959) (dealing with congressional ratification of Department of Defense administrative security programs).

102. *Id.* at 506-07. *See also Ex parte Endo*, 323 U.S. 283 (1944) (holding a congressional appropriation insufficient to ratify all executive actions funded by that appropriation).

103. In *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972) (the plaintiff did not possess standing to bring suit), Judge Sweigert

clearly the presidential action it is authorizing or ratifying.¹⁰⁴

A similarly unconvincing argument is that knowing acquiescence by Congress meets the constitutional burden for congressional action.¹⁰⁵ This fails to reflect the constitutional responsibilities imposed on Congress. It also fails to recognize the significance of shifting the burden of securing a majority in Congress from those favoring ratification of a presidential decision to those disfavoring such an action.¹⁰⁶ If appropriations, or even acquiescence, could authorize or ratify presidential use of force, then the Framers' intention of having Congress check the power of the Executive would be ill served.¹⁰⁷

B. Treaties and International Law

Many United States treaties, such as the Kellogg-Briand Pact,¹⁰⁸ the United Nations Charter,¹⁰⁹ and the 1947 Inter-American Treaty of Reciprocal Assistance,¹¹⁰ allow the use of armed force only in self-de-

recognized that the Constitution may require a congressional declaration of war or "an equally explicit congressional expression" before military hostilities can be initiated. *Id.* at 553. The court indicated that absent such explicit authorization there would arguably be a "usurpation by the President or an abdication by the Congress—or, perhaps, both." *Id.*

In *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973), the court noted:

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

104. A. THOMAS, *supra* note 1, at 90.

105. *Id.* at 89-90.

106. *Id.* Enacting legislation is a slow and not always successful process. Consequently, shifting the burden of securing a majority of Congress from those favoring to those disfavoring presidential actions significantly increases the autonomy of the Executive.

107. See Note, *Power to Commit Forces*, *supra* note 42, at 646.

108. The Kellogg-Briand Pact, July 24, 1929, 46 Stat. 2343, T.S. No. 769, also known as the General Treaty for the Renunciation of War, was one of the earliest treaties signed by the United States calling for restraint in the use of military force. Article I pledges the signatories to "condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." *Id.* at art. 1.

109. U.N. CHARTER, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993. Article 2 of the Charter contains the most pertinent provision: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." *Id.* at art. 2, para. 4.

110. The Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (1947), although a mutual defense pact, also obliges its signatories to refrain from the use of force. The signatories "condemn war and undertake in their international relations not to resort to the threat or the use of force. . . ." *Id.* at art. 1.

fense¹¹¹ and specifically outlaw the use of force to settle international disputes and to influence official domestic policies in other nations.¹¹² Treaties are binding and part of the law of the land under article VI of the Constitution.¹¹³ Although the Supreme Court has ruled that Congress can abrogate treaties,¹¹⁴ it has never extended this power to the

111. Presidents have often justified their use of force in foreign lands on the basis of being bound by mutual defense treaties. Note, *Power to Commit Forces*, *supra* note 42, at 636-37. However, many of our mutual defense pacts have included language which says force will be used to aid other nations "in accordance with . . . constitutional processes." A. THOMAS, *supra* note 1, at 119 (citing NATO Treaty, 43 AM. J. INT'L L. SUPP. 159-62 (1949)). Scholars have differed on whether the President's use of force without prior congressional approval is legitimate. Scholars arguing that such actions are legal base their opinions on the notion that the President has the ability to use force in situations short of war. *Id.* This requires defining some military conflicts as not constituting war, a questionable construction of the Constitution. See *supra* notes 37-49 and accompanying text. The Framers intended to provide for presidential use of force without congressional approval only in situations of national self-defense. A. THOMAS, *supra* note 1, at 37.

Other commentators have argued that mutual defense treaties cannot constitutionally bind the United States to the military aid of another country, see Note, *Power to Commit Forces*, *supra* note 42, at 641-43, because the Constitution gave the power to initiate wars to the Congress, not to the Senate or the President, the only parties involved in binding the Nation to a treaty.

Of all the Nation's treaties, mutual defense pacts are but a small percentage, and probably an equal number of treaties restrain the Nation from using force in all situations except for self-defense. A. THOMAS, *supra* note 1, at 86. An interesting question which has never been addressed is whether a mutual defense pact or a self-defense treaty takes precedence when the two are in conflict.

112. The purpose of these agreements was pointed out by Professor Wright:

The Hague Conventions, the League of Nations Covenant, the Kellogg-Briand Pact, the Nuremberg Charter and the United Nations Charter have progressively developed international law to "outlaw" war in the traditional sense . . . [I]nternational law permits states to use force in international relations only for individual or collective self-defense against armed attack or in support of sanctioning action authorized by the United Nations. Force may not be used as an instrument of national policy or for the settlement of international disputes.

Wright, *supra* note 79, at 518-19.

113. U.S. CONST. art. VI, cl. 2. The Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

114. In the Chinese Exclusion Case, 130 U.S. 581 (1889), the Supreme Court recognized that Congress has the ability to abrogate treaties. The Court held:

[T]reaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. . . . In either case the last expression of the sovereign will must control.

Id. at 600. Explaining that a sovereign nation cannot give up its ability to modify its international agreements without giving up its independence, the Court held that a treaty is "subject

executive branch.¹¹⁵ Presidents, therefore, are constitutionally required to faithfully execute treaties.

In *The Paquete Habana*,¹¹⁶ the Supreme Court held that international law is also part of the law of the land.¹¹⁷ The Court noted that rules commonly and historically accepted by most civilized societies can result in an obligation to follow those rules.¹¹⁸ Furthermore, the Supreme Court has held that the President must at least abide by international law unless Congress explicitly authorizes a contrary action.¹¹⁹ Because the use of force for political purposes—such as “military pressure in aid of diplomacy, territorial acquisition, or intervention to influence the policy or ideology of a foreign government”¹²⁰—violates interna-

to such acts as Congress may pass for its enforcement, modification, or repeal.” *Id.* (quoting *The Head Money Cases*, 112 U.S. 580, 599 (1884)).

Though the Court has never addressed the merits of presidential authority to abrogate a treaty, the rationale which justifies a congressional abrogation would not apply to executive actions. Moreover, the President’s duty to execute faithfully the laws of the land suggests that the executive branch has an affirmative obligation to enforce treaties.

115. See *Goldwater v. Carter*, 444 U.S. 996 (1979), which raised the issue of the President’s authority to terminate the mutual defense treaty between the United States and Taiwan. The district court held on the merits that the President could not terminate the treaty while the court of appeals held on the merits that the President could terminate the treaty. The Supreme Court dismissed the case as being nonjusticiable.

116. In *The Paquete Habana*, 175 U.S. 677 (1900), the Court held that the capture of fishing vessels belonging to a Spanish subject in Havana during the Spanish-American War was an unlawful violation of international law, and that customary international law protected coastal fishermen and their vessels and cargo from capture as prizes of war.

117. *Id.* at 700.

118. *Id.* at 711-12. The Court stated:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations

Id. at 700. Commenting on the moral as well as the legal basis for recognizing international law as part of the law of the land in the United States, the Court quoted from *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871), where Justice Strong said of the law of the sea: “That law is of universal obligation Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.” *The Paquete Habana*, 175 U.S. at 711.

119. *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1871); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852); *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850).

It has also been argued that breaches of international law are sufficiently serious to require congressional participation:

[I]f the United States is to engage in an armed intervention in a foreign nation to protect only its political interests, and by so doing will commit a breach of international law, it is thought that such derogation from law with its serious consequences should have the support of Congress. The peoples’ will as expressed through their representatives in the legislative branch should prevail.

A. THOMAS, *supra* note 1, at 72.

120. *Wright*, *supra* note 79, at 512.

tional law, such use of force by the President, absent congressional action, also violates the Constitution.¹²¹

III. Justiciability of War and Foreign Affairs Powers

Though a significant number of cases raising foreign affairs or war powers issues have been brought in federal courts, most are dismissed on the ground of nonjusticiability.¹²² The predominant theory supporting nonjusticiability is the political question doctrine.¹²³

In *Baker v. Carr*,¹²⁴ the Supreme Court attempted to establish guidelines for the application of the political question doctrine. The Court indicated that cases are nonjusticiable when they involve:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹²⁵

121. Professor Wright has written specifically about the use of military force abroad and international law. He calls for an explicit rule of constitutional law that the President be required to observe international legal standards: "In this way the world rule of law might be promoted, national security enhanced, and the opportunity offered for democratic processes to influence important diplomatic and military decisions." *Id.* at 520.

The use of force for self-defense, to secure reparations from or to prevent future unlawful acts of other nations, and to protect citizens and property abroad, may have been legitimate under the customary international law of a previous era where treaties restraining nations from using force to settle their disputes did not exist. However, that customary international law has been expressly superceded by specific written international agreements such as the United Nations Charter. U.N. CHARTER, *supra* note 109.

122. See *infra* notes 145-184 and accompanying text. A nonjusticiable issue is present when a court declines to resolve a controversy, or finds that no controversy exists. See BAL-LENTINE'S LAW DICTIONARY 697 (3d Ed. 1969).

123. The political question doctrine has been described as a principle of extraordinary judicial abstention that is applied when there are "claims that the political branches have failed to live up to constitutional requirements or limitations." Henkin, *Viet-Nam in the Courts of the United States: "Political Questions"* in 3 VIETNAM WAR: THE WIDENING CONTEXT, *supra* note 25, at 625, 626.

Judicial review of actions by the political branches of government—the legislative and executive branches—began with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Marbury* established the principle that under the Constitution, the Supreme Court delineates the authority of the different branches of government. *Id.* at 173-79. The political question doctrine, however, is an exception to this general rule because it legitimizes judicial decisions to abstain from delineating the limits of the other branches of government.

124. 369 U.S. 186 (1962).

125. *Id.* at 217.

Although the political question doctrine has been intensely criticized as a doctrine without constitutional support,¹²⁶ it has also been analyzed in terms of four distinct theories: a classical theory,¹²⁷ a functional theory,¹²⁸ a prudential theory,¹²⁹ and an excessive judicial

126. See Tigar, *Judicial Power, the "Political Question Doctrine" and Foreign Relations*, in 3 VIETNAM WAR: THE WIDENING CONTEXT *supra* note 25, at 654:

[The political question doctrine] is a cluster of disparate legal rules and principles any of which may, in a given case, dictate a result on the merits, lead to dismissal for want of article three jurisdiction, prevent a party from airing an issue the favorable resolution of which might terminate the litigation in his favor, or authorize a federal court in its discretion and as a matter of prudence to decline jurisdiction to hear a case or decide an issue.

127. The classical theory explains the traditional application of the political question doctrine to issues involving the separation of powers: whether a particular substantive "matter should be left to the unlimited discretion of the responsible branch," Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033, 1041 (1968), or whether "the Constitution has committed the determination of the issue to another agency of government than the courts," Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959). Under *Baker v. Carr*, the classical view is represented by the criterion of "a textually demonstrable constitutional commitment of the issue to a coordinate political department." 369 U.S. at 217.

This analysis leaves the courts with considerable discretion. For example, though the Constitution clearly gives Congress the power to declare wars, the courts have repeatedly found cases questioning presidentially initiated wars to be nonjusticiable on political question grounds. See *infra* notes 133-139 and accompanying text. However, in *Baker v. Carr*, despite the Constitution's silence on the issue of apportionment, the Court found there was no textual commitment to another branch, leaving the Court free to decide the issue. 369 U.S. at 227-37. See also Velvel, *supra* note 36, at 684.

This basis for abstention has been interpreted by some commentators as constituting little more than a label applied by the Court after it has decided that an issue must be left to another branch of government for determination. Schwartz & McCormack, *supra*, at 1041-45. Decisions to dismiss cases on political question grounds result in a determination that "the conduct of the political department involved was constitutionally within its powers, being neither prohibited nor withheld." A. THOMAS, *supra* note 1, at 93. Consequently, the Court has been criticized for applying the political question doctrine to Vietnam War cases where it allowed the President to determine the construction of the Constitution and relevant treaties. *Id.* Even with regard to the President's war powers, an area where the Court is more deferential, the Court can and has ruled that a President's determinations of his or her powers can be incorrect. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

128. Professor Scharpf has advocated a functional analysis of the political question doctrine. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 566-97 (1966), cited in Moore, *The Justiciability of Challenges to the Use of Military Forces Abroad*, in 3 VIETNAM WAR: THE WIDENING CONTEXT, *supra* note 25, at 631, 636. Two *Baker v. Carr* criteria, the "lack of judicially discoverable and manageable standards for resolving [an issue]," and "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," 369 U.S. at 217, provide the basis for the functional view.

The discoverable standards criterion focuses on the "lack of judicial decisional criteria and relevant data, and possibly the problem of devising effective judicial remedies." A. THOMAS, *supra* note 1, at 98. The nonjudicial discretion criterion supports the principle that courts should not review the wisdom of a decision by a political branch, but rather should limit their role to determining whether the branch in question had the authority to make a particu-

caution theory.¹³⁰

lar decision. Issues related to foreign affairs have often been considered policymaking matters within the authority of the executive. *Id.* at 99.

129. The prudential view is illuminated in the last three criteria of *Baker v. Carr*:

[t]he impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

One advocate of the prudential view has argued that the Court should abstain from deciding issues on political question grounds whenever the Court senses its own lack of capacity, based on:

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

A. BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962).

Professor Bickel's view rests on the notion that there is no constitutional obligation for the Court to decide cases, and it is free to abstain if, in its practical judgment, the issue is better left to the political branches. *Id.*

Other legal scholars, such as Professor Wechsler, have argued instead that the Court is under a constitutional obligation to determine issues and decide cases, and it does not have the freedom to abstain on purely practical grounds. *See* Wechsler, *supra* note 127, at 6; *see also* Schwartz & McCormack, *supra* note 127, at 1045-52.

130. Another view of the political question doctrine is that its basis lies in judicial caution rather than legal or philosophical analysis. According to one scholar:

[T]he Court can neither validate a clearly unconstitutional distribution [of power], and thereby subject its role as guardian to claims of fraud, nor invalidate a functioning system with an order which would be ignored. To do either would be to sacrifice the popular prestige which is the Court's primary source of power. Consequently, it temporarily relinquishes its task of validation by declaring that the entire matter involves a 'political question'.

P. STRUM, *THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION* 140-41 (1974).

Two underlying reasons have been given for this view of the political question doctrine: the Court's reliance on the executive branch for enforcement of its rulings, and the lack of a social consensus which effectively coerces the Court into abstaining from decisions which would otherwise be justiciable. *Id.* at 130, 142. The enforcement problem raises the issue of whether a court order would be ignored by, or even antagonize the executive branch. An enforcement problem last occurred in 1832 when President Jackson reportedly said of Chief Justice Marshall's opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832): "John Marshall has made his decision; now let him enforce it." *See* D. GETCHES, D. ROSENFELT, & C. WILKINSON, *FEDERAL INDIAN LAW* 160 (1979). More recently, during the Watergate scandal there was some concern that President Nixon might not turn over the Watergate tapes when he was ordered to do so by the Court. President Nixon eventually complied, albeit with some erasures. *See* T. WHITE, *BREACH OF FAITH: THE FALL OF RICHARD NIXON* 271, 296-97 (1975).

Professor Bickel's prudential views are in accord with his concern for the lack of social consensus, but judicial abstention on this basis has been criticized for tending to "isolate [the Court] . . . from the forces which make its decisions responsive to democratic values." Tigar, *supra* note 126, at 660.

Though the political question doctrine is the most significant impediment to deciding on the merits cases concerning foreign and military affairs, courts also use other procedural barriers such as lack of standing to sue.¹³¹ The standing doctrine focuses on whether the party bringing the action has suffered some threatened or actual injury "that is likely to be redressed by a favorable decision."¹³² Standing does not address the issues in a dispute, but only the ability of a party to bring the action.

The Vietnam War cases present several interesting examples of how the justiciability analysis has been applied, and how this application changed as the war dragged on and public opposition to its continuance increased. In *Luftig v. McNamara*,¹³³ a member of the armed services sought an injunction against military authorities sending him to Vietnam because, he claimed, the President lacked authority to conduct the war. The district court dismissed the suit on the basis that it raised a nonjusticiable political question,¹³⁴ and the court of appeals readily affirmed.¹³⁵

The first Vietnam case to reach the Supreme Court, *Mora v. McNamara*,¹³⁶ raised issues very similar to those in *Luftig*. The Court in *Mora* denied certiorari, letting stand the appellate court's decision affirming the district court's dismissal on political question grounds.¹³⁷ A 1968 class action suit brought by Professor Velvel against President Johnson for

[T]he Court's willingness to regard abstention from decision as a principle in itself without a clearly-articulated set of reasons for not deciding insulates it from arguments made at its bar by advocates for the persons and interests whose legal rights are in issue. That is, if the Court looks first to ill-defined considerations of appropriateness in deciding whether to decide, and then seizes upon the justification for not deciding which lies most readily at hand, it will become impossible for counsel to argue out in a rational way the reasons why not deciding is or is not appropriate. . . . It will do nothing save nurture legal fictions if decisional rationales, or rationales for avoiding constitutional decision, are transmuted into mere devices to be employed in the service of other values.

Id. at 665-66 (footnotes omitted).

131. A party has standing to sue if a court determines that the party has sufficient stake in obtaining a judicial resolution. Factors considered by courts in determining whether a party is sufficiently affected are whether the litigant is injured or threatened with injury, and whether the litigant is the proper party to bring the suit. Standing is denied to prevent judicial entanglement in abstract disagreements over administrative policies and to protect agencies from judicial interference before an administrative decision is formalized. BLACK'S LAW DICTIONARY 1260 (5th ed. 1979). See also *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Carolina Env'tl. Study Group, Inc. v. United States Atomic Energy Comm'n*, 431 F. Supp. 203, 218 (W.D.N.C. 1977); *Guidry v. Roberts*, 331 So. 2d 44, 50 (La. Ct. App. 1976).

132. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1975).

133. 252 F. Supp. 819 (D.D.C. 1966).

134. *Id.*

135. 373 F.2d 664 (D.C. Cir. 1967).

136. 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967).

137. Dissenting from the denial of certiorari, Justice Stewart wrote:

These are large and deeply troubling questions. Whether the Court would ultimately reach them depends, of course, upon the resolution of serious preliminary issues of justiciability. We cannot make these problems go away simply by refusing to hear the case of three obscure Army privates. I intimate not even tentative views upon

conducting the Vietnam War without a congressional declaration of war was similarly dismissed.¹³⁸

In a second group of cases, federal courts continued to state that the validity of the Vietnam War presented nonjusticiable political questions, yet in addition, also decided that the President's actions were legitimate.¹³⁹ Eventually, however, the political question doctrine was held not to bar judicial review of congressional authorization for the Vietnam War.¹⁴⁰ Towards the end of the war, some federal judges came to view the issues as fully justiciable and the war as illegal.¹⁴¹ The courts may

any of these matters, but I think the Court should squarely face them by granting certiorari and setting this case for oral argument.

389 U.S. at 935 (Stewart, J., dissenting).

138. *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kan. 1968), *aff'd sub nom. Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). In dismissing the case, the district court said:

That the executive or legislative branches of the government have seen fit to carry on a limited military action without a formal declaration of war by the legislative branch is a matter resting solely within the discretion of those duly elected representatives of the people. . . . This Court has neither the information necessary nor the power required to question the wisdom of the manner in which the military activity of our country is being conducted.

287 F. Supp. at 852.

139. In *United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968), for example, a draftee refused to comply with an induction order arguing that the government lacked authority to conscript him to serve in an illegal war. The court held this to be a nonjusticiable political question, but also found that there had been joint legislative-executive authorization of the war. *Id.* at 514-15. In *Davi v. Laird*, 318 F. Supp. 478 (W.D. Va. 1970), the district court found that the constitutionality of the Vietnam War raised a nonjusticiable political question concerning separation of powers, but also found that Congress had actively participated in the decisions to use military force in Vietnam through enactment of the Selective Service Act, and various military appropriations bills. *Id.* at 481-84. In *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), the court found the legality of the Vietnam War to be nonjusticiable, but made a point of saying the political question doctrine applied because the issues involved foreign policy. *Id.* at 696, 705-07. Similarly, in *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973), the court found that a challenge to President Nixon's authority to bomb Cambodia presented a nonjusticiable political question which was to be resolved by the political branches of government, and the case was dismissed for lack of a justiciable issue. *Id.* at 865.

140. In *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970), *cert. denied sub nom. Orlando v. Laird*, 404 U.S. 869 (1971), for example, the court held that whether there had been congressional authorization of the war was a justiciable question. *Id.* at 305-06. Though the *Berk* court found sufficient legislative action to legalize the federal government's war effort, a later court found that the means used by Congress to authorize or ratify a presidential action itself presented a nonjusticiable political question. *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

When the Vietnam War continued after congressional repeal of the Gulf of Tonkin Resolution, more cases came before the courts challenging the legality of the war. In *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971), and *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972), suits were dismissed on the ground that despite the repeal of the Resolution, Congress had continued to authorize and ratify the President's military actions. *Id.* at 1369-70.

141. The court in *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970), *rev'd*, 464 F.2d 178 (1972), for example, held that "none of the formulations of the political-question doctrine,

have shifted their views of the justiciability of the Vietnam War for two reasons: (1) the political process would not resolve the issue in a tolerably short time; and (2) the result dictated by constitutional principles had become politically acceptable and had gained widespread popular support.¹⁴²

Courts are extremely reluctant to determine the legality of presidential uses of force on the merits, particularly when the courts perceive significant public support for the President's actions. By abstaining, the courts have eliminated constitutional review, abdicated their responsibility to define the boundaries of governmental power, and essentially condoned the exercise of broad war and foreign policy powers by the Executive.¹⁴³ Where real cases and controversies are presented to the courts, the judiciary should be viewed as constitutionally compelled to decide these cases on their merits.¹⁴⁴

IV. Application to United States Policies in Central America

A. Judicial Involvement and Self-Imposed Barriers

One example of unconstitutional presidential action is the Reagan Administration's attempt to change, by force, the form of government in Nicaragua.¹⁴⁵ Presidential adventurism such as United States support of the Nicaraguan "Contra" guerrillas, having the potential for directly involving United States troops,¹⁴⁶ is the type of decision the Framers felt was best addressed by Congress, the more deliberative and representative branch of government. Although Congress has never made a declaration of war against Nicaragua, it is likely that most Nicaraguans consider their country to be at war with the United States-supported guerrillas. Moreover, although Congress has at times agreed to provide both finan-

as stated in *Baker v. Carr*, barred adjudication of the issue." *Id.* at 550 (quoting *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969)). Similarly, in *Holtzman v. Richardson*, 361 F. Supp. 544 (E.D.N.Y. 1973), the court held that the issue of presidential authority to continue bombing Cambodia was not a political question. In a companion case, the court held that since the bombing had not been authorized by Congress, it was illegal. *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973). On appeal, the district court's ruling in *Schlesinger* was reversed and the case was remanded for dismissal on the basis that it presented a nonjusticiable political question. *Schlesinger*, 484 F.2d at 1312.

142. *Schwartz & McCormack*, *supra* note 127, at 1045.

143. *See infra* notes 174-176 and accompanying text.

144. *Schwartz and McCormack* have argued: "If people are going to be told to obey the law and go to Vietnam because they may be lawfully commanded to do so, then the directions they are required to honor should be based on reasons that are plainly stated and justified on principle." *Schwartz & McCormack*, *supra* note 127, at 1049.

145. *See* N.Y. Times, Mar. 11, 1986, at 1, col. 5.

146. *Id.*

cial and material support to the Contras, the "Contragate" scandal¹⁴⁷ indicates executive branch involvement in hostilities towards Nicaragua even when Congress has prohibited such activities.¹⁴⁸

Two cases challenging presidential actions in Central America were dismissed on procedural grounds because they raised nonjusticiable political questions.¹⁴⁹ In *Crockett v. Reagan*,¹⁵⁰ the court was not concerned with potential judicial interference with executive discretion in the field of foreign affairs,¹⁵¹ nor was it troubled by the apportionment of power between the executive and legislative branches of government.¹⁵² Instead, the court chose to base its nonjusticiability finding on the *Baker v. Carr*¹⁵³ criterion of "a lack of judicially discoverable and manageable standards for resolution."¹⁵⁴ The court explained:

The Court concludes that the fact finding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-justiciable. The questions as to the nature and extent of the United States' presence in El Salvador and whether a report under the WPR [War Powers Resolution] is mandated because our forces have been subject to hostile fire or are taking part in the war effort are appropriate for congressional, not judicial, investigation and determination. . . .

. . . .
 . . . Even if the plaintiffs could introduce admissible evidence concerning the state of hostilities in various geographical areas in El Salvador where U.S. forces are stationed and the exact nature of U.S. participation in the conflict . . . the Court no doubt would be presented conflicting evidence on those issues by defendants. The Court lacks the resources and expertise . . . to resolve disputed questions of fact concerning the military situation in El Salvador.¹⁵⁵

The court's analysis is unconvincing. The judiciary's role frequently involves determining the outcome of controversies on the basis of con-

147. "Contragate" refers to the scandal involving the Reagan Administration's secret sales of military supplies to Iran and diversion of profits to the Nicaraguan Contras. See N.Y. Times, Feb. 15, 1987, at 1, col. 6.

148. See *supra* note 18.

149. *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd on other grounds*, 770 F.2d 202 (D.C. Cir. 1985). See also *supra* notes 10-22 and accompanying text.

150. 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984).

151. *Id.* at 898.

152. *Id.*

153. 369 U.S. 186 (1962). See *supra* notes 124-125 and accompanying text.

154. 558 F. Supp. at 898.

155. *Id.*

flicting views of the facts. Moreover, courts often face controversies involving facts about which they know very little, yet rarely do they dismiss such cases on the basis of the political question doctrine. Furthermore, courts are increasingly faced with complex litigation where questions of fact take years to resolve; the fact-finding involved in sophisticated antitrust, securities fraud, tort, and other claims is as difficult as ascertaining whether United States forces have been involved in hostilities in El Salvador. Similarly, although the *Crockett* court raised the issue of the reliability of evidence, that issue is present in most litigation presenting questions of fact and is best dealt with by applying the rules of evidence¹⁵⁶ rather than holding the case nonjusticiable due to the difficulty of fact-finding.

The plaintiffs in *Crockett* also claimed that because of human rights abuses in El Salvador, aid to that country violated the Foreign Assistance Act.¹⁵⁷ The court dismissed this claim on the basis of the doctrine of equitable discretion.¹⁵⁸ Despite the court's assertion to the contrary, however, *Crockett* was not about disagreements among members of Congress; the defendants in this case were the President and his top advisors. The issue was whether President Reagan's certification for aid to El Salvador violated those provisions of the Foreign Assistance Act which prohibits aid to countries engaging in human rights violations. A decision on the merits of this issue would not have involved the court in a controversy between members of Congress; the court need only have decided whether the executive branch had complied with federal statutes.

Another case dismissed on procedural grounds was *Sanchez-Espinoza v. Reagan*.¹⁵⁹ Relying on the *Crockett* decision, the court first noted that "this Court lacks judicially discoverable and manageable standards for resolving the dispute presented."¹⁶⁰ The court argued that the activities of the Central Intelligence Agency and its agents in Nicaragua are even more difficult to know with certainty than the more overt El Salvador aid at issue in *Crockett*. Difficulty in fact-finding, however, is a particularly poor basis for a finding of nonjusticiability.

The court's second reason for avoiding adjudication of the claim was that it would be impossible to undertake an independent resolution of the issues "without expressing a lack of the respect due coordinate branches

156. Rules of Evidence for United States Courts and Magistrates, 28 U.S.C. app. (1982).

157. 22 U.S.C. § 2304 (1982). The plaintiffs alleged the Foreign Assistance Act was violated by any provision of aid to a country that engaged in human rights violations. 558 F. Supp. at 902.

158. 558 F. Supp. at 902-03. The court invoked the doctrine of equitable estoppel after it chose to view the alleged violation of the Foreign Assistance Act as a quarrel among legislators.

159. 568 F. Supp. 596 (D.D.C. 1983), *aff'd on other grounds*, 770 F.2d 202 (D.C. Cir. 1985).

160. *Id.* at 600.

of the government.”¹⁶¹ The court noted that President Reagan and members of Congress disagreed about the law and the facts, and if the judiciary were to intervene, “one or both of the coordinate branches would be justifiably offended.”¹⁶²

Third, the court noted that “there is a real danger of embarrassment from multifarious pronouncements by various departments on one question.”¹⁶³ Explaining that the executive and legislative branches of government already were expressing different views, and that judicial determination of the issues might present a third view, the court said: “such an occurrence would, undoubtedly, rattle the delicate diplomatic balance that is required in the foreign affairs arena.”¹⁶⁴

These “prudential” concerns set out by the court are often advocated by Professor Bickel,¹⁶⁵ and criticized by many other scholars including Professor Wechsler.¹⁶⁶ The Supreme Court has never expressly relied on prudential concerns as a basis for determining that a case should be dismissed as a nonjusticiable political question; in fact, the Court has stated that the political question doctrine deals with the separation of powers.¹⁶⁷ In two recent cases, *Powell v. McCormack*¹⁶⁸ and *INS v. Chadha*,¹⁶⁹ the Supreme Court indicated that neither a judicial interpretation of the Constitution different from that held by another branch of the government, nor significant political ramifications of a decision are sufficient reasons to apply the political question doctrine. Further, in *Baker v. Carr*,¹⁷⁰ the Supreme Court said: “[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”¹⁷¹ In *Baker v. Carr*¹⁷² and *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁷³ the Court decided on the merits cases which involved highly political issues involving the allocation of powers among the coordinate branches of government and matters of foreign policy, and there is no justifiable reason for treating *Sanchez-Espinoza* differently.

The *Sanchez-Espinoza* court implied that its true concern was the separation of powers; it viewed the issues as proper for determination by the executive or legislative branches of government. However, since

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *See supra* note 129.

166. Wechsler, *supra* note 127.

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

168. 395 U.S. 486, 548-49 (1969).

169. 462 U.S. 919, 942-43 (1983).

170. 369 U.S. 186 (1962).

171. *Id.* at 211-12.

172. 369 U.S. 186 (1962).

173. 343 U.S. 579 (1952).

Marbury v. Madison,¹⁷⁴ one key judicial role in the constitutional separation of powers is to delimit the authority of the executive or legislative branches. In dismissing cases on the basis of the political question doctrine, the judiciary abdicates its constitutional responsibility for protecting the people from excessive abuses of power by the political branches.

Absent judicial checks on the abuses of the powers exercised by the other branches, the legislative and executive branches are free to interpret the law as they see fit. In the arena of foreign affairs and foreign military actions, the executive branch has consistently interpreted the Constitution as giving itself far greater discretion than the Framers intended. One example of executive abuse of power came to light in late 1986 with the "Contragate" scandal,¹⁷⁵ and with the revelations of other secret covert actions by the Reagan Administration.¹⁷⁶

The court's dismissal of the claims by the Nicaraguan plaintiffs in *Sanchez-Espinoza* was inappropriate in light of *Filartiga v. Pena-Irala*.¹⁷⁷ In *Filartiga*, human rights-based tort claims of foreign plaintiffs in the United States, against a foreign official in the United States, were found to be justiciable. The facts in *Sanchez-Espinoza* were very similar; the most significant difference between the cases was that the defendants in *Filartiga* were foreign officials while the defendants in *Sanchez-Espinoza* were United States officials. Dismissal of these claims in *Sanchez-Espinoza*, therefore, sends a clear message to the executive branch of government: United States officials may violate international human rights laws with greater impunity than federal courts are willing to grant to the officials of other nations.

On appeal, the *Sanchez-Espinoza* court's dismissal of all claims was affirmed on different grounds, but without disapproving the basis for dismissal used by the district court.¹⁷⁸ Claims by the Nicaraguans were dismissed on several grounds: (1) although the injunctive and declaratory relief sought is within the court's discretion, providing such relief would be an abuse of discretion given the sensitive nature of foreign policy;¹⁷⁹ (2) the allegations of violations of the Nicaraguans' rights under the Constitution failed to "set forth a claim on which relief can be

174. 5 U.S. (1 Cranch) 137 (1803).

175. See *supra* note 147.

176. N.Y. Times, Feb. 15, 1987, at 1, col. 6.

177. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The plaintiffs were citizens of Paraguay who brought an action in federal court against another Paraguayan who was a former police official in the United States. The plaintiffs claimed that the defendant was responsible for the death of their son by torture in violation of international law. The court of appeals reversed the lower court's dismissal of the action for want of subject matter jurisdiction.

178. 770 F.2d 202 (D.C. Cir. 1985).

179. *Id.* at 207-08.

granted,"¹⁸⁰ and (3) any statutory violations which did exist did not provide for a private damage remedy.¹⁸¹ The appellate court also summarily dismissed the claims of the congressional plaintiffs on the grounds that some of those claims were moot and others were nonjusticiable political questions.¹⁸²

The judicial response to actions charging that the Vietnam War was illegal and unconstitutional evolved from summarily dismissing the actions on political question grounds, to concluding that courts should determine on the merits of the case whether the executive branch had the authority it was asserting.¹⁸³ Opponents to American policy in Central America, such as the plaintiffs in *Crockett* and *Sanchez-Espinoza*, should be entitled to benefit from the evolution of the standard for judicial intervention and have their cases heard on the merits.

As the court of appeals demonstrated in *Sanchez-Espinoza*, courts wishing to abstain from cases involving United States support for the hostile use of force in Central America can create a variety of grounds for doing so.¹⁸⁴ Regardless of whether courts dismiss cases on political question grounds or on other procedural grounds such as standing or equitable estoppel, courts are unwilling to get involved in difficult decisions which set boundaries on legislative and executive powers. The courts' failure to carry out their constitutional responsibility has resulted in implicit approval of the executive branch's interpretation of its foreign policy powers, even though this allows the Executive essentially to establish the Nation's foreign policy, often through the use of hostile force. This is precisely the type of executive adventurism which the Framers sought to prohibit.¹⁸⁵

B. Decisions on the Merits

Once the judiciary acknowledges its constitutional responsibility to determine controversies involving the Executive's foreign policy actions, including the use of hostile force, then it may evaluate those actions in light of the Constitution. In the Vietnam cases, for example, once the substantive issues were addressed, courts often found sufficient legislative branch authorization in the Gulf of Tonkin Resolution,¹⁸⁶ congressional willingness to fund the war effort, or military conscription legislation.

180. *Id.* at 208. Although the court held that the case failed to set forth a claim on which relief could be granted, the court's reasoning reflected the prudential concerns of the political question doctrine. *See supra* note 129.

181. 770 F.2d at 209-10.

182. *Id.* at 210.

183. *See supra* notes 133-142 and accompanying text.

184. 770 F.2d at 211 (Ginsburg, J., concurring) (the case should be dismissed due to lack of ripeness).

185. *See supra* notes 37-49 and accompanying text.

186. H.R.J. Res. 1145, 78 Stat. 384 (1964).

The facts in *Crockett* and *Sanchez-Espinoza*, however, are considerably different from the facts facing the courts in the Vietnam cases. The Boland Amendment, for example, was evidence of Congressional efforts to limit the war effort rather than to continue it.¹⁸⁷ Moreover, although Congress has funded aid to the Contras for limited periods of time,¹⁸⁸ the Reagan Administration began its program of hostile force against the government of Nicaragua long before seeking specific funds or legislative approval from Congress.¹⁸⁹ Such actions have presented Congress with a *fait accompli* problem.

Applying constitutional law to the facts in *Crockett* and *Sanchez-Espinoza*, a court could reasonably conclude that President Reagan's Central America initiatives have exceeded the authority vested in the executive office. In supporting military actions against the government of Nicaragua, President Reagan has waged war against that sovereign nation.¹⁹⁰ Offensive hostilities, however, are a matter of national policy which should be determined by Congress, not the Executive.¹⁹¹

If the Framers knew about the Contras, they might perceive the Contras' relationship with the United States as similar to the relationship that existed between the privateers and the federal government during this Nation's revolutionary period.¹⁹² Assuming this to be the case, however, the actions of the privateers were authorized exclusively by Congress through the granting of letters of marque and reprisal.¹⁹³ Raising and supporting an army, which the Reagan Administration has done with the Contras, is also within Congress' exclusive domain.¹⁹⁴ Similarly, despite President Reagan's imposition of a trade embargo on Nicaragua, the regulation of foreign commerce is constitutionally mandated to be within the exclusive realm of Congress.¹⁹⁵

The Executive has the authority to use force in self-defense of the Nation—such as to repel invasions—without seeking congressional approval.¹⁹⁶ Yet, neither the government of Nicaragua nor the rebels in El Salvador have posed any serious threat to the United States.¹⁹⁷ Moreover, although the President has pledged faithfully to execute the laws of the land, these laws include nonaggression treaties ratified by the Sen-

187. *See supra* note 18.

188. N.Y. Times, Mar. 26, 1987, at 6, col. 3.

189. NEWSWEEK, Nov. 8, 1982, at 42.

190. *See supra* notes 73-75 and accompanying text.

191. *See supra* notes 26-84 and accompanying text.

192. The Contras act as agents of the United States just as privateers acted as agents of the government 200 years ago.

193. *See supra* note 27.

194. *See supra* notes 28 & 40.

195. *See supra* note 29.

196. *See supra* notes 37-39 and accompanying text.

197. The Reagan Administration justifies its policies on the basis of the need to halt the growth of communism. *See supra* note 145.

ate¹⁹⁸ and customary international law.¹⁹⁹ Instead, the Executive has endorsed hostile aggression and the violation of basic human rights, entirely disregarding treaties which the President has the duty to execute faithfully.²⁰⁰

Just as the procedural law involving cases challenging executive authority to use hostile force evolved during the Vietnam War, the analysis of the substantive law also evolved. For example, applying the *Yale Papers* test, *Crockett* and *Sanchez-Espinoza* would likely result in judgments for the plaintiffs on the grounds that the events involved in these cases did not require speedy executive action.²⁰¹ Similarly, the use of hostile force to affect the political structure of a foreign sovereign should be considered a war under the Constitution; it is the type of action which the Framers intended to be determined by Congress when they allocated to that branch the power to declare war.²⁰² A more difficult question is whether there has been sufficient congressional action to satisfy the Constitution in these cases. However, this question can be answered in the negative for at least some of the time periods covered by the claims in *Crockett* and *Sanchez-Espinoza*.²⁰³

C. Proposal

The courts should proscribe at least four constitutional limitations on a President's ability to use force and to determine foreign policy. First, congressional authorizations must clearly and explicitly authorize the presidential actions in question. Second, Congress must be involved at the earliest point in foreign policymaking to avoid delivering the legislative branch with a *fait accompli*.²⁰⁴ Third, allowing presidential discretion in the initiation of foreign hostilities violates the basic intent of the Framers: not only is the Nation committed to hostilities without the benefit of legislative debate or the need to obtain majority approval, but it also shifts the burden of invoking the political process from those who desire war to those who desire peace.²⁰⁵ Fourth, the courts should limit the ability of the legislative branch to delegate to the President broad discretionary authority over foreign policy and the use of force, as well as the executive branch's independent ability to use force as a tool of foreign policy.

198. See *supra* notes 108-115 and accompanying text.

199. See *supra* notes 116-121.

200. The plaintiffs in *Crockett* and *Sanchez-Espinoza* offered to prove these claims, but the courts dismissed the cases before such evidence could be presented. 558 F. Supp. at 902; 568 F. Supp. at 601-02.

201. See *supra* notes 65-70 and accompanying text.

202. See *supra* notes 73-84 and accompanying text.

203. See *supra* notes 99-107 and accompanying text.

204. See *supra* notes 93-97 and accompanying text.

205. See *supra* notes 37-49 & 105-107 and accompanying text.

The courts should also not hesitate to reflect the Nation's moral character in interpreting the application of the law. Covert wars are federal actions fought by proxy soldiers; there is no justifiable basis for treating military actions by mercenaries acting on behalf of the United States differently from those involving United States troops. Had the courts been willing to hear the cases in *Crockett* and *Sanchez-Espinoza*, judicial limitations on executive power could be imposed before American involvement escalates into another Vietnam War.

Conclusion

Had the judiciary the courage to pursue the fact-finding which it claimed was too difficult in *Crockett* and *Sanchez-Espinoza*, not only would the boundaries of executive authority be more clearly delineated, but it is feasible that some of the Reagan Administration's illegal activities in supplying aid to the Contras would have been uncovered earlier. The judiciary would have fulfilled its constitutional responsibility to determine the law and delimit the authorities and responsibilities of the different branches of government. Importantly, such judicial action could have helped save the Nation from the embarrassment of scandals such as "Contragate." In exercising excessive caution in abstaining from deciding on the merits cases such as *Crockett* and *Sanchez-Espinoza*, the judiciary's acquiescence has aided and abetted not only the exercise of, but also the increasing concentration of, war powers in the executive branch of government.

Presidents exceed their authority when they use military force beyond that which is appropriate for the immediate defense of the Nation. The Framers understood the Executive's role and intended to restrict it by giving Congress the authority to initiate hostile uses of force. Presidents are also restricted by numerous treaties and international law, which only Congress has constitutional authority to abrogate.

Arguments that some uses of force do not constitute war are irrelevant. The fact is that all uses of force abroad—whether to protect the interests of United States citizens, to quell civil strife, or to change the political structure of another country—are elements of foreign policy which the Framers intended to be implemented subject to the debate and compromise found only in the legislative branch of government. Moreover, the Framers understood that the long-term security and stability of the federal government could be assured only if governmental actions with serious consequences, such as using force against a foreign sovereign, reflected the will of the people as expressed through the representative branch of government.

These restrictions necessarily apply to all uses of force, whether they be covert undeclared military actions or overt formally declared wars. Covert actions can draw the Nation into a larger scale war and therefore

must be subject to congressional determination of foreign policy. More importantly, just as an employer is responsible for the actions of its agents, the United States is ultimately responsible for the covert activities of its agents; the use of proxies should be subject to the same constitutional limitations as apply to other governmental uses of force.

Professor Velvel has made a convincing argument for maintaining legislative control over decisions to use force against foreign sovereigns: unless we can criticize the motivations of the Framers, who had the experience of living under the regime of a strong executive, we should respect their experience and wisdom and we should enforce their intent.²⁰⁶ The motivations of the Framers in their attempt to design a system with an Executive whose powers could be restrained are as applicable today as they were 200 years ago. The judiciary can play an important role in helping us return to values that inspired our Founding Fathers by holding the issues discussed above to be justiciable, and by defining the limits of presidential power.

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206. Velvel, *supra* note 36, at 653-55.

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