

SCHOLARLY OPINIONS

PRESIDENTIAL UNDECLARED WARMAKING AND FUNCTIONALIST THEORY: *DELLUMS V. BUSH* AND OPERATIONS DESERT SHIELD AND DESERT STORM

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You cannot handle an armed nation if it is democratic, because democracies do not go to war that way. You have got to have a concentrated, militaristic organization of government to run a nation of that sort. You have got to think of the President of the United States, not as the chief counsellor of the nation, elected for a little while, but as the man meant constantly and every day to be the commander in chief of the army and navy of the United States, ready to order them to any part of the world where the threat of war is a menace to his own people.

And you cannot do that under free debate.¹

[W]ar was an instrument of foreign policy, pure and simple. President Bush had demonstrated this in Panama. The administration had not gone out and taken a vote or attempted to drum up support. Instead, Bush had used his authority as commander-in-chief of the armed forces. The public and congressional support had then followed.²

I. INTRODUCTION

The following briefly delineates the 1990-1991 military crisis whereby Kuwait was invaded and occupied by Iraq, and thereafter liberated by an

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1. W. Wilson, *An Address in the St. Louis Coliseum* (Sept. 5, 1919) in 64 THE PAPERS OF WOODROW WILSON 43, 46 (A. Link ed. 1990).

2. B. WOODWARD, THE COMMANDERS 230 (1991) (reflections of National Security Council Director Brent Scowcroft). Said some of President Bush's advisors on August 15, 1990, of exercising American military muscle in the Persian Gulf:

"It'll be easier to get the U.N. to agree than Congress." And one of them added, "It's true we've promised to consult Congress if there's a war. In other words, we'll phone them just after the first bombs have been dropped."

P. SALINGER & E. LAURENT, SECRET DOSSIER: THE HIDDEN AGENDA BEHIND THE GULF WAR 176 (H. Curtis trans. 1991). Pierre Salinger is a former U.S. Senator from California.

international force authorized by the Security Council of the United Nations. It will be seen that, in general, Security Council resolutions were enforced energetically by President George Bush consistently with the Charter of the United Nations. That American commitment was not mandatory under the United Nations Charter and the United Nations Participation Act. However, the American military endeavor at the President's behest was constitutional, at least as it erupted into Operation Desert Storm shortly after passage of the Congress' January 12, 1991, Authorization for Use of Military Force against Iraq Resolution. When U.S. Representative Ronald Dellums and his colleagues from both houses of Congress had turned to the federal judiciary in late 1990 to forestall war without Congressional consent, they were rebuffed.

The instant discussion comprehends the modern, federal interbranch division of labor—wherein a bifurcated presidency makes foreign policy independently, while sharing domestic policymaking with a Congress concentrating upon economic policies³—rather in terms of political economy.⁴ It analyzes the Presidential and Congressional response to the crisis of 1990-1991 from the social science perspective⁵ of functionalism, which

3. Swan, *The Political Economy of Presidential Foreign Policymaking: The Contemporary Theory of a Bifurcated Presidency*, 21 CALIF. W. INT'L L.J. 67, 68-69 (1990).

4. "[A] good case can be made for the proposition that, as suggested by the older term 'political economy,' the very purpose of economics is to predict the economic consequences of political decisions." D. USHER, *THE ECONOMIC PREREQUISITE TO DEMOCRACY* 3 (1981).

5. M. GLENNON, *CONSTITUTIONAL DIPLOMACY*, xx (1990). Since the instant discussion draws upon the fine work of Prof. Glennon, it must be acknowledged that, like all mortals, he is fallible; he refers to "the requirement that the Chief Executive give a State-of-the Union address." *Id.* at 50. But the Constitution actually requires of the President: "He shall from time to time give to the Congress Information of the State of the Union. . . ." U.S. CONST. art. II, § 3. In fact, President Wilson on April 8, 1913, was the first President since John Adams on November 22, 1800, to personally address Congress. 3 R. BAKER, *WOODROW WILSON: LIFE AND LETTERS* 104 n.4, 105-06 (1946). This address was assailed on separation of powers grounds as "the speech from the throne." *Id.* at 105. The Adams and Wilson traditions have been melded: "President Nixon broke with precedent Jan. 20 [1972] when he delivered two state-of-the-union messages to Congress—a 4,000 word speech tailored for national television and a 15,000 word document elaborating on the address." CONGRESSIONAL QUARTERLY, *NIXON: THE THIRD YEAR OF HIS PRESIDENCY* 1 (1972). Glennon's belief that the throne speech is constitutionally mandated evidences how far even Glennon has embraced the imperial presidency. A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973). As even historical novelist Gore Vidal asserted subsequent to Glennon:

Since 1920 no American president has written his state speeches; lately, many of our presidents seem to experience some difficulty in reading aloud what others have written for them to say. But until Woodrow Wilson suffered a stroke, it was assumed that the chief task of the first magistrate was to report to the American people, in their Congress assembled, upon the state of the union. The president was elected not only to execute the laws but to communicate to the people his vision of the prospect before us.

premises social organization along classifications determined by performance.⁶ This approach as invoked here is not supposed to be normative⁷ or prescriptive.⁸ In constitutional debate that is normative or prescriptive, functionalist argument would be of no more than subsidiary value: it would fall behind initial dependence upon the constitutional text, the case law, and the synthesis of custom with the Framers' intent by assigning weight to those practices dating back to the days when the Framers managed the nation.⁹

II. THE CRISIS OF 1990-1991

On July 25, 1990, Iraqi President Saddam Hussein¹⁰ summoned U.S. Ambassador April Glaspie for the final, pre-invasion high-level contact¹¹ between the two governments.¹² The transcript of their meeting on that date as released by Baghdad¹³ includes Ambassador Glaspie's face to face assurance to Saddam Hussein: "I have a direct instruction from the president

6. DICTIONARY OF SOCIOLOGY 126 (H. Fairchild ed. 1967). Cf. 3 THE ENCYCLOPEDIA OF PHILOSOPHY 256 (P. Edwards ed. 1967); THE HARPER DICTIONARY OF MODERN THOUGHT 250 (A. Bullock & O. Stallybrass eds. 1977); and J. ZADROZNY, DICTIONARY OF SOCIAL SCIENCE 129 (1959).

7. "Rivkin and Block are correct as to the law in their articulation of the contemporary theory of a bifurcated presidency, at least insofar as the Constitutional law is defined descriptively and predictively." Swan, *supra* note 3, at 101. "However, Rivkin and Block may be seriously incorrect as to the law insofar as the constitutional law is defined either normatively or explanatorily." *Id.* at 102.

8. As Glennon frames the matter from a somewhat different perspective: "[O]ne cannot normally argue for a given allocation of powers on the basis of functional considerations, for a simple reason: The Constitution has already taken those considerations into account." M. GLENNON, *supra* note 5, at 47. "There appears to be no case in which the approach was solely relied upon by the [Supreme] Court, and indeed even passing references to functional considerations are fairly rare." *Id.* at 42.

9. *Id.* at 51-52 & 68-69.

10. President Saddam Hussein remained a focus of controversy personally throughout the 1990-1992 crisis beyond the degree indicated by a legal analysis such as this one.

11. The true substance of this July 25, 1990, interview remained in dispute in 1991. U.S. Judge Charles Richey then ordered the State Department to surrender classified records of the Glaspie interview with Hussein. U.S. NEWS & WORLD REPORT, Sept. 9, 1991, at 16. This much is certain:

Ambassador returned to her theme, recalling that the President had instructed her to broaden and deepen our relations with Iraq. Saddam had referred to some circles' antipathetic to that aim. Such circles certainly existed, but U.S. Administration is instructed by the President. On the other hand, the President does not control the American press; if he did, criticism of the administration would not exist.

Cablegram from Ambassador Glaspie to Secretary Baker, July 23, 1990, *quoted in Draper, Presidential Wars*, N.Y. REV. BOOKS, Sept. 26, 1991, at 64, 72, col. 3.

12. "Never before had any ambassador been called for a private audience with the dictator." Blumenthal, *April's Bluff*, NEW REPUBLIC, Aug. 5, 1991, at 8.

13. "In early February 1991 the Iraqi government released what it said was the transcript of the meeting." P. SALINGER & E. LAURENT, *supra* note 2, at 212.

to seek better relations with Iraq.”¹⁴ She soon elaborated upon her direction from President Bush with one from Secretary of State James A. Baker, III:

I have lived here for years. I admire your extraordinary efforts to rebuild your country. I know you need funds. We understand that and our opinion is that you should have the opportunity to rebuild your country. But we have no opinion on the Arab-Arab conflicts, like your border disagreement with Kuwait.

I was in the American embassy in Kuwait during the late '60s. The instruction we had during this period was that we should express no opinion on this issue and that the issue is not associated with America. James Baker has directed our official spokesmen to emphasize this instruction. We hope you can solve this problem using any suitable methods via Klibi or via President Mubarak. All that we hope is that these issues are solved quickly.

. . .¹⁵

Of course, her auditor did plan to solve the Kuwait border issue quickly.

At almost the same time State Department spokeswoman Margaret Tutwiler told reporters: “We do not have any defence treaties with Kuwait, and there are no defence or special security commitments to Kuwait.”¹⁶ On July 31, 1990, Under Secretary of State John Kelly testified before the Middle East Subcommittee of the House of Representatives.¹⁷ Kelly shared this exchange with Representative Lee Hamilton:

“Defense Secretary Richard Cheney has been quoted in the press as saying that the United States was committed to going to the defense of Kuwait if she were attacked. Is that exactly what was said? Could Mr. Kelly clarify this?”

“I don’t know the quotation to which you refer, but I have confidence in the administration’s position on this matter. We don’t have any defense treaty with the Gulf states. That’s clear. We support the independence and security of all friendly states in the region.

Since the Truman administration, we’ve maintained naval forces in the area because its stability is in our interest. We call for a peaceful solution to all disputes and we think that the sovereignty of every state in the Gulf must be respected.”

“If, for example, Iraq crossed the Kuwaiti border, for whatever

14. *The Glaspie Transcript: Saddam Meets the U.S. Ambassador*, in *THE GULF READER: HISTORY, DOCUMENTS, OPINIONS* 122, 128 (M. Sifry and C. Cerf eds. 1991).

15. *Id.* at 130.

16. A. DARWISH & G. ALEXANDER, *UNHOLY BABYLON: THE SECRET HISTORY OF SADDAM’S WAR* 266 (1991).

17. P. SALINGER & LAURENT, *supra* note 2, at 68.

reason, what would our position be regarding the use of American forces?"

"That's the kind of hypothetical question I cannot enter into. Suffice it to say that we would be extremely concerned, but I cannot venture into the realms of hypothesis."

"If such a thing should happen, though, is it correct to say that we have no treaty, no commitment, which would oblige us to use American forces?"

"That's exactly right."¹⁸

The Kuwaiti rulers thought, with some reason, that the Iraqi threat would not wax unrestrained. Never before in the Arab nation's recent history had one country invaded another:¹⁹ Saddam's blitzkrieg invasion of their land²⁰ would be the first.²¹ (To be sure, during the Suez crisis it had been Iraq—then ruled by a royal family—which had permitted Britain to use air facilities to attack Egypt with fighter planes.²²) In fact, Kuwait on August 2, 1990, was the first entire, independent country since 1945 to be murdered outright, i.e., invaded to be erased from the map²³ (unlike Hungary, 1956;

18. *Id.* at 68-69.

19. *Id.* at 32.

20. J. MILLER & L. MYLROIE, *SADDAM HUSSEIN AND THE CRISIS IN THE GULF* xiv (1990).

21. R. PYLE, *SCHWARTZKOPF: THE MAN, THE MISSION, THE TRIUMPH* 83 (1991). Abba Eban, Israel's foreign minister during 1967, offered the label "policide" for destroying a state's independence, as distinguished from seizing land or installing a satellite regime. M. WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 52 (1977) ("policide"). "The future of Israel remains uncertain in the face of the continuing ultimate Arab goal of policide if not genocide." A. DERSHOWITZ, *CHUTZPAH* 248 (1991) ("policide").

22. S. SALINGER & E. LAURENT, *supra* note 2, at 220.

23. J. MILLER & L. MYLROIE, *supra* note 20, at 219.

[S]tates generally restrict their use of armed force to intervention in civil war and to security issues. In relatively few instances, for example, have states sought to take control of territory through armed force: China in Tibet, Iraq in Iran, Arab states in Israel, Argentina in the Falklands, Indonesia in East Timor, India in Goa, Pakistan in Kashmir, and Iraq in Kuwait. Half of these attempts have failed.

O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait*, 15 *SO. ILL. U.L.J.* 453, 462 (1991).

Interestingly, in all these cases the attacking state had some colorable legal claim to the territory in question. No cases since the U.N. Charter exist of a state attempting to annex territory by force to which it had no claim, even though as late as the 1940's this was obviously an activity which states thought they could engage in with impunity.

Id. at 462 n.53.

Most major fighting occurring today, including the fighting in Ethiopia, Angola, Sri Lanka, Lebanon, Liberia, El Salvador and Mozambique are all civil wars. Only the Iraqi invasion of Kuwait and the Vietnamese invasion of Cambodia do not qualify as civil wars.

the Dominican Republic, 1965; Czechoslovakia, 1968; Bangladesh, 1971; Uganda, 1979; Afghanistan, 1979; Grenada, 1983; or Panama, 1989).

On August 7, 1990, President Bush sent the first American troops to defend Kuwait's neighbor, Saudi Arabia. On August 8, 1990, he told the American people from the Oval Office: "First, we seek the immediate, unconditional and complete withdrawal of all Iraqi forces from Kuwait."²⁴ He added:

I want to be clear about what we are doing and why. America does not seek conflict, nor do we seek to chart the destiny of other nations. But America will stand by her friends. The mission of our troops is wholly defensive. Hopefully, they will not be needed long. They will not initiate hostilities, but they will defend themselves, the Kingdom of Saudi Arabia, and other friends in the Persian Gulf.²⁵

By August 9, 1990, this defensive effort had been dubbed Operation Desert Shield.²⁶

Not only had the U.S. no mutual security treaty with Kuwait, but the U.S. had none with any of the other Gulf states. Therefore, the commitment to intervene in the Gulf region represented no more than a sole executive agreement.²⁷ Given the presidential authority as commander in chief,²⁸ and the presidential authority to recognize foreign governments and receive foreign ambassadors,²⁹ he doubtless enjoys the capacity to enter some sole executive agreements,³⁰ the scope of his power to conclude international agreements without the Senate's consent remains undefined.³¹ Sole executive agreements, arrived at without reference to either treaty or congressional enactment, validly may deal with any matter which constitutionally falls under the president's independent powers.³² This Gulf commitment was actually more inclusive than is any of the seven mutual security treaties to which America is party, because none of those includes an ironclad guarantee that America will go to war.

Id. at 463.

24. *Weekly Compilation of Presidential Documents*, Aug. 13, 1990, at 1216-17.

25. *Id.* at 1218.

26. B. WOODWARD, *supra* note 2, at 279.

27. Glennon, *The Gulf War and the Constitution*, 70 FOREIGN AFFAIRS 84, 85 (Nov. 2, 1991). "[E]xecutive agreements have not been used for mutual-security undertakings." M. GLENNON, *supra* note 5, at 35.

28. U.S. CONST. art. II, § 2, cl. 1.

29. U.S. CONST. art. II, § 3.

30. Swan, *The 1962 Cuban Missile Agreement: Status and Prospects upon Its Second Quarter-Century*, 11 HASTINGS INT'L AND COMP. L. REV. 391, 394 (1988).

31. *Id.*

32. *Id.* at 395.

For example, the late Secretary of State Dean Gooderham Acheson, who executed³³ the treaty of the North Atlantic Treaty Organization³⁴ for the United States, recalled for his memoirs³⁵ that Article 5 of that treaty merely calls for each signatory nation to respond to attack upon the N.A.T.O. alliance with such action as it chose, "including the use of armed force."³⁶ That treaty does not require an automatic, defensive American war bypassing Congressional deliberation.³⁷ Article 11 declares that "This Treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes."³⁸ (Close reading of this chapter shows that the subtle Acheson never actually denies that the President as commander in chief can enter a N.A.T.O. war on his own.³⁹ Acheson even relates: "I believe it to be true that Congress has never 'declared war.' Beginning with the Declaration of Independence, it has found that some foreign power has made war on the United States and that a state of war exists with that power."⁴⁰)

On January 12, 1991, the Senate by a vote of 52 to 47 joined the House of Representatives of the 102nd Congress in passing the Authorization for Use of Military Force against Iraq Resolution.⁴¹ It was keyed to both the United Nations Security Council's resolutions and the War Powers Resolution.⁴² This January 12 Resolution in provided:

(a) AUTHORIZATION.—The President is authorized, subject to

33. D. ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* 284 (1969).

34. North Atlantic Treaty, April 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243 [hereinafter NATO].

35. D. ACHESON, *supra* note 33, at 280-81.

36.

The Parties agreed that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

NATO, *supra* note 34, art. 5.

37. "Similar to the North Atlantic Treaty Organization's Charter, the U.N. Charter was never intended to displace the U.S. constitutional process." E. KEYNES, *UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER* xvi (1991).

38. NATO, *supra* note 34, art. 11.

39. D. ACHESON, *supra* note 33, at 280-83.

40. *Id.* at 749 n.

41. S.J. Res. 2, 102d Cong., 1st Sess., Cong. Rec. S. 403 (daily ed. Jan. 12, 1991).

42. 50 U.S.C. § 1547 (1973).

subsection (b) to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677.

(b) REQUIREMENT FOR DETERMINATION THAT USE OF MILITARY FORCE IS NECESSARY.—Before exercising the authority granted in subsection (a), the President shall make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that—

(1) the United States has used all appropriate diplomatic and other peaceful means to obtain compliance by Iraq with the United National Security Council resolutions cited in subsection (a); and

(2) those efforts have not been and would not be successful in obtaining such compliance.

(c) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) **SPECIFIC STATUTORY AUTHORIZATION.**—Consistent with section 6(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) **APPLICABILITY OF OTHER REQUIREMENTS.**—Nothing in this resolution supersedes any requirement of the War Powers Resolution.⁴³

On January 16, 1991, allied aerial attacks upon the Iraqis opened the American-led United Nations-authorized offensive to free Kuwait; the U.S. offensive role changed the name of the Operation from Desert Shield to Desert Storm.⁴⁴ Weeks of aerial pounding preceded a ground offensive freeing Kuwait in what President Bush styled “the hundred hour war.”⁴⁵ Those four days of land warfare preceded a unilateral, provisional cease fire

43. S. J. Res. 2, 102d Cong., 1st Sess., Cong. Rec. at S. 403 - S. 404 (daily ed. Jan. 12, 1991); 30 I.L.M. 296 (1991).

44. B. WOODWARD, *supra* note 2, at 352.

In response to Iraq, the weakness in enforcement has been overcome, and the U.N. has acted dramatically. It has adopted sweeping, comprehensive enforcement measures culminating in Desert Storm. Desert Storm seems to be what conventional thinking in international law has wanted in terms of enforcement: force authorized by the United Nations to counter aggression. Desert Storm is the answer to critics of the law. Nevertheless, international lawyers should now question whether it is the sort of enforcement the nations of the world really want.

O'Connell, *supra* note 23, at 456.

45. R. PYLE, *supra* note 21, at 148.

on February 28, 1991.⁴⁶

Security Council Resolution 687 of April 3, 1991, offered to close the conflict and progressively to lift most sanctions against Iraq were Baghdad to bow to a stringent series of military and financial conditions.⁴⁷ Resolution 687 not only demanded that Iraq respect the Kuwait border as inviolable, but decided Baghdad must embrace its chemical and biological disarmament, and its disarmament of all ballistic missiles of a range beyond 150 kilometers. The Security Council held Iraq must unconditionally abjure nuclear weapons, and reaffirmed Iraq's financial liability for damages resulting from the Iraqis' unlawful invasion and occupation of Kuwait. It added that upon Baghdad's accession to the stringencies of Resolution 687 the embargo announced in Resolution 661 would be dissolved. While deciding to remain seized of the matter generally, the Security Council declared that a formal ceasefire between Iraq and Kuwait and the nations reinforcing Kuwait in accordance with Resolution 678 would take effect upon official notice by Baghdad to the Security Council of Iraq's acceptance of the terms of Resolution 687.⁴⁸

On April 6, 1991, Baghdad acceded to these United Nations terms. Iraqi representative at the United Nations Abdul Amir al-Anbari delivered the Iraqi acceptance to the offices of the United Nations Secretary General and the chair of the Security Council. That representative then publicly announced that he considered Resolution 687 "one-sided and unfair."⁴⁹ The Iraqi acceptance, automatically imposing a permanent ceasefire,⁵⁰ brought the war to a close, leaving the United States without a United Nations justification for a heavy American military presence.

It has been seen that the January 12, 1991, Authorization for Use of Military Force against Iraq Resolution was geared to U.N. Security Council resolutions. It was Baghdad's accession to Security Council Resolution 687 which ended the conflict. Therefore, a closer look at the 1990 resolutions of the Security Council is undertaken in Section III. A more detailed examination of the presidential response to these resolutions is presented in Section IV.

III. THE RESOLUTIONS OF THE U.N. SECURITY COUNCIL

Security Council Resolution 660 of August 2, 1990, determined there to be a breach of international peace and security respecting the overrunning of Kuwait. It condemned the Iraqi invasion, and demanded an immediate and

46. P. SALINGER & E. LAURENT, *supra* note 2, at 219.

47. Lewis, *U.N. Votes Stern Conditions for Formally Ending War; Iraqi Response Uncertain*, N.Y. Times, Apr. 4, 1991, at 1, col. 6.

48. SCOR Res. 687 (1991), *reprinted in* 30 I.L.M. 847.

49. Cowell, *Baghdad Formally Agrees to 'Unjust' U.N. Conditions for Permanent Cease-Fire: Truce Is Official*, N.Y. Times, Apr. 7, 1991, at 1, col. 6.

50. *Id.*

unconditional Iraqi withdrawal of all of Baghdad's forces to their August 1, 1990, positions. The vote was 14 to 0, Yemen alone abstaining.⁵¹

Resolution 661 of August 6, 1990, affirmed, in accordance with Article 51 of the U.N. Charter,⁵² the inherent right of individual or collective self-defense regarding Iraq's attack upon Kuwait. Nothing was to impede assistance to the legitimate government of Kuwait, which the Security Council found to have been usurped. Resolution 661 slapped an embargo against exports from Iraq and Kuwait, foreclosed the sale of nonmedical, nonhumanitarian commodities or products to Iraq and Kuwait, and called for a financial blockade of Iraq and Kuwait. This vote was 13 to 0, Yemen and Cuba abstaining.⁵³

The Security Council Resolution 662 of August 9, 1990, was a reaction to Iraq's announced comprehensive and eternal merger with Kuwait. The Security Council decided the absorption of Kuwait by Iraq, under whatever form or pretext, to be devoid of legal validity, and a nullity. It determined to restore Kuwait's sovereignty, independence, and territorial integrity. The

51. SCOR Res. 660 (1990), reprinted in 29 I.L.M. 1325. "The 1990 condemnation of Iraq by the Security Council for its naked aggression against Kuwait was the first time in recent memory that the United Nations had condemned Arab aggression." A. DERSHOWITZ, *supra* note 21, at 224.

52. U.N. CHARTER art. 51.

On August 6, 1990, the U.N. Security Council intervened decisively in the growing crisis by approving Resolution No. 661, requiring member states to impose a variety of sanctions against Iraq, short of the use of armed force, under Chapter VII of the U.N. Charter. Significantly, this resolution also explicitly "[a]ffirm[ed] the inherent right of individual and collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter."

Malloy, *The Iraqi Sanctions: Something Old, Something New*, 15 SO. ILL. U.L.J. 413, 422-23 (1991).

53. SCOR Res. 661 (1990), reprinted in 29 I.L.M. 1325.

Various terms have been used to describe the naval operations in support of this Resolution. It would seem inappropriate to use "blockade," a term carrying with it connotations of a state of war and the implication of the right of a neutral to trade to some extent on grounds of equality with the belligerents and which is not sufficiently wide to cover the full extent of the limitation on trading relations with Iraq demanded by Resolution 661. Also, it is not the intention that carriers of contraband should be subject to the usual sanctions for their unneutral service of forfeiture of the goods or the ships. The American term "interdiction" is not a term of art. Reliance upon it has probably been prompted as much by domestic constitutional considerations—it could be presented as less than or different from an act of war—as by ones of international law. It became less accurate as a description when it became necessary to extend the authorization of States to take measures from ships to aircraft suspected of violating Resolution 661. The measures envisaged here were principally refusal of permission to take off from or over-fly a State's territory for flights bound to Iraq or Kuwait. It was specifically provided that any such measures be consistent with international law, which substantially restricts the right to use force against commercial aeroplanes.

vote therefor was unanimous.⁵⁴

Resolution 664 of August 18, 1990, unanimously reaffirmed Resolution 662, and demanded that Baghdad permit the departure of third country nationals from Iraq and Kuwait.⁵⁵ Resolution 665 of August 25, 1990, summoned the governments cooperating with Kuwait against Iraq to halt shipping so as to implement Resolution 661. Head of the U.S. delegation at the U.N. Thomas Pickering received orders from Secretary of State Baker to keep the fifteen members of the Security Council in session for as long as needed to pass Resolution 665.⁵⁶ This very serious vote taken at 4:00 a.m. was 13 to 0, Yemen and Cuba abstaining.⁵⁷ Resolution 666 of September 13, 1990, recognized that circumstances might arise where it would be necessary to supply food to the civilians in Iraq or Kuwait, and recalled that Resolution 661 did not apply to supplies strictly intended for medical purposes. This vote also was 13 to 0, Yemen and Cuba again abstaining.⁵⁸

The unanimously supported Resolution 667 of September 16, 1990, expressed outrage at Iraq's violations of diplomatic premises inside Kuwait, and at the abduction of personnel with diplomatic immunity, and at the abduction of foreign nationals within the violated diplomatic premises. It demanded the release at once of those foreign nationals, as well as those encompassed by Resolution 664.⁵⁹ (As it happened, all hostages were released by the close of 1990.⁶⁰) The unanimously adopted Security Council Resolution 669⁶¹ of September 24, 1990, and Resolution 670 of September 25, 1990, between them reviewed the Resolution 661 embargo and tightened the air cargo embargo. Resolution 670 also called upon all states to detain any Iraqi registry-ships entering their ports being, or previously having been, used in violation of Resolution 661. This vote was 14 to 1, Cuba opposing.⁶²

Resolution 674 of October 29, 1990, added the condemnation of Iraq's destruction of Kuwaiti demographic records, forced relocation of Kuwaitis, and unlawful seizure and destruction of public and private property in Kuwait. It reminded Baghdad that under international law Iraq is liable to Kuwait and third states, and to their nationals and corporations, for damages stemming from the illegal invasion and occupation of Kuwait. The Resolution 674 vote was 13 to 0, Yemen and Cuba abstaining.⁶³

54. SCOR Res. 662 (1990), *reprinted in* 29 I.L.M. 1327.

55. SCOR Res. 664 (1990), *reprinted in* 29 I.L.M. 1328.

56. S. SALINGER & E. LAURENT, *supra* note 2, at 180.

57. SCOR Res. 665 (1990), *reprinted in* 29 I.L.M. 1329.

58. SCOR Res. 666 (1990), *reprinted in* 29 I.L.M. 1330.

59. SCOR Res. 667 (1990), *reprinted in* 29 I.L.M. 1332; Meron, *Prisoners of War, Civilians and Diplomats in the Gulf Crisis*, 85 A.J.I.L. 104.

60. S. SALINGER & E. LAURENT, *supra* note 2, at 204.

61. SCOR Res. 669 (1990), *reprinted in* 29 I.L.M. 1333.

62. SCOR Res. 670 (1990), *reprinted in* 29 I.L.M. 1334.

63. SCOR Res. 674 (1990), *reprinted in* 29 I.L.M. 1561.

Resolution 677 of November 28 articulated the Security Council's grave concern at, and condemned, Iraq's ongoing bid to alter the demographic makeup of the Kuwaiti populace, and to destroy the civil records maintained by Kuwait's legitimate government. The Security Council unanimously mandated the Secretary General to assume custody of the Kuwaiti population register current to August 1, 1990.⁶⁴

The issue of Iraq's political manipulation of the demography of Kuwait reached in the unopposed Resolutions 674 and 677 was one properly addressed.⁶⁵ The noted scholar Alfred Cobban long ago questioned whether a country may annex a land inhabited by members of another nationality, remove a great many of them by pressure explicit or implicit—or simply through their own preference not to live under an alien regime—introduce in their place its own nationals, and thereupon claim the region on the theory of self-determination.⁶⁶ The problem in recent times has reemerged in such diverse locales as Northern Ireland, the Falkland Islands, and New Caledonia.⁶⁷ Only the timely intervention of Operation Desert Storm precluded agonizing future dilemmas deriving from the Iraqi political manipulation of demography in Kuwait.

Security Council Resolution 678 of November 29, 1990, demanded Iraq fully comply with Resolution 660 and all subsequent relevant resolutions. It authorized (unless Iraq by January 15, 1991, fully complied with all relevant resolutions) countries cooperating with Kuwait against Iraq to exercise all necessary force to implement Resolution 660 and to restore peace and international security to the region. The vote on this crucial initiative was 12 to 2; Yemen and Cuba voted in the negative, while the veto-wielding⁶⁸ People's Republic of China abstained.⁶⁹

64. SCOR Res. 677 (1990), *reprinted in* 29 I.L.M. 1564.

65. Swan, *Irish Unification as Northern Ireland Self-Determination: A Speculative Reappraisal of the Evidence*, 2 FLA. INT'L L.J. 129, 142-52 (1986).

66. A. COBBAN, *THE NATION-STATE AND NATIONAL SELF-DETERMINATION* 72-73 (rev. ed. 1969).

67. Swan, *supra* note 65, at 150-52, 152 n. 144.

68.

1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

U.N. CHARTER art. 27, paras. 1-3. Strict interpretation of Article 27 would demand positive concurrence of the permanent members, instead of acquiescence via abstention for decision on issues of substance. However, the Security Council established that abstention by a great power failed to veto. Swan, *Quasi-Constitutional Developments in Northern Ireland: Enduring Stalemate and Potential Resolution*, 13 CALIF. W. INT'L L.J. 378, 402 (1983).

69. SCOR Res. 678 (1990), *reprinted in* 29 I.L.M. 1565.

IV. PRESIDENTIAL RESPONSE TO SECURITY COUNCIL RESOLUTIONS

In Saddam Hussein's capture of Kuwait President Bush faced what was characterized as the gravest global crisis since the 1950 Korean War.⁷⁰ Only twice in its history has the U.N. Security Council authorized military enforcement (i.e., compulsion or coercion) action, as distinguished from simple peacekeeping or deterrence,⁷¹ and these instances were in the Korean War and in the Persian Gulf during 1990.⁷² It was Security Council Resolution 665 of August 25, 1990, which represented the first time since the Korean War where the Security Council had endorsed force to resolve an international crisis.⁷³ In both Korea and the Persian Gulf the Security Council authorized the unleashing of *ad hoc* forces to restore peace internationally.⁷⁴ Security Council Resolution 678 of November 29, 1990, carried the broadest authorization of war to be granted by the Security Council since 1950.⁷⁵

Resolution 661 of August 6, 1990, hinged on Article 51 of the United Nations Charter⁷⁶ allowing force in individual or collective self-defense "until the Security Council has taken the measures necessary to maintain international peace and security."⁷⁷ Already by August 10, 1990, Secretary of State Baker claimed Security Council authority to forcibly interfere with third country trade with Kuwait or Iraq: "[W]e have the legal authority necessary to institute such an embargo or blockade provided that the request comes from the legitimate Government of Kuwait."⁷⁸ The Emir of Kuwait scarcely being in any position to withhold such a request, called for it on August 12.⁷⁹ On August 12, President Bush ordered Navy ships to stop all vessels carrying Iraqi oil products and all imports into Iraq but for some

70. A. DARWISH & G. ALEXANDER, *supra* note 16, at xv.

71. Russett & Sutterlin, *The U.N. in a New World Order*, 70 FOREIGN AFFAIRS 69, 73 (Nov. 2, 1991).

72. *Id.* at 68.

73. R. PYLE, *supra* note 21, at 111. "Korea stood alone in United Nations practice until August 25, 1990." Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 A.J.I.L. 74, 81 (1991).

74. Russett & Sutterlin, *supra* note 71, at 73. America's Gen. Douglas MacArthur, being Supreme Commander of the United Nations Forces in Korea, was the first U.N. general and first leader of a largescale military action ever shouldered by a global organization. R. ROVERE & A. SCHLESINGER, JR., *THE GENERAL AND THE PRESIDENT* 223 (1951).

75. B. WOODWARD, *supra* note 2, at 333.

76. "Affirming the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter. . . ." SCOR Res. 661 (1990), *reprinted in* 29 I.L.M. 1325.

77. U.N. CHARTER art. 51.

78. Lewis, *Security Council's Rare Unity May Be Threatened Over U.S. Warships in the Gulf*, N.Y. Times, Aug. 11, 1990, at A7, col. 3.

79. Crozier, *Handling the United Nations*, NATIONAL REVIEW, April 1, 1991, at 40, 42.

foodstuffs, saying he responded to the Emir's request.⁸⁰ This blockade was, of course, considered an act of war.⁸¹

The British U.N. representative Sir Crispin Tickell told the Council that London understood the resolution authorization only to extend to naval vessel monitoring of ship movements in the Gulf and reporting of suspected embargo violations;⁸² this basically was the stance as well of Canada, China, Ethiopia, Finland, the Ivory Coast, Malaysia, Romania, Yemen and Zaire.⁸³ By August 13, 1990, the American announcement that U.S. war vessels were enforcing sanctions largely isolated the U.S. in the Security Council.⁸⁴ Nevertheless, on August 14, 1990, Washington clung to its

80. R. PYLE, *supra* note 21, at 88. The U.S. since 1945 repeatedly has blockaded foreign shores without a declaration of war, e.g., Guatemala, 1954, S. AMBROSE, *EISENHOWER: THE PRESIDENT 193-97*, 214 (1984), and Cuba, 1962. The latter followed Congress's Joint Resolution of October 3, 1962. Pub. L. No. 87-733, 59 Stat. 1044 (1962). This Cuba Resolution was appealed to by President Kennedy as authority, even if it carried no legal effect. F. WORMUTH & E. FIRMGAGE, *infra* note 81, at 45. Kennedy also declared he had authority as Commander in Chief to use force to check the Soviet buildup in Cuba. C. LOFGREN, *GOVERNMENT FROM REFLECTION AND CHOICE: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM* 223 (1986). The U.S. maritime search and seizure policy against Guatemala in peacetime was contrary to the unambiguous judgment of the Acting Legal Adviser of the Department of State. B. COOK, *THE DECLASSIFIED EISENHOWER: A DIVIDED LEGACY* 267-68 (1981).

81. F. WORMUTH & E. FRIMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 44-46 (1989). Naval War College Oceans Law and Policy Department of the Center for Naval Warfare Studies Director Richard J. Grunawalt argued:

United Nations Security Council Resolution 661 does not purport to establish a blockade of Iraq or Kuwait nor does it invoke the belligerent right of "visit and search." While both of these measures are embraced by the forceful measures provisions of Article 42 of the United Nations Charter (blockade explicitly, "visit and search" by implication), the Security Council has not yet directed their utilization. Instead, the economic sanction of embargo has been applied. Enforcement of an embargo at sea is not encompassed within either the peacetime right of "approach and visit" or the belligerent right of "visit and search." The flexible concept of maritime quarantine best describes the enforcement mechanism for embargo. Warships of participating states may intercept vessels proceeding to or from embargoed territory, subject them to boarding and inspection, and, if offending cargo is found, turn them away from the targeted state or, if outbound, require them to return to port. Under this procedure, neither the vessel nor its cargo are normally subject to capture or destruction. However, minimum force may be exerted by the intercepting warship to enforce compliance. The authority to use force to compel compliance with an embargo was specifically recognized by the Security Council in its embargo against Southern Rhodesia in 1966, when it called upon the British Government "to prevent by the use of force if necessary the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia."

Grunawalt, *The Maritime Dimension of Operation Desert Shield*, 15 SO. ILL. U.L.J. 487, 498-99 (1991), citing SCOR Res. 221 (1966), reprinted in 5 I.L.M. 534. Grunawalt analogizes summoning a state to impede the imports of *its own colonial holding* (U.K.-Rhodesia) with summoning a third party (e.g., the U.S.) to impede second party shipping to a third party (Iraq).

82. Lewis, *supra* note 78, at cols. 3-4.

83. *Id.* at col. 4.

84. Lewis, *Order for Blockade Largely Isolates U.S. at Security Council*, N.Y. Times, Aug. 14, 1990, at A9, col. 6.

contention that the U.S. Navy was authorized to enforce an embargo against Iraq.⁸⁵ On that date representatives of Britain, France, China, and the Soviet Union (i.e., the other veto-bearing permanent members of the Security Council) argued prospectively that the Council should authorize a naval blockade, if at all, only under Chapter VII of the U.N. Charter,⁸⁶ Articles 39-51: "Action with Respect to Threats of the Peace, Breaches of the Peace, and Acts of Aggression."⁸⁷ As it transpired, in the 1990-1991 Kuwait crisis as in the Korean War, there was no Security Council reference to Chapter VII as a foundation for mobilization of a U.N. force for military endeavors.⁸⁸

That day President Bush at his press conference doggedly insisted upon the American right within Article 51 of the Charter unilaterally to enforce the Security Council blockade even in the face of the opposition of U.N. Secretary-General Perez de Cuellar:

Q. Mr. President, I have a two-part question. After successfully internationalizing opposition to the Iraqi aggression through the U.N., why did you jump the gun and unilaterally order a blockade, upsetting other members? And two, is the U.S. policy against the annexation of captured lands in the Middle East an across-the-board policy with the U.S.?

The President. Upsetting—I don't think we've upset members on our policy of interdiction. We are acting within our legal rights. And I think the world wants to see these chapter [sic: Article] 51 sanctions carried out, and that's the role the United States is trying to do.

Q. We didn't go through the step-by-step of chapter 7.

The President. Well, we're doing it the way our attorneys and others around the world recommend. And I think we're doing it properly, and I hope we're doing it to the degree that all ships will turn back if they are in contravention of the U.N. action.⁸⁹

. . . .

Q. Mr. President, you have ambassadors coming to the State

85. Lewis, *U.S. Seeks to Revive Panel That Enforces U.N. Decrees*, N.Y. Times, Aug. 15, 1990, at A19, col. 1.

86. *Id.* at col. 2.

87. U.N. CHARTER arts. 39-51.

88. Russett & Sutterlin, *supra* note 71, at 75.

89. *The President's News Conference: August 14, 1990, Weekly Compilation of Presidential Documents*, Aug. 20, 1990, at 1246.

Department, presumably to discuss a U.N. multinational quarantine, or interdiction, whatever word you want. Is it now the policy of the United States to potentially submit to a joint U.N. command or reflag U.S. ships under a U.N. command?

The President. That is not the plan right now, but we are talking to see how we can make this naval presence most effective. What you've said there is not the policy of the United States.

Q. Well, sir, may I ask: Do you consider in any way—there are reports out of the U.N. that there is some criticism that you have acted unilaterally and perhaps outside your legal authority in the de facto blockade that's going on. Do you consider that you've had your hand slapped, or do you think—

The President. No, I don't think so at all. And I think we're acting legally. So, this little meeting that was called by Cuba yesterday—it doesn't disturb me in the least. I mean, there can be differences, people can discuss them. But I'm convinced we're acting properly, and we are determined to continue to act in that manner.

You see, Perez de Cuellar apparently talked about only the U.N. through resolutions can decide about a blockade. But he also said every country has the right to bring up article 51, and the Secretary-General had nothing to say against it. And we have good opinions that we are acting properly. And I have no intention to change at all. I think it's important that others join in and do their part, which most of them are doing in their determination to see that commerce does not continue.⁹⁰

. . . .

Q. Mr. President, if I could go back to the naval interdiction effort for a second. The Soviets apparently are proposing some kind of a joint security council command to control the naval interdiction effort. Are you pursuing that in any way with the Soviets? Are you interested in the idea at all?

The President. There was originally a—I think that was raised to Jim Baker by [Soviet Foreign Minister Eduard] Shevardnadze. And I don't have any problem talking to the Soviets about that. I think it would be a very good thing to have an active Soviet presence to enforce these U.N. resolutions. All I'm saying is that

90. *Id.* at 1247.

I don't think it is essential that you have a U.N. flag in order for countries to carry out their responsibilities. But I'd be somewhat openminded to talk further along those lines.⁹¹

By August 22, 1990, the question was whether the U.S. Navy, which already had stopped some Iraqi ships but boarded none, should board them without further U.N. approval.⁹² On that date Secretary Baker told Foreign Minister Shevardnadze: "We're under a lot of pressure, especially from the Pentagon, who want to be able to use force to implement the embargo without waiting for U.N. backing."⁹³

Thereafter, the Security Council validated—only in terminology at best oblique—the use of force.⁹⁴ The predawn Security Council Resolution 665 of August 25, 1990, summoned states cooperating with Kuwait and deploying "forces in the area to use such measures commensurate to the specific circumstances as may be necessary . . . to ensure strict implementation of the provisions"⁹⁵ of Resolution 661. This constituted the only time in the history of the United Nations that individual countries outside any umbrella U.N. command were authorized to enforce an international blockade.⁹⁶

91. *Id.* at 1250.

92. B. WOODWARD, *supra* note 2, at 284.

93. P. SALINGER & E. LAURENT, *supra* note 2, at 180. Reported Director Grunawalt of the Naval War College:

U.S. naval forces in the Persian Gulf, the Gulf of Oman, and the Red Sea, acting in concert with the warships of other states operating in those waters, instituted a maritime quarantine of Iraq and Kuwait. Although fully consistent with the purpose and intent of Resolution 661, the Bush administration made it clear from the outset that U.S. actions were premised upon the inherent right of collective self-defense reflected in Article 51 of the Charter. When, on August 25th, the Security Council issued Resolution 665, calling upon States "deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary . . . to ensure strict implementation of . . . Resolution 661," the legal basis for resort to force by the United States in its maritime quarantine operation was further strengthened.

Grunawalt, *supra* note 80, at 496.

94. Russett & Sutterlin, *supra* note 71, at 74.

95. SCOR Res. 665 (1990), *reprinted in* 29 I.L.M. 1329.

Prior to the adoption of the Security Council Resolution 665 on August 25th, which authorized States to take unilateral action to enforce the U.N.-imposed embargo against Iraq, a pertinent question was: could a State such as the United States take unilateral action to enforce an embargo under Article 51 of the Charter which recognizes "the inherent right of individual or collective self-defence" in case of an armed attack against a U.N. member?

The conceptual difficulty, of course, is that the Charter limits the freedom to take action in self-defense "until the Security Council has taken measures necessary to maintain international peace and security." Because the Council adopted Resolution 665, the question became moot.

Nanda, *The Iraqi Invasion of Kuwait: The U.N. Response*, 15 SO. ILL. U.L.J. 431, 449 (1991).

96. B. WOODWARD, *supra* note 2, at 285.

It has been seen that an extremely expansive American reading of Resolution 661 underpinned assertive U.S. naval initiatives under Article 51. A closer look at the enforcement machinery of the United Nations Charter, and at American duties under that Charter, is therefore appropriate.

V. THE U.S. AND THE U.N. CHARTER

A. *The Charter of the United Nations*

Article 39 of the U.N. Charter provides:

The Security Council shall determine the existence of any threat to the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.⁹⁷

In turn, those latter two Articles provide:

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.⁹⁸

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.⁹⁹

97. U.N. CHARTER art. 39.

98. U.N. CHARTER art. 41.

99. U.N. CHARTER art. 42. According to Thomas M. Franck and Faiza Patel:

The new alternative to traditional wars of self-defense is collective police actions by the members of the international community. Exceptionally, these could be implemented by regional organizations. Usually, they would take the form of

Yet as of early August 1990 the Security Council was in no position to itself shelter Iraq's neighbors from attack. Consequently, the American undertaking was launched, as indicated by President Bush as quoted in Section IV, pursuant to Article 51.¹⁰⁰

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.¹⁰¹

Given that the individual or collective self-defense under Article 51, as in the August 1990 Operation Desert Shield defense of Kuwait, does not derogate from the responsibility of the Security Council at any time to take action to restore international security, Articles 46 and 47 remain salient:

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.¹⁰²

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of

global action. Either way, the police action must be authorized specifically by the Security Council under Article 53 (for regional action) or Article 42 (for global action).

If states use armed force under the self-defense rubric of Article 51, their individual activities are subsumed by, or incorporated into, the global policy response once it is activated. That is, the old way is licensed only until the new way begins to work: "until," in the words of Article 51, "the Security Council has taken the necessary measures to maintain international peace and security."

Franck & Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 A.J.I.L. 63 (1991).

100. Urquhart, *Learning from the Gulf*, N.Y. REV. BOOKS, Mar. 7, 1991, at 34, col. 3.

101. U.N. CHARTER art. 51.

102. U.N. CHARTER art. 46.

forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.¹⁰³

What, in the event, proved to be the effective status of the Security Council's Military Staff Committee?

Security Council Resolution 661 of August 5 decided that all states should prevent "The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution;" ¹⁰⁴ And Security Council Resolution 665 of August 25 called upon those

Member States cooperating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstance as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990): ¹⁰⁵

And, of course, Security Council Resolution 678¹⁰⁶ of November 29,

103. U.N. CHARTER art. 47.

104. SCOR Res. 661 (1990), *reprinted in* 29 I.L.M. 1325.

105. SCOR Res. 665 (1990), *reprinted in* 29 I.L.M. 1329.

106. SCOR Res. 678 (1990), *reprinted in* 29 I.L.M. 1565.

[T]he opaque language of the Resolution was understood by the British government to include the use of armed force and, once again, that force was seen as an aspect

1990, harkened back to Security Council Resolution 660¹⁰⁷ of August 2, 1990, which demanded Iraqi withdrawal from Kuwait. It did so when Resolution 678 authorized (“Authorizes”) “all necessary means” to “restore international peace and security in the area.”¹⁰⁸ This was extremely vague; Westerners claimed it justified going beyond liberating Kuwait to invade Iraq,¹⁰⁹ and American officials privately maintained it included destroying the Iraqi war machine.¹¹⁰ They did so notwithstanding that not a single one of the twelve relevant Security Council resolutions had extended beyond the rescue of Kuwait.

No provision for Military Staff Committee control of the Security Council’s replies to aggression ever was made.¹¹¹ The notion that land or sea forces in the Persian Gulf ought to fall under a Security Council Military Staff Committee was, seemingly, disregarded as unrealistic by the major participants in the military force amassed in Saudi Arabia.¹¹² Those national actors seem never to have weighed the chance that the Security Council ought, under Article 47.3, to arrange for the command of the forces in the Persian Gulf.¹¹³ Instead, Resolution 678 by authorizing “all necessary means to uphold and implement Security Council Resolution 660 (1990) and all subsequent relevant resolutions”¹¹⁴ merely wedded its series

of collective self-defence, to be undertaken at the request of Kuwait, rather than collective measures directed by the Security Council.

Warbrick, *supra* note 53, at 486-87.

107. SCOR Res. 660 (1990), *reprinted in* 29 I.L.M. 1325.

108. SCOR Res. 678 (1990), *reprinted in* 29 I.L.M. 1565.

The Council authorized force only to liberate Kuwait. The words of the resolution limited action to enforcing prior resolutions, in particular, the one calling on Iraq to withdraw from Kuwait. The coalition used massive force directly against Iraq to accomplish this goal. Some reports suggested that the coalition was aimed at crippling Iraq’s military capacity, which would have gone beyond the coalition’s authorization. It appears, however, that Desert Storm conformed with the Council’s resolutions.

O’Connell, *supra* note 23, at 479-80.

109. P. SALINGER & E. LAURENT, *supra* note 2, at 199.

110. Massing, *The Way to War*, N.Y. REV. BOOKS, Mar. 28, 1991, at 17, 22, col. 2.

111. Urquhart, *supra* note 100, at 34, col. 3.

112. *Id.* at 34, col. 4-35, col. 1.

113. *Id.* at 35, col. 1.

The establishment of the Military Staff Committee (MSC) is mandated under the U.N. Charter “to advise and assist the Security Council on all questions relating to the Security Council’s military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.” The MSC was revived during the Gulf crisis but its role has been rather limited since the Security Council’s decision was not to take action under Article 42.

Nanda, *supra* note 95, at 449.

114. SCOR Res. 678 (1990), *reprinted in* 29 I.L.M. 1565.

of resolutions to the forces collected in Saudi Arabia in the name of Article 51.¹¹⁵

B. *The United Nations Participation Act*

Article 25 of the U.N. Charter provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."¹¹⁶ Remembering always that under the Supremacy Clause of the U.S. Constitution all treaties, including the U.N. Charter,¹¹⁷ which are made under the authority of the United States are the supreme law of the land,¹¹⁸ was the United States with its peacekeeping reserves legally bound to go to war (even without a 1991 congressional authorization) to enforce Resolution 678, or would it so have been bound had that Resolution been mandatory and not permissive?¹¹⁹ (By its own terms Resolution 678 lacked binding force because it validated or authorized but did not require member states' provision of military

115. Urquhart, *supra* note 100, at 35, col. 1.

While it has sometimes been suggested that the UN collective security system has functioned in the present crisis in the way anticipated in the Charter, this is not, in fact, the case. The Security Council is not in a position to require States to provide forces to take the forcible action envisaged by Article 42 nor has it even called on States to contribute forces to a UN Force to take military action. Instead, it has authorised "those Member States co-operating with the Government of Kuwait" to take action.

Furthermore, Resolution 661 specifically affirmed the right of individual and collective self-defence.

Warbrick, *supra* note 53, at 487.

116. U.N. CHARTER art. 25.

117. "[S]ome treaties that lack termination clauses may not be terminable. . . . The United Nations Charter has been said to represent such a treaty." M. GLENNON, *supra* note 5, at 158. "The view of the Charter as an organic treaty to be interpreted with a view to facilitating the expanding functions of the Organization was first expressed in *Certain Expenses of the United Nations*, 1962 I.C.J. Rep. 151 (Advisory Opinion of July 20)." Franck & Patel, *supra* note 99, at 67 n.17.

118. U.S. CONST. art. VI, cl. 2. Thomas M. Franck & Faiza Patel argue:

The text and practice are clear. When the President commits U.S. forces to a UN police action in accordance with Article 42 of the Charter, it is because the U.S. Government is obliged by international law to comply. Such compliance by the President with international law is not prohibited—indeed, it is required—by the Constitution.

Franck & Patel, *supra* note 99, at 72. Their paper is silent as to the duty of the globe's other nations (e.g., Japan or the People's Republic of China, another Security Council permanent member) to march to the front when mustered.

119. The United Nations Participation Act of 1945 unsettled one analyst: "The nice question arises: Are the 400,000 soldiers we have in Saudi Arabia a part of the peacekeeping reserves of the United Nations?" Buckley, *The Constitutional Question*, NATIONAL REVIEW, Jan. 28, 1991, at 70.

assistance.¹²⁰) After all, the framers of the U.N. had hoped it to have permanently on call land, sea and air forces for immediate deployment in crisis situations, as U.S. Senator Daniel P. Moynihan recollected immediately prior to Operation Desert Shield. Such an arrangement lay at the heart of President Franklin D. Roosevelt's concept of a world organization.¹²¹

There was no such duty.

The United Nations Participation Act of 1945¹²² is the U.N. Charter's implementing legislation in the United States.¹²³ It provides:

The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein:¹²⁴

Observe that the United Nations Participation Act ordains that the President does not require congressional authorization to make U.S. armed forces available to the Security Council to take action under Article 42. Further,

120. E. KEYNES, *supra* note 37, at xv.

121. D. MOYNIHAN, *ON THE LAW OF NATIONS* 112 (1990).

It would be one thing to persuade Congress to enter into a peacetime alliance with the European countries that made up the nation's heritage. But they would never accept a global string of regional military alliances. The United Nations has been created to obviate any such need.

V. NEWTON, *THE CAMBRIDGE SPIES: THE UNTOLD STORY OF MACLEAN, PHILBY, AND BURGESS IN AMERICA* 197 (1991).

122. 22 U.S.C. §§ 287 *et seq.*

123. Glennon, *supra* note 27, at 100-01; M. GLENNON, *supra* note 5, at 206.

124. 22 U.S.C. § 287d. This section continues:

Provided, That, except as authorized in section 287d-1 of this title, nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.

And section 287d-1 provides that the President may upon U.N. request assign up to one thousand troops as observers, guards and noncombatants supporting peaceful settlement of disputes without armed force. 22 U.S.C. § 287d-1.

observe that Article 42 calls for Security Council initiatives, including blockade, utilizing the armed forces of U.N. member states when it considers that, short of force, the Article 41 sanctions must be inadequate. But, no such determination by the Security Council regarding the inadequacy of sanctions ever was reached.¹²⁵

Furthermore, observe that the United Nations Participation Act authorizes the President to negotiate a special agreement or agreements with the Security Council respecting the availability of American armed forces to the Security Council. Article 43 of the U.N. Charter provides:

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its calls and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.¹²⁶

The U.N. Charter itself demands the negotiation of such Security Council special agreements prior to requisitioning forces from member states.¹²⁷ When the problem of U.N. requisition of troops arose for detailed consideration in 1945, John Foster Dulles, a member of the U.S. delegation to the San Francisco conference at which the Charter was signed, informed the Senate Foreign Relations Committee that a U.S.-U.N. agreement on provision of troops should be regarded itself as a treaty needing a two-thirds

125. Urquhart, *supra* note 100, at 35, col. 1; O'Connell, *supra* note 23, at 479, 485.

If the Security Council were to act under Article 41 (non-use of force) or even under Article 42 (Security Council's use of force), who is to decide, under what standards and using what criteria, whether the Security Council has taken the "necessary" measures for the maintenance of international peace and security?

Nanda, *supra* note 95, at 450.

126. U.N. CHARTER art. 43.

127. Glennon, *supra* note 27, at 90, citing Glennon, *The Constitution and Chapter VII of the U.N. Charter*, A.J.I.L. 74 (Jan. 1991). "[A]rticles 42 through 44 of the United Nations Charter are not self-executing provisions. In each case, the Security Council must negotiate agreements with the member states to provide armed forces." E. KEYNES, *supra* note 37, at xv.

approval¹²⁸ from the Senate.¹²⁹ The Security Council has yet to negotiate such an agreement with any member state.¹³⁰

The Charter of the United Nations at no time laid any duty upon the United States to redeem Kuwait. Nor, did Congress by either resolution or declaration of war, demand the commander in chief enforce Article 51. The President moved toward his own goals between August 2, 1990, and January 12, 1991, citing specific authority for his efforts generally as commander in chief, not from the democratically-elected Congress but from the United Nations Security Council.¹³¹ In theory, a Security Council might be comprised of no democratic governments at all. In fact, the actual governments voting on the resolutions of August-November 1990 included few democratic governments. What did democratically elected members of the Congress do to ensure that their voices would be heard in the global clamor over war and peace?¹³²

VI. *DELLUMS V. BUSH*

*Dellums v. Bush*¹³³ was brought by plaintiffs, fifty-three U.S. Representatives and one U.S. Senator, requesting an injunction preventing President Bush from launching an offensive against Iraq absent a prior declaration of

128. U.S. CONST. art. II, § 2, cl. 2.

129. Russett & Sutterlin, *supra* note 71, at 78; M. GLENNON, *supra* note 5, at 206.

130. Glennon, *supra* note 27, at 101; Franck & Patel, *supra* note 99, at 66, 70; O'Connell, *supra* note 23, at 466.

131. According to Franck and Patel:

While the President was no doubt politically well-advised to consult fully with Congress in this instance, time allowing, he is not obliged to secure what the new system was created to make unnecessary: the nation's unilateral decision to go to war.

If this is the correct position in international law, it also comports with the intent of the drafters of the Constitution. The purpose of the war-declaring clause was to ensure that this fateful decision did not rest with a single person. The new system vests that responsibility in the Security Council, a body where the most divergent interests and perspectives of humanity are represented and where five of fifteen members have a veto power. This Council is far less likely to be stampeded by combat fever than is Congress.

Franck & Patel, *supra* note 99, at 74. Franck and Patel's conflation of "humanity" with governments is a widespread error. Worse is the breathtaking conflation of the "perspectives of humanity" with those of dictatorships (e.g., the veto-bearing People's Republic of China).

132. Wrote Plutarch of Caius Marius:

It is told of him, that having at one time given the city to one thousand men of Camerinum who had behaved valiantly in this war, and this seeming to be illegally done, upon some one or other calling him to an account for it, he answered, that the law spoke too softly to be heard in such a noise of war. . . .

PLUTARCH, THE LIVES OF THE NOBLE GRECIANS AND ROMANS 511 (Modern Library ed., J. Dryden trans. 1932).

133. 752 F. Supp. 1141 (D.D.C. 1990).

war or similar express congressional authorization for such a military move.¹³⁴ Judge Harold H. Greene of the U.S. District Court, District of Columbia, briefly reviewed the history of Iraq's invasion of Kuwait and the deployment of U.S. and multinational forces to the Persian Gulf region antecedent to President Bush's November 9, 1990, announced goal of an offensive military capacity. He recounted that Congress had neither been requested by President Bush to, nor independently chosen to, declare war¹³⁵ as it constitutionally is empowered to do.¹³⁶ On November 19, 1990, the plaintiffs brought their action on the premise that an American military offensive was imminent but would be unlawful for want of a congressional declaration of war, and that war without congressional concurrence would deny the plaintiffs a voice constitutionally guaranteed them.¹³⁷

Judge Greene noted that the American Civil Liberties Union had filed a memorandum as *amicus curiae* supportive of the plaintiffs' position;¹³⁸ on that brief was University of California, Davis, Law School Professor Michael J. Glennon.¹³⁹ Likewise, a number of other prominent law professors filed an *amicus curiae* memorandum supporting the plaintiffs' stance.¹⁴⁰ Their names represent a rollcall of prestigious American constitutionalists: Bruce A. Ackerman, Abram Chayes, Lori Fisler Damrosch, John Hart Ely, Erwin N. Griswold, Gerald Gunther, Louis Henkin, Harold Hongju Koh, Philip B. Kurland, Laurence H. Tribe, and William W. Van Alstyne.¹⁴¹

For the President, the Department of Justice opposed the motion for a preliminary injunction and likewise moved to dismiss. The administration's pleadings did not reach the merits.¹⁴² The Department urged that the complaint raised a nonjusticiable political question, that plaintiffs lacked standing, that the plaintiffs' claim breached established canons of equity jurisprudence, and that the interbranch allocation of warmaking powers issue remained unripe.¹⁴³

A. *The Political Question Issue*

Congress, under Article I, section 8 of the Constitution, not only enjoys the power to declare war but to raise and support armies,¹⁴⁴ provide and

134. *Id.* at 1143 n.1.

135. *Id.* at 1143-44.

136. U.S. CONST. art. I, § 8, cl. 11.

137. *Dellums v. Bush*, 752 F. Supp. 1141, 1144 (D.D.C. 1990).

138. *Id.* at 1144, n.2.

139. Glennon, *supra* note 27, at 89 n.

140. *Dellums v. Bush*, 752 F. Supp. 1141, 1144 n.2 (D.D.C. 1990).

141. Memorandum *Amicus Curiae* of Law Professors, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1.C.1 1990).

142. Glennon, *supra* note 27, at 89.

143. *Dellums v. Bush*, 752 F. Supp. 1141, 1144 (D.D.C. 1990).

144. U.S. CONST. art. I, § 8, cl. 12.

maintain a navy,¹⁴⁵ make rules for the government and regulation of the land and naval forces,¹⁴⁶ and to make such other laws as are necessary and proper for execution of the enumerated powers.¹⁴⁷ Article II meanwhile vests the executive power in the President,¹⁴⁸ and provides for the President to be commander in chief of the army and navy.¹⁴⁹ Relying upon the political question doctrine,¹⁵⁰ the Justice Department posited that the existence simultaneously of all such provisions renders it impossible to isolate the warmaking authority:¹⁵¹ the constitutional design must be to have these varied provisions harmonized as a political rather than a legal matter.¹⁵² The political question doctrine hinging upon both the separation of powers and the inherent limitations of the judiciary, the Justice Department contended that whether an American military offensive presents an act of war, to be triggered by a congressional declaration, or impelled by the President as commander in chief, is a judgment call beyond the assessment of the objective facts.¹⁵³

The court rejected the claims. Where, as in the Operation Desert Shield context, the forces deployed are of such size and strength that no one seriously could deny that war must ensue were they to engage in battle, congressional approval clearly is required if Congress chooses to involve itself.¹⁵⁴

Nonetheless, the Justice Department insisted that the *Dellums* case remained a political question because to settle the dispute the judiciary must inject itself into foreign affairs.¹⁵⁵ The Court cited such major precedents as *United States v. Curtiss-Wright Export Corp.*¹⁵⁶ and *Youngstown Sheet & Tube Co. v. Sawyer.*¹⁵⁷ The former opinion had styled the President the sole organ of the federal government in the foreign policy field.¹⁵⁸ The latter had weighed whether, during the Korean War, President Harry S Truman had moved unconstitutionally in ordering the Secretary of Commerce to seize and operate most of the nation's steel mills.¹⁵⁹ (Such is the

145. U.S. CONST. art. I, § 8, cl. 13.

146. U.S. CONST. art. I, § 8, cl. 14.

147. U.S. CONST. art. I, § 8, cl. 18.

148. U.S. CONST. art. II, § 1, cl. 1.

149. U.S. CONST. art. II, § 2, cl. 1.

150. *Dellums v. Bush*, 752 F. Supp. 1141, 1145 (D.D.C. 1990).

151. *Id.* at 1144.

152. *Id.* at 1144-45.

153. *Id.* at 1145.

154. *Id.*

155. *Id.* at 1146.

156. 299 U.S. 304 (1936); Swan, *The Political Economy of Presidential Foreign Policymaking: The Contemporary Theory of a Bifurcated Presidency*, 21 CALIF. W. INT'L L.J. 67, 72-74 (1990).

157. 343 U.S. 579 (1952); Swan, *supra* note 156, at 76-79.

158. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

159. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

propensity of the presidency to amass domestic power in the name of international defense that in 1991 Truman's Counsel to the President, Clark Clifford, still endorsed the option of a well-posthostilities (1946) takeover by Truman of the national coal and railroad industries undergoing labor unrest, to impress foreign tyrants with Truman's strength;¹⁶⁰ even thus does the national security state eclipse the entirety of the presidency.¹⁶¹ The court concluded the Justice Department to be wrong. Courts routinely decide cases which relate to, or even substantially impact upon, defense and foreign policy.¹⁶²

B. Ange v. Bush

Judge Greene's refusal in *Dellums* to apply the political doctrine defense contrasts with U.S. District Court, District of Columbia, Judge Royce C. Lamberth's simultaneous December 13, 1990, opinion in *Ange v. Bush*.¹⁶³ The *Ange* plaintiff, Sergeant Michael Ray Ange, had claimed in relevant part that an order from President Bush deploying Ange to the Persian Gulf had exceeded the presidential authority¹⁶⁴ under both the War Powers Clause¹⁶⁵ and the War Powers Resolution.¹⁶⁶ Judge Lamberth dismissed that portion of that case, argued at a hearing of December 10, 1990,¹⁶⁷ challenging Ange's deployment order as positing nonjusticiable political questions¹⁶⁸ (which the court also found not yet ripe).¹⁶⁹

Sergeant Ange had requested an injunction requiring he be returned to the

160. C. CLIFFORD, COUNSEL TO THE PRESIDENT: A MEMOIR 88 (1991).

Under the urgency of telephone and coal strikes in the winter of 1946, Congress addressed itself to the problems raised by "national emergency" strikes and lockouts. The *termination of wartime seizure powers on December 31, 1946*, brought these matters to the attention of Congress with vivid impact. A proposal that the President be given powers to seize plants to avert a shutdown where the 'health or safety' of the nation was endangered, was thoroughly canvassed by Congress and rejected.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 598-599 (1952) (Frankfurter, J.) (emphasis added).

161. "[S]ince 1945, . . . one presidential role, that of commander in chief, has come to predominate over all others." Will, . . . *And John Sonunu Over the Line*, Wash. Post, June 30, 1990, at C7, cols. 3-4. Pulitzer Prize-winning political journalist Dr. George F. Will in this essay cites to the Wilson passage quoted at the opening of the instant article. *Id.* at col. 4.

162. *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990).

163. 752 F. Supp. 509 (D.D.C. 1990).

164. *Id.* at 510.

165. U.S. CONST. art. I, § 8, cl. 11.

166. 50 U.S.C. § 1541, *et seq.* (1973).

167. *Ange v. Bush*, 752 F. Supp. 509, 510 (D.D.C. 1990).

168. *Id.*

169. "Because the court cannot find the President's 'threat' to involve the United States in war without Congressional consent is anything but speculative, the court finds that Ange's War Powers Clause and War Powers Resolution claims are not ripe for judicial review." *Id.* at 515.

U.S.¹⁷⁰ The *Ange* opinion explained that each of the determinations sought in the Sergeant's challenges to the presidential moves in the Gulf was one which the judiciary cannot render under the separation of powers principles embodied within the judiciary's equitable discretion and in the political question doctrine.¹⁷¹ It decided that the Constitution entrusts resolution of the war powers dispute to the political branches rather than to the courts.¹⁷² Should Congress conclude the President's deployment in the Gulf to have been unconstitutional, according to the *Ange* opinion, Congress could declare war on its own, exploit its appropriations power to frustrate further military action in the Gulf, or impeach the President.¹⁷³ Judge Lamberth did recognize that *Ange* presented a dispute wherein the plaintiff might not obtain any relief, because the Sergeant might not motivate Congress to forestall what *Ange* felt an unconstitutional usurpation of the congressional war power:¹⁷⁴ violations of the Constitution might, sometimes, go unredressed.¹⁷⁵

C. *The Issues of Standing, Remedy, and Ripeness*

The Justice Department next asserted in *Dellums* that the plaintiffs lacked standing to pursue their action.¹⁷⁶ Those plaintiffs averred that their interests guaranteed by the Constitution's War Clause was in imminent danger of being compromised by a presidential assault against Iraq.¹⁷⁷ The court determined this to be a legally-cognizable injury, members of Congress having a plain interest in defending their right to vote on questions entrusted constitutionally to their respective chambers.¹⁷⁸ When the Department of Justice discounted the threat of injury in *Dellums* as a mere possibility,¹⁷⁹ the court disagreed. With nearly 400,000 American troops stationed in Saudi Arabia, with their troop rotation and leaves suspended, and with the President having vigorously acted to elicit a U.N. Security Council resolution authorizing the use of force to evict the Iraqis from Kuwait, it was disingenuous to characterize the plaintiff's allegations of the imminent prospect of a military offensive as conjectural and remote.¹⁸⁰

170. *Id.* at 511.

171. *Id.* at 512.

172. *Id.* at 514.

173. *Id.*

174. *Id.* at 518 n.8.

175. *Id.*, citing *Melcher v. Federal Open Market Committee*, 836 F. 2d 561, 565 (D.C. Cir. 1987).

176. *Dellums v. Bush*, 752 F. Supp. 1141, 1147 (D.D.C. 1990).

177. *Id.*

178. *Id.*, citing *Moore v. United States House of Representatives*, 733 F.2d 946, 950 (D.C. Cir. 1984).

179. *Dellums v. Bush*, 752 F. Supp. 1141, 1147 (D.D.C. 1990).

180. *Id.* at 1148.

The Department of Justice raised, too, the doctrine of remedial discretion, evidencing as it does a concern for the separation of powers engendered when a member of Congress asks a court to rule on a statute's constitutionality simply due to the member's failure to win the backing of a majority of his colleagues. However, the decisions which on the basis of this doctrine have dismissed actions have almost invariably involved congressional plaintiffs locked in intracongressional battles or seeking a ruling upon a statute's constitutionality.¹⁸¹ In the former situation the congressional plaintiff has the remedy of changing or enforcing the internal rules of Congress; in the latter, the remedy is repeal or amendment of the alleged supposedly unconstitutional enactment.¹⁸² Yet in *Dellums* neither such remedy could afford the relief sought by plaintiffs; this defense was, consequently, rebuffed by the court.¹⁸³

Dellums declares that an injunction may issue at the solicitation of Members of Congress to prevent a war about to be unleashed without congressional authorization.¹⁸⁴ But Congress had not indicated whether it felt a declaration of war either necessary or imprudent.¹⁸⁵ Hence, the *Dellums* court elected the course charted in Justice Lewis F. Powell's concurrence in *Goldwater v. Carter*.¹⁸⁶ a congressional-presidential dispute remains unready for judicial review until each branch has acted to assert its constitutional authority.¹⁸⁷

It scarcely would be fitting for a court—by an injunctive decision (called for by only some ten percent of its membership) that unless Congress declares war the President is immobilized—to force a choice upon Congress.¹⁸⁸ Plaintiffs cannot, via an injunctive suit against the President, receive relief from the action or inaction of their congressional colleagues.¹⁸⁹ The President similarly is entitled to protection from an injunction respecting a declaration when there is no evidence that this is the desire of the legislative branch (as distinguished from a fraction thereof).¹⁹⁰ The majority of Congress alone is competent to declare war, and consequently that majority alone can seek a judicial order forestalling the executive from in effect declaring war.¹⁹¹

181. *Id.*

182. *Id.* at 1149.

183. *Id.*

184. *Id.*

185. *Id.* at 1149-50.

186. 444 U.S. 996 (1979).

187. *Id.* at 997-98 (1979) (Powell, J., concurring in the judgment); Swan, *supra* note 30, at 401.

188. *Dellums v. Bush*, 752 F. Supp. 1141, 1150-51 (D.D.C. 1990).

189. *Id.* at 1151 n.27.

190. *Id.* at 1151.

191. *Id.*

VII. THE *DELLUMS* AFTERMATH

Representative Dellums on December 13, 1990, announced his satisfaction with Judge Greene's ruling in *Dellums*.¹⁹² Judge Greene having indicated the necessity for Congress as a body to advance its claim to Persian Gulf war decisionmaking, Representative Dellums said: "We are in the process of framing that strategy now."¹⁹³ Director of the American Civil Liberties Union Washington Office Morton H. Halperin that day added:

It is now crucial that Congress pass a Concurrent Resolution that says no offensive military action shall be initiated by U.S. forces in the Persian Gulf without the affirmative approval of Congress as required by article I, section 8, clause 11 of the U.S. Constitution. Such a resolution will be offered in the House when it reconvenes on January 3 by Congressman Charles Bennett (D-FL) and Richard Durbin (D-IL). The Senate should take up the same measure at that time as well, and upon passing the resolution, both Houses should join the *Dellums* lawsuit.¹⁹⁴

There would, nonetheless, be no Concurrent Resolution saying no offensive military action should be initiated by American forces in the Persian Gulf without the affirmative approval of Congress. On Thursday, November 8, 1990, twelve days after adjournment of the 101st Congress,¹⁹⁵ Bush had told a news briefing:

After consultation with King Fahd of Saudi Arabia and our other allies, I have today directed the Secretary of Defense to increase the size of U.S. forces committed to Desert Shield to ensure that the coalition has an adequate offensive military option should that be necessary to achieve our common goals. Toward this end, we will continue to discuss the possibility of both additional allied force contributions and appropriate United Nation actions.

Iraq's brutality, aggression, and violations of international law

192. R. Dellums, Press Release, *Dellums Pleased With Court Ruling on His Suit*, (Dec. 13, 1990) (available at California Western School of Law).

193. *Id.*

194. M. Halperin, Press Release, *ACLU Calls Greene Opinion in Dellums Case a Great Victory for the Constitution*, (Dec. 13, 1990) (ACLU News) (available at California Western School of Law).

195. "[W]hat happened on November 8—two days after the election— . . . suddenly lurched us into a Cold War mode." Moynihan, *A Return to Cold War Thinking* (Speech of January 10, 1991), in *THE GULF READER: HISTORY, DOCUMENTS, OPINIONS*, *supra* note 14, at 284.

cannot be allowed to succeed. . . .¹⁹⁶

The majority leadership of the Senate and House had been given special authority to call the 101st Congress back into session under the unusual terms of the October 27, 1990, adjournment resolution.¹⁹⁷ That instrument resolved:

That when the House adjourns on the legislative day of October 27, 1990, and the Senate adjourns on Saturday, October 27, Sunday, October 28 or Monday, October 29, 1990, they stand adjourned sine die or until noon on the second day after Members are notified to reassemble pursuant to section 2 of this concurrent resolution.

Sec. 2. The Speaker of the House and the Leader of the Senate, acting jointly after consultation with the Minority Leader of the House and the Minority Leader of the Senate, shall notify the Members of the House and Senate, respectively, to reassemble whenever, in their opinion, the public interest shall warrant it.¹⁹⁸

Senators ranging from Edward M. Kennedy to Richard Lugar urged the leadership to recall Congress into session immediately after the President's November 8, 1990, announcement.¹⁹⁹ The primary justification for inaction was that the 101st Congress had become a lame-duck.²⁰⁰

While the White House opined that the President did not need a congressional declaration of war, President Bush wanted a congressional resolution that would lift any doubt—particularly concerning the Saudis and other coalition partners—that the American populace was willing to fight for

196. *The President's News Conference: November 8, 1990, Weekly Compilation of Presidential Documents*, Nov. 12, 1990, at 1789, 1790.

Q. Mr. President, it sounds like you're going to war. You have moved from a defensive position to an offensive position, and you have not said how many more troops you are sending or, really, why.

The President. Well, I've said why right now. And I hope it's been very clear to the American people.

Q. Are there new reasons that have moved this posture?

The President. No, it's just continuing to do what we feel is necessary to complete our objectives, to fulfill our objectives, that have been clearly stated.

Id. at 1791.

197. Glennon, *supra* note 27, at 97.

198. H. Cong. Res. 399, 101st Cong., 2d Sess., Cong. Rec. H. 12370, S. 16999, (daily ed. Oct. 27, 1990).

199. Glennon, *supra* note 27, at 97.

200. *Id.*

the liberation of Kuwait.²⁰¹ As early as November 14, 1990, President Bush had met with bipartisan congressional leaders and read aloud Iraqi headlines picturing American disunity, and also pulled out a pocket-sized copy of the Constitution to read: "The President shall be Commander-in-Chief. . . ." ²⁰² He then had solicited the leadership to call a postelection special session of Congress, but only if the President were to receive a substantial vote favoring his military initiatives.²⁰³

During November 1990,²⁰⁴ Secretary Baker had persuaded Foreign Minister Shevardnadze to accept the "all necessary means" language of proposed Security Council Resolution 678. Baker said that since Baker would be temporary president of the Security Council for the Resolution 678 voting, Baker would *afterward* characterize the language as unambiguously authorizing "force"; Baker's characterization would form a part of the permanent record, and so interpret "all necessary means" if unobjected to.²⁰⁵ After the divided vote, Baker indeed said: "Today's resolution is very clear. The words authorize the use of force," ²⁰⁶

On January 8, 1991, President Bush met in the Cabinet Room with his White House legal counsel, C. Boyden Gray, and with the senior lawyers from the departments.²⁰⁷ The President asked for evaluation of his legal authority to conduct military operations against the Iraqis.²⁰⁸ Deputy Attorney General William P. Barr replied that in the opinion of Barr and of the senior department lawyers the President holds complete authority to conduct military operations, as the commander in chief (regardless of whether Congress voted a supporting resolution).²⁰⁹ Barr reported that the President is constitutionally empowered to employ the armed forces and the Congress is constitutionally empowered to provide those forces and the laws whereunder they serve. The congressional remedy for utilization of the armed forces in ways Congress disapproves is to take away the military's funding.

Even a congressional resolution inconsistent with the President's war policy would not negate the presidential authority: Congress merely could withhold funding or disband the forces.²¹⁰

On January 9, 1990, President Bush shared this exchange at his press

201. R. PYLE, *supra* note 21, at 125.

202. B. WOODWARD, *supra* note 2, at 326, quoting U.S. CONST. art. II, § 2, cl. 1.

203. B. WOODWARD, *supra* note 2, at 326.

204. *Id.* at 333.

205. *Id.* at 334.

206. *Id.* at 335.

207. *Id.* at 356.

208. *Id.*

209. *Id.* at 356-57. On October 16, 1991, President Bush nominated Barr to be Attorney General. Rosenthal, *Bush Nominates Deputy as Head of Justice Dept.*, N.Y. Times, Oct. 17, 1991, at 1, col 1.

210. B. WOODWARD, *supra* note 2, at 357.

conference regarding a Congressional use of force resolution:

Q. Do you think you need such a resolution? And if you lose it, would you be bound to that?

The President. I don't think I need it. I think Secretary Cheney expressed it very well the other day. There are different opinions on either side of this question, but Saddam Hussein should be under no question on this: I feel that I have the authority to fully implement the United Nations resolutions.

Q. And the question of being bound—the second part of that?

The President. I still feel that I have the constitutional authority—many attorneys having so advised me.²¹¹

Immediately following the January 9, 1991, meeting in Geneva of Secretary Baker with Iraqi Foreign Minister Tariq Aziz, President Bush told his news conference:

I sent Secretary Jim Baker to Geneva, not to negotiate, but to communicate, and I wanted Iraqi leaders to know just how determined we are that the Iraqi forces leave Kuwait without condition or further delay. Secretary Baker made clear that by its full compliance with the twelve relevant United Nations Security Council resolutions, Iraq would gain the opportunity to rejoin the international community. And he also made clear—he also made clear how much Iraq stands to lose if it does not comply.

Let me emphasize that I have not given up on a peaceful outcome. It's not too late. I've just been on the phone subsequent to the Baker press conference with King Fahd, with President Mitterrand, to whom I've talked twice today, Prime Minister Mulroney, and others are contacting other coalition partners to keep the matter under lively discussion. It isn't too late.

But now, as before, as it's been before, the choice of peace or war is really Saddam Hussein's to make.²¹²

These remarks prove, notwithstanding *Dellums*, the practical triviality (this is not to say, legal triviality) of the January 12, 1991, Authorization for Use of Military Force against Iraq Resolution. The President on November 8,

211. *The President's News Conference: January 9, 1991, Weekly Compilation of Presidential Documents*, Jan. 14, 1991, at 23, 25.

212. *Id.* at 23.

1990, announced his postelection offensive buildup, and on January 9, 1991, announced his ultimatum ("not to negotiate") threatening "war" enforcing Security Council Resolution 678. He did so although his administration took no position on Arab-Arab border disagreements, although his original preelection stance had been "wholly defensive," although enforcement of Resolution 678 was not binding on the United States, when interpretation of Resolution 678 as authorizing force was made by his own creature, the Secretary of State, and although Congress had not yet resolved in favor of the war option.

The retrospective military appraisal of the war proved be that the President most ably had served as commander in chief by releasing his subordinates to perform exactly the same as if they had no commander superior to them. As General H. Norman Schwarzkopf summarized in his celebrated Central Command briefing in Riyadh on February 27:²¹³

Q: I'm wondering if your recommendation and analysis were accepted without change.

A: I'm very thankful for the fact that the President of the United States has allowed the United States military and the coalition military to fight this war exactly as it should have been fought. *The President in every case has taken our guidance* and our recommendations to heart and has acted superbly as the Commander-in-Chief of the United States.²¹⁴

Here constitutional lawyers might ponder sociologist C. Wright Mills' evaluation of the post-*Curtiss-Wright* military-industrial complex: "From the military's standpoint, perhaps the ideal civilian at the top would be a front to Congress but a willing tool of military decision."²¹⁵ Also, constitutionalists might heed a second feature of General Schwarzkopf's expression of gratitude, beyond the military formulation of the superb commander in chief as one who without exception takes guidance from his inferiors.

This General actually thinks the President is "Commander-in-Chief of the United States."²¹⁶ However, the Constitution's President is just the

213. R. PYLE, *supra* note 21, at 239.

214. *Id.* at 7, 264 (emphasis supplied).

215. C. MILLS, *THE POWER ELITE* 188 (1956).

216. R. PYLE, *supra* note 21, at 264. Like Gen. Schwarzkopf, former Lt. Col. Oliver L. North greatly exaggerates the constitutional reach of being Commander in Chief:

The Constitution gives the president the chief responsibility for setting U.S. foreign policy. That's why the Constitution refers to him as the "commander-in-chief."

North, *Congress should end the torture for good*, CONSERVATIVE CHRONICLE, October 2, 1991, at 14, col. 3. Both men confound a mere military Commander with a universal Commander.

commander in chief of the federal armed forces, not of the country at large. Indeed, the President only sometimes, and then conditionally, becomes commander in chief of the state militias.²¹⁷ Since 1960, the President has been identified not solely as the commander of the entire American people, but of the whole free world.²¹⁸ A constitutional clause supposed to keep the military subordinate to a civilian President is nowadays cited to awe the civilian citizenry with the aura glorifying the President through his tie to the military. Given this aftermath of *Dellums*, who now will chain the dogs of war?

VIII. WILL CONGRESS, OR THE COURTS, CHAIN THE DOGS OF WAR?

A. *Glennon and Franck on the Dogs of War*

In his *Dellums* postmortem, Professor Glennon found the record of Presidents Bush's August 1990 unilateral military commitment in the Gulf to the January 12, 1991, Authorization for Use of Military Force against Iraq Resolution²¹⁹ offered the textbook example of a bold executive, compliant legislature, and deferential judiciary pushing the constitutional separation of powers system backward toward the King George III model.²²⁰ If the judiciary shrinks from intervening when the executive fundamentally menaces the separation of powers, it is the executive which becomes final arbiter of the Constitution.²²¹ Glennon is not the only constitutional scholar to share such concerns in light of Operation Desert Shield and Operation Desert

217. U.S. CONST. art. II, § 2, cl. 1.

218. As recalled by Dr. Garry Wills:

The President is the Commander-in-Chief of the Armed Forces, not of the citizenry at large. But in his 1960 campaign [John F.] Kennedy assured us that the American people yearn for leadership: "They want to know what is needed—they want to be led by the Commander-in-Chief." And the President was not only the Commander-in-Chief of all American people but of the whole free world—he must be "a man capable of acting as the Commander-in-Chief of the grand alliance." Hugh Sidey significantly called his chapter on counterinsurgent warfare in other people's countries "Commander in Chief." Needless to say, the Constitution did not set up military titles for foreigners to obey. But Kennedy-[Theodore C.] Sorensen was convinced that all the world's free people yearned for a leader who enjoyed the widest powers he could lay claim to.

G. WILLS, THE KENNEDY IMPRISONMENT: A MEDITATION ON POWER 179-80 (1982).

219. S.J. Res. 2, 102d Cong., 2d Sess., Cong. Rec. S. 403-S 404 (1991). "The evolution of Anglo-American constitutionalism is in no small part a history of the decline of the war-making power as a 'prerogative' power, a history of its transfer to legislative authorities." M. GLENNON, *supra* note 5, at 228. *Cf. id.* at 285.

220. Glennon, *supra* note 27, at 84.

221. *Id.* at 94.

Storm. Professor Edward Keynes²²² insisted on January 13, 1991,²²³ that the only warmaking authority the President wields constitutionally is his capacity to repel sudden attacks against America's soil, armed forces, or citizenry at home or abroad.²²⁴

Glennon finds the flaw in the Powell approach adopted in *Dellums* to be that it bars a court from invalidating an unconstitutional presidential ploy unless Congress first reiterates the demands the Constitution makes from the start.²²⁵ Glennon proposes amending the War Powers Resolution²²⁶ to facilitate judicial review by preventing a judicial retreat like that in *Dellums*.²²⁷ It can state expressly that presidential noncompliance with the War Powers Resolution creates an impasse within the meaning of the ripeness doctrine, and that the political question doctrine cannot afford grounds for dismissal insofar as it is not constitutionally mandated.²²⁸

Consistent with Glennon, Dr. Thomas M. Franck,²²⁹ shortly post-Operation Desert Storm assailed the oft-quoted opinion²³⁰ in *United States v. Curtiss-Wright Export Corp.*²³¹ cited in *Dellums*.²³² He rues the *Curtiss-Wright* suggestion that the President must be the sole organ in foreign relations and that the federal government is vested with powers of external

222. "Edward Keynes and his former student Randall K. Miller have produced a meritorious work [*The Courts vs. Congress: Prayer, Busing, and Abortion*, 1989] divisible into two parts." Swan, *Book Review*, 7 CONSTITUTIONAL COMMENTARY 416 (1990).

223. E. KEYNES, *supra* note 37, at xvii.

224. *Id.* at xiii.

225. Glennon, *supra* note 27, at 95. Cf. M. GLENNON, *supra* note 5, at 323-25.

Suppose Congress rendered a split decision, i.e., the authorization to use force passed one house but failed in the other. What if the House passed a measure authorizing the use of military force, but the Senate passed a resolution prohibiting the use of force in the Gulf without a specific declaration of war? What if only one house of Congress passed any of these resolutions and the other house was silent? Majority action by both houses of Congress, regardless of the outcome, clearly makes the decision justiciable.

Clark, *Questioning the Constitutional Distribution of War Powers in the Wake of the Iraqi Crisis and Operation Desert Shield/Storm*, 15 SO. ILL. U.L.J. 669, 681 (1991).

226. 50 U.S.C. § 1547 (1973).

227. Glennon, *supra* note 27, at 99.

228. *Id.* at 99-100.

229. Dr. Franck is the author of, *inter alia*, FOREIGN POLICY BY CONGRESS (1979); CONTROL OF SEA RESOURCES BY SEMI-AUTONOMOUS STATES (1978); RESIGNATION IN PROTEST (1975); SECRECY AND FOREIGN POLICY (1973); A FREE TRADE ASSOCIATION (1968); WHY FEDERATIONS FAIL (1968); THE STRUCTURE OF IMPARTIALITY (1968); COMPARATIVE CONSTITUTIONAL PROCESS (1968); EAST AFRICAN UNITY THROUGH LAW (1965); THE UNITED NATIONS IN THE CONGRESS (1963); and RACE AND NATIONALISM (1960). Dr. Franck and Prof. Glennon co-authored T. FRANCK & M. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW (1988).

230. Franck, *Courts and Foreign Policy*, FOREIGN POLICY 66, 69 (No. 83 1991).

231. 299 U.S. 304 (1936).

232. *Dellums v. Bush*, 852 F. Supp. 1141, 1146 (D.C.C. 1990).

sovereignty not dependent upon the Constitution's positive grants of power:²³³ "It would be difficult to think of a jurisprudential notion more at odds with the text of the Constitution and the intent of its framers."²³⁴

Just as Glennon hopefully promotes judicial review of foreign military policy, Franck helpfully recounts that the experiences of two nations whose constitutional structures resemble closely the U.S. system demonstrate the workability of an expanded judicial review.²³⁵ Both the Dominion of Canada and the Federal Republic of Germany have written constitutions, federal systems, and vested constitutional rights.²³⁶ The Supreme Court of Canada and the German Constitutional Court both have been invited to shun foreign affairs matters; both specifically have rejected that invitation.²³⁷ There is no credible reason why in the U.S. foreign relations, any more than in Canada or Germany, should be exempt from a restricted yet systemically crucial level of court supervision.²³⁸

The borders of the constitutionally tolerable expand or contract circumstantially. Hence, once the judiciary reviews the constitutionality of a foreign policy matter it at once inquires into those special circumstances which comprise the foreign relations field.²³⁹ Such questions must be resolved before the judiciary can rule upon foreign policy cases as they do other cases.²⁴⁰ Franck discovers answers for American judges with respective precedents addressing a state gubernatorial power, and the federal congressional power.

In the Supreme Court's 1932 opinion in *Sterling v. Constantin*,²⁴¹ the Justices reviewed a state governor's defense that he had expropriated the plaintiff's property under the governor's constitutional authority to resist insurrection and riot. He argued that because his decision was political it was beyond judicial review. But Franck recounts that the Supreme Court rejected this defense, instead fashioning the sensible rule of evidence that great weight be accorded the governor's good faith belief in the necessity summoning gubernatorial emergency measures.²⁴²

233. Franck, *supra* note 230, at 69-70. Cf. M. GLENNON, *supra* note 5, at 7-8.

234. Franck, *supra* note 230, at 70.

235. *Id.* at 79.

236. *Id.* But of course Canada's vested constitutional rights date only from 1982. Swan, *Article III, Section 2, Exceptions Clause Canadian Constitutional Parallels: Canada Teaches the United States an American History Lesson*, 13 CALIF. W. INT'L L.J. 37, 43 (1983); E. MCWHINNEY, CANADA AND THE CONSTITUTION 1979-1982: PATRIATION AND THE CHARTER OF RIGHTS (1982). The most recent discussion in the American legal literature of constitutional control of military action in Germany is Damrosch, *Constitutional Control of Military Actions: A Comparative Dimension*, 85 A.J.I.L. 92, 99-103 (1991).

237. Franck, *supra* note 230, at 79.

238. *Id.* at 81.

239. *Id.*

240. *Id.* at 82.

241. 187 U.S. 378 (1932).

242. Franck, *supra* note 230, at 82.

In the Supreme Court's 1977 opinion in *Fiallo v. Bell*,²⁴³ Franck approvingly records, the Supreme Court applied a corresponding evidentiary rule in reviewing the equal protection constitutionality of a statute facially discriminating by granting priority in applying for entry into the U.S. of the illegitimate children of American mothers over those of American fathers: "Applying a theory of 'limited judicial review,' the Court affirmed the decision of the District Court, which had refused to overturn the distinction chosen by Congress because the plaintiff had not shown that it was 'wholly devoid of any conceivable rational purpose' or 'fundamentally aimed at achieving a goal unrelated to the regulation of immigration.'"²⁴⁴

B. Congress and the Dogs of War

Expanded judicial review of foreign warmaking, as under an amended War Powers Resolution, Glennon feels imperative if that Resolution is not to be repealed altogether.²⁴⁵ Aside, at least, from the legislative veto case of *INS v. Chadha*,²⁴⁶ Congress never has lost a war powers dispute against the President which the Supreme Court has adjudicated on its merits.²⁴⁷ Indeed, it has been said that never in history has the Supreme Court invalidated any foreign relations enactment by Congress.²⁴⁸ But, Glennon unfortunately misapprehends the Constitution under which Congress has operated through the generations following the 1936/1938 interval.

Since *Curtiss-Wright* the President has made foreign policy wholly unchecked by any judicially-enforced principle of the Constitution. Since *NLRB v. Jones & Laughlin Steel Corp.*,²⁴⁹ Congress has made economic policy entirely unchecked by any judicially-enforced principle of the Constitution. (According to West Virginia Supreme Court of Appeals Justice Richard Neely: "Legislatures are interested in economic rather than social issues, because economic issues deliver the money or votes to win elections."²⁵⁰) Since *United States v. Carolene Products Co.*,²⁵¹ the federal

243. 430 U.S. 787 (1977).

244. Franck, *supra* note 230, at 83, quoting *Fiallo v. Bell*, 430 U.S. 787, 791 (1977).

245. Glennon, *supra* note 27, at 98.

246. 462 U.S. 919 (1983); Swan, *The Political Economy of the Separation of Powers: Bowsher v. Synar*, 17 CUMBERLAND L. REV. 795, 811-14 (1987). Cf. M. GLENNON, *supra* note 5, at 98-99 and 108-109. "[I]n only one case . . . has any court invalidated an act of Congress on the ground that it violated general presidential foreign-affairs powers." M. GLENNON, *supra* note 5, at 13 (Glennon's emphasis) (citing *National Federation of Federal Employees v. United States*, 695 F. Supp. 1196 (D.D.C. 1988)).

247. Glennon, *supra* note 27, at 98.

248. L. HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 77 (1990).

249. 301 U.S. 1 (1937).

250. R. NEELY, WHY COURTS DON'T WORK 241 (1983).

251. 304 U.S. 144 (1938).

One of the most extraordinary things about the last twenty years of civil rights law is that Congress has had virtually nothing to do with large parts of it. The *Griggs*

judiciary, especially the Supreme Court, has made social policy (particularly over the states) absolutely unchecked by any principle of the Constitution. The role of the states, who created the federal government,²⁵² is simply to obey these federal organs even through the point (of interest given Operations Desert Shield and Desert Storm) of the call of their National Guards to active duty to train abroad in peacetime with neither the consent of their state governors nor a declaration of national emergency.²⁵³

Curtiss-Wright most properly is analogized to *Jones & Laughlin Steel Corp.* because both (not merely the latter) demonstrate judicial retreat from constitutionally checking the two other branches of the federal government during the New Deal. In the famous 1935 case of *A.L.A. Schechter Poultry Corp. v. United States*,²⁵⁴ the Supreme Court had invalidated under the delegation doctrine a statutory centerpiece of the New Deal²⁵⁵ because the President had been empowered to impose upon the poultry industry virtually any regulation he liked.²⁵⁶ In *Curtiss-Wright*, the Supreme Court hastened to concede that what would be invalid under the delegation doctrine if directed toward domestic issues need not be invalid if aimed at foreign relations.²⁵⁷

Glennon argues:

If the President, acting alone, promulgated a new tax code and directed executive branch officials to commence its implementation, would that not represent a plain constitutional violation that the courts have full power to overturn? There is no reason to think that under such circumstances—or the facts of *Dellums*, where the president claimed power to commence war against Iraq—the courts are powerless to act unless effectively permitted to do so by Congress.²⁵⁸

disparate impact test and virtually the entire law of affirmative action were forged by federal judges and administrative agencies, not Congress. And though Congress came close to assuming responsibility for these policies when it amended Title VII in 1972, it backed off then and has silently acquiescent ever since.

Something seems to have gone wrong in a democracy when Congress does not assume responsibility for policies that so fundamentally change the country.

Gewirth, *Discrimination Endgame*, NEW REPUBLIC, Aug. 12, 1991, at 18, 22, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Yale Law School Professor Paul Gewirth does not understand the separation of powers has been supplanted with a deviation of labor assigning social policy to the federal courts.

252. U.S. CONST. art. VII.

253. *Perpich v. Department of Defense*, 110 L. Ed. 2d 312, 110 S. Ct. 2418 (1990). Members of the National Guard are not even subject to the U.S. Code of Military Justice except when in federal status. 22 U.S.C. § 109(b).

254. 295 U.S. 495 (1935).

255. M. GLENNON, *supra* note 5, at 18.

256. *Id.* at 197.

257. *Id.* at 19.

258. Glennon, *supra* note 27, at 95-96.

Glennon's taxation/warfare parallel is inapposite to the post-1936/1938 realities of three unchecked branches of an unchecked central government. Congress, as Justice Neely's words suggest, clutches economic policymaking power to aggrandize itself by offering bread and circuses, and so would resist presidential interbranch encroachments concerning taxation. Meanwhile, each president can gamble upon aggrandizing himself by playing Caesar, as suggested by the second of the passages prefacing the instant article. Both branches batten longterm thanks to their division of labor. Thus, the political economy of presidential undeclared warmaking. Hence, the contemporary theory of a bifurcated presidency, whereunder the President makes foreign policy wholly unchecked while sharing with Congress domestic lawmaking chores. While Glennon's hypothetical presidential tax system concededly would call forth Congressional resistance,²⁵⁹ the President's actual undeclared foreign war ultimatum of January 9, 1991, brought forth only the January 12, 1991, Authorization for Use of Military Force against Iraq Resolution.

The indignant Glennon delivers no news in comparing the events of 1990-1991 with the reign of George III. Phillip Kurland (who jointly filed the *amicus curiae* brief for the *Dellums* plaintiff) made this point in the 1970s:

The spending power and the commerce power as construed by the Supreme Court have afforded government hegemony over all affairs of the citizens and residents of this nation. The national government is free to regulate everything, except that it must conform to the Supreme Court's interpretation of the limitations imposed by the Bill of Rights [i.e., social policy] and other specific limitations spelled out in the Constitution itself. From a government of delegated powers it has become a sovereignty with jurisdiction no different from that of the nation from which it seceded in 1776.²⁶⁰

Far from affronting Congress, this is the system Congress favors. Speaking predictively, the amended War Powers Resolution and meaningful judicial review favored by Glennon and by Franck are a combination not in the cards, as indicated by authorities they themselves cite.

Glennon remembers accurately that it was during the 1970s that the renaissance of congressional power over foreign affairs attained its peak.²⁶¹ But the November 7, 1973, War Powers Resolution itself expressly directs the judiciary never to interpret congressional appropriations as authorizing

259. Cf. *id.* at 95; M. GLENNON, *supra* note 5, at 17, citing *Yoshida International, Inc. v. United States*, 378 F. Supp. 1155 (Cust. Ct. 1974), *rev'd*, 526 F.2d 560 (C.C.P.A. 1975).

260. P. KURLAND, *WATERGATE AND THE CONSTITUTION* 174 (1978).

261. Glennon, *supra* note 27, at 98.

military actions unless Congress so provides explicit authorization in legislation:

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law whether or not in effect before November 7, 1973, including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter.²⁶²

Even at its boldest, Congress wanted to fund warfare without actually taking responsibility for war itself. However noisily they enjoy playing backseat driver, the pusillanimous²⁶³ U.S. Senators and Representatives of 1992, like their predecessors, recoil from grasping the wheel. No vote is more career-threatening than the vote on war or peace.²⁶⁴

C. *The Courts and the Dogs of War*

Franck is accurate that *Sterling* flatly denied that an executive's range of discretion conclusively supports by executive fiat any move a governor takes, however unjustified by exigency or subversive of private rights and the otherwise available jurisdiction of the courts.²⁶⁵ A governor does have a

262. 50 U.S.C. § 1547(a) (1973).

263.

But I remember, when the fight was done,
When I was dry with rage and extreme
toil, Breathless and faint, leaning upon my sword,
Came there a certain lord, neat,
trimly dressed, Fresh as a bridegroom . . .

. . . he smiled and talked; And as the soldiers bore dead bodies by,
He called them untaught knaves, unmannerly,
To bring a slovenly unhandsome corpse,
Betwixt the wind and his nobility.

W. Shakespeare, *Henry IV* (Part 1), Act I, scene 3, lines 30-34 and 41-45. The late Gen. Joseph W. Stillwell declared often that these lines were from his favorite passage in Shakespeare. J. STILLWELL, *THE STILLWELL PAPERS* xvi (T. White ed. 1948). "[W]e are the step-children of World War II. (Election coming up.) I am getting sour enough about this pusillanimous proceeding to warrant being called Vinegar Joe." *Id.* at 344 (letter of Oct. 17, 1944, from J. W. Stillwell to Mrs. Winifred A. Stillwell).

264. Glennon, *supra* note 27, at 96. Cf. M. GLENNON, *supra* note 5, at 120-21.

265. *Sterling v. Constantine*, 287 U.S. 378, 400-01 (1932).

permitted scope of action wherein to meet force with force.²⁶⁶ Yet in situations both of insurrection and of the theater of actual war the seizure or destruction of private property is a right engendered by the emergency, which emergency must be shown before the taking is justified.²⁶⁷

However, the Supreme Court's focus in *Sterling* was different from Franck's:

The question before us is simply with respect to the Governor's attempt to regulate by executive order the lawful use of complainants' properties in the production of oil. Instead of affording them protection in the lawful exercise of their rights as determined by the courts, he sought, by his executive orders, to make that exercise impossible. In the place of judicial procedure, available in the courts which were open and functioning, he set up his executive commands which brooked neither delay nor appeal. *In particular*, to the process of the Federal court actually and properly engaged in examining and protecting an asserted Federal right, the Governor interposed the obstruction of his will, subverting the Federal authority. The assertion that such action can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this Court.²⁶⁸

The true lesson of *Sterling* is, as suggested in Section VIII B above, that the states dance to the tune of federal judges even regarding the quelling of unrest within their own borders:

If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, *the proper use of that power in this instance was to maintain the Federal court in the exercise of its jurisdiction* and not to attempt to override it; to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared.²⁶⁹

The true lesson of *Fiallo* is, as suggested in Section VIII B above, that Congress makes economic policy wholly unchecked by any judicially-enforced constitutional principle. *Fiallo* declares that since decisions over matters like immigration implicate America's relations with

266. *Id.* at 399-400.

267. *Id.* at 401.

268. *Id.* at 401-02 (emphasis supplied).

269. *Id.* at 404 (emphasis supplied).

foreign powers, and inasmuch as a broad variety of classifications must be established in view of shifting political and economic contexts, the rationales precluding judicial review of political questions dictate also a narrow standard of review of congressional or presidential decisions regarding immigration and naturalization.²⁷⁰ *Fiallo* deferentially admits that “The Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”²⁷¹ *Fiallo* dissenters former Justices Marshall and Brennan, unlike Franck, grasped that exclusion of aliens on grounds of gender and illegitimacy are reviewed via a test which “turns out to be completely ‘toothless’.”²⁷² In fact, a standard treatise comprehends *Fiallo* by sharp contrast with Franck’s reading of *Fiallo*: “This decision comports with decisions deferring to the legislative power over immigration and naturalization.”²⁷³

The *Fiallo* teaching that Congress makes economic policy entirely unchecked by any judicially-enforced constitutional rule is the more vivid considering that *Fiallo* could have been treated by the Supreme Court as a social policy controversy (turning upon nationality, marriage and sex); the latter policy controversies are federal judicial, not congressional, turf under the post-1936/1938 federal interbranch division of labor. The Justices instead recognized the *Fiallo* issue as one within the economic policymaking field; therein Congress roams unchecked. The labor force in the United States, unlike that in Canada, shares a two thousand mile-long border with the Third World.

IX. THE CRISIS OF 1990-1991 AS CONSTITUTIONAL LESSON

A. Post-Curtiss Wright Undeclared War in 1991

The post-1936/1938 federal-level executive, legislative and judicial branch division of labor along foreign, economic, and social policymaking lines respectively was sensed immediately after the acceptance of Resolution 687 by Iraq. Political journalist Chris Matthews then reported Congress to be charting economic policy unchallenged, while the President likewise captained foreign policy unchecked:

Instead of competing for our support, as they once did

270. *Fiallo v. Bell*, 403 U.S. 787, 796 (1977), quoting *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976).

271. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977), quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909).

272. *Fiallo v. Bell*, 430 U.S. 787, 805 (1977) (Marshall, J., dissenting). “[T]he Court appears to hold that discrimination among citizens, however invidious and irrational, must be tolerated if it occurs in the context of the immigration laws.” *Id.* at 800.

273. M. NOWAK & R. ROTUNDA, *CONSTITUTIONAL LAW* 732 (4th ed. 1991).

passionately, Republicans and Democrats now openly collude. Instead of fighting over foreign and domestic policy, they partition the territory—one gets to control foreign affairs and big-picture economic policy, the other gets custody of domestic issues like health and Social Security.

. . . .

Which party loses in this flagrant division of the political spoils?

The American voter. Instead of getting two options in the foreign, economic and social policy issues, he gets one. If the citizen doesn't like what George Bush is offering on foreign policy, the citizen's out of luck. If the voter doesn't like what the Democrats are saying on home-front matters like health insurance or family leave legislation, he's got little alternative. George Bush is too busy running the world.

The fact is, both parties have traded territory for peace. To avoid looking weak on defense, the Democrats no longer put forward a foreign policy. Except for an occasional sniper shot at the president's treatment of the Kurds, we don't hear a peep from them about what the U.S. should be doing in the world.

The Republicans have made a similar deal. To avoid looking nasty on social programs, they no longer talk about them. When was the last time you heard a Republican mention the two words "Social Security"? The purpose of this sweet little deal is obvious. By not risking any serious attack on home-front problems, Republicans get to maintain their control of the presidency. By not having a foreign policy, Democrats avoid jeopardizing their seats on Capitol Hill.²⁷⁴

As a political journalist, Matthews understandably perceives matters dividing along partisan lines. A constitutional lawyer could read his evidence as not bespeaking a two-way partisan division of labor. She would perceive a tripartite division of branches-allocation of unchecked power (with the federal judiciary wielding unchecked national social policymaking authority). While Matthews supposes Congress to be a social policymaker, his actual

274. Matthews, *Partition Politics*, LIBERAL OPINION, Apr. 22, 1991, at 9, cols. 1, 2.

If you think this an overstatement, give yourself this pop quiz: What is the Democratic Party's foreign policy these days? What is the Democrats' fiscal policy? What is the Republican Party's domestic program? Welcome to "partition politics," a system that guards the parties from any risk and the voters from any choice.

Id. at col. 2. Cf. Matthews, *Parenthood*, NEW REPUBLIC, May 20, 1991, at 15. Christopher Matthews was a 1980 speechwriter for President Jimmy Carter. C. MATTHEWS, *HARDBALL: HOW POLITICS IS PLAYED—TOLD BY ONE WHO KNOWS THE GAME* 42 (1988).

examples (health insurance, Social Security, family leave) exemplify Congressional expansion of the welfare state.²⁷⁵

Executive branch dismissal of a Congressional role in foreign warmaking as Operation Desert Storm loomed was represented by the November 13, 1990, meeting of Secretary of Defense Richard B. Cheney with a hundred U.S. Representatives. The primary topic of their meeting was the President's post-election shift to an offensive option against Iraq. The eruption in the room hardened Cheney's belief that Congress was unequipped to handle the matter²⁷⁶: "He found himself thinking of August 1941, just four months before Pearl Harbor, when the House was able to muster only a one-vote margin for continuing the Selective Service system."²⁷⁷

B. *Post-Curtiss-Wright Undeclared War Before Pearl Harbor*

In 1936, the year of *Curtiss-Wright*, the Congressional Joint Army and Navy Selective Service Committee was assigned Army Major Lewis B. Hershey²⁷⁸ as its executive officer and secretary.²⁷⁹ By midsummer 1940, the Committee established a national headquarters and alerted previously-selected officers to set up state Selective Service programs.²⁸⁰ The Burke-Wadsworth bill of June 1940, provided for conscription for a year of service by 1,400,000 men and the incorporation of the National Guard into federal service.²⁸¹ President Franklin D. Roosevelt in July 1940, publicly announced his support. A few weeks later the bill was endorsed by Republican presidential candidate Wendell L. Willkie. The bill was passed in September and the President signed it in a White House ceremony.²⁸²

By August 1941, the 1940 conscription law was about to expire. Republicans were withholding the votes of several Representatives opposing the Selective Service Extension Act, and several others planned to switch their votes to opposition from support once they saw how many votes were necessary to defeat the measure. House rules permitted a member to switch his vote until the result was announced. But they were denied their option when Speaker of the House Sam Rayburn read the vote figures of 203 for the bill and 202 opposed. He at once pounded his gavel and announced the vote

275. Matthews does assign one social policy to the President: "Except for that old perennial, the crime bill, President Bush might as well be General Secretary of the United Nations." Matthews, *Partition Politics*, *supra* note 274, at 9, col. 2. But his own language exposes presidential crimefighting ("that old perennial") as *status quo* politics.

276. B. WOODWARD, *supra* note 2, at 325.

277. *Id.*

278. G. FLYNN, LEWIS B. HERSHEY: MR. SELECTIVE SERVICE (1985).

279. L. ROTHENBERG, THE DRAFT AND YOU 10 (1968).

280. *Id.*

281. E. LARRABEE, COMMANDER IN CHIEF: FRANKLIN DELANO ROOSEVELT, HIS LIEUTENANTS, AND THEIR WAR 117 (1987).

282. *Id.*

to freeze it:²⁸³ "He had stretched House rules to a point at which they would have broken had not the power of his iron personality stood behind his rulings. . . ."²⁸⁴

On September 11, 1941, President Roosevelt announced his order to shoot on sight German or Italian war vessels in the sea shielding America.²⁸⁵ On October 16, 1941, the *U.S.S. Kearney*, south of Iceland, was struck by a torpedo which killed eleven crewmen.²⁸⁶ On October 31, 1941, the American destroyer *Reuben James*, while engaging in convoy duty, was torpedoed and sank: 115 lives were lost.²⁸⁷ The undeclared presidential war of 1941 flowed into declared hostilities as of December 1941. In the course of the Second World War 75 percent of Army troops were procured by the draft; additional volunteers derived through threat of conscription.²⁸⁸

Dellums and the martial events of 1990-1991 teach the constitutional lesson that the potent post-*Curtiss-Wright* armed forces are wielded abroad at presidential discretion, wholly unchecked by any judicially-enforced constitutional rule. *Dellums*, Operation Desert Shield, and Operation Desert Storm thus reiterate the constitutional lesson of 1941, which witnessed the initial post-*Curtiss-Wright* undeclared foreign war. That undeclared presidential war, having no large standing military machine to exploit, reaped conscripts raised by America's first peacetime draft. In these two undeclared wars, as in the intervening eleven years of Korean and Indochina warfare, Congress contented itself with economic policymaking unchecked by any judicially-enforced constitutional rule.

Articles I, II, and III of the Constitution have been superseded by *Jones and Laughlin Steel Corp.*, *Curtiss-Wright*, and *Carolene Products* and a central government completely unchecked because no longer restraining itself.

283. R. CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 595 (1983); J. BURNS, *ROOSEVELT: THE SOLDIER OF FREEDOM* 120, 142 (1970).

284. R. CARO, *supra* note 283, at 595.

285.

In the waters which we deem necessary for our defense, American naval vessels and American planes will no longer wait until Axis submarines lurking under the water, or Axis raiders on the surface of the sea, strike their deadly blow—first. Upon our naval and air patrol—now operating in large number over a vast expanse of the Atlantic Ocean—falls the duty of maintaining the American policy of freedom of the seas—now. That means, very simply, very clearly, that our patrolling vessels and plans will protect all merchant ships—not only American ships but ships of any flag—engaged in commerce in our defensive waters. They will protect them from submarines; they will protect them from surface raiders.

Roosevelt, *When You See a Rattlesnake Poised to Strike, You Do Not Wait Until He Has Struck* (Sept. 11, 1941), in 10 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 384, 391 (1969).

286. J. BURNS, *supra* note 284, at 141.

287. A. DECONDE, *A HISTORY OF AMERICAN FOREIGN POLICY* 602 (1963).

288. J. HELMER, *THE DEADLY SIMPLE MECHANICS OF SOCIETY* 198 (1974) (data for 1941-1946).

C. *Post-Curtiss-Wright Declarations of War*

A standard constitutional treatise related in 1991 of Article I, section 8, clause 11: "The purpose of this clause was to transfer to Congress a power that in Great Britain belonged to the king, the executive branch. This purpose has not been realized."²⁸⁹ Has this atrophy of the congressional declaration of war constituted a threat to the people's freedom?

There is some plausibility for those legal analysts jealously protective of American liberties to press for an outright declaration of war under Article I whenever possible before U.S. entry into international hostilities, and to denounce the waging of undeclared wars. Congressional voting on the declaration facilitates, more accurately than would a President's exercise of wide discretion as commander in chief under Article II, decisionmaking about war and peace nearly reflective of the wishes of the American people overall. Because Congress cannot command a mighty military machine expanded in wartime, Senators and Representatives may have more incentive to resist unnecessary conflicts, and so protract Americans' enjoyment of their liberties at peace. However, the law affords prudential counterarguments whereby libertarian partisans, recognizing the need from time to time to engage in hostilities abroad,²⁹⁰ might decline an insistence upon the declaration of war, and with an eye to guarding the people's freedom prefer to acquiesce in undeclared warfare.

The congressional act of declaring war triggers grave changes. It brings into play the laws of war: territorial courts may be established, foreign-owned property may be vulnerable to confiscation, and previous treaties are severed.²⁹¹ Domestically, the power of government to control

289. J. PELTASON, CORWIN & PELTASON'S UNDERSTANDING THE CONSTITUTION 85 (12th ed. 1991).

290. Ancient authority asserts the legitimacy of drawing the sword to vindicate justice:

Let every soul be subject unto the higher powers. For there is no power but of God: Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation. For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same: For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil. Wherefore ye must needs be subject, not only for wrath, but also for conscience sake.

Romans 13:1-5 (King James). Paul teaches that the sovereign is authorized ("Wherefore") to enforce justice, but the minister of the state forfeits this ordinance if proceeding unjustly ("minister . . . for good"). The Declaration of Independence correspondingly repudiated an illegitimate rule, in the name of "the laws of nature and of nature's God." The Declaration of Independence, para. 1 (U.S. 1776).

Presupposing human law illegitimate if not premised on the law of nature and of nature's God was familiar to lawyers of the Revolutionary Era like Thomas Jefferson and John Adams. W. BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND § 2, at 29 (1902).

291. Benjamin, *Rhetoric and the Performative Act of Declaring War*, 21 PRESIDENTIAL STUDIES Q. 73, 76 (1991).

private citizens and private enterprise is multiplied and the protections guaranteed by the Constitution are practically suspended.²⁹² The performative²⁹³ congressional act of declaring war under Article I, in brief, hands the government a vast, autocratic control of men and women. Declaring war is no ritual formality but means a fundamental shift of power.²⁹⁴

The declaration of war embodying a basic power shift, the equally proper method of meeting crises with limited hostilities might be not unauthorized presidential warfare but a Congressional resolution authorizing warmaking²⁹⁵ (as did the Authorization for Use of Military Force against Iraq Resolution of January 12). This, too, is a constitutional lesson of the crisis of 1990-1991. It was affirmed in the legal literature immediately pre-Operation Desert Shield.²⁹⁶

292. *Id.*

293. The import of declaring war runs far beyond that suggested by Secretary Acheson as quoted in the text. *Supra* note 40. Modern literary criticism discerns a performative act in not only "declaring" but even in reading. J. MILLER, *VERSIONS OF PYGMALION* 8, 21-22, & 240-43 (1990).

294. Benjamin, *supra* note 291, at 76.

295. The propriety of meeting crises with "limited" hostilities is exemplified when victory can be pressed resolutely without need for mobilization so menacing domestic liberty as to be unjustifiable without a declaration of war by Congress; here what is limited is the need for mobilization (Grenada, Panama). This is not to assert the propriety of engaging in hostilities "limited" to not victory but bloody stalemate; there what is limited is presidential honoring of the mutual support partnership between the commander in chief and his troops (Korea, Indochina).

[O]nce war is forced upon us, there is no other alternative than to apply every available means to bring it to a swift end. War's very object is victory, not prolonged indecision.

In war there is no substitute for victory. . . .

MacArthur, *Address by General MacArthur to a Joint Meeting of Congress*, April 19, 1951, in R. ROVERE & A. SCHLESINGER, JR., *supra* note 74, at 269, 275. In a subsection entitled "Justice in Settlements" discussing the Korean War, M. WALZER, *supra* note 21, at 117-24, Michael Walzer (with a chapter entitled "War's Ends, and the Importance of Winning," *id.* at 109) attacks the no substitute for victory maxim as "a silly idea, since it offers no definition of victory." *Id.* at 122. But Walzer never reveals how that war actually was settled (nor even that it was settled at all): President Eisenhower successfully threatened nuclear escalation. D. EISENHOWER, *MANDATE FOR CHANGE* 181 (1963). Former President Nixon likewise conceded that Nixon should have ended the Indochina War in 1969 by undertaking his May and December 1972 bombing campaigns in early 1969. FROM: *THE PRESIDENT 1* (B. Oudes ed. 1988), *citing Meet the Press*, Apr. 10, 1988.

296. Swan, *supra* note 156, at 86-87 n. 184. *Cf.* M. GLENNON, *supra* note 5, at 77-78 and 116-117, *citing* *Bas v. Tingy*, 4 U.S. 37 (1800); *Talbot v. Seeman*, 5 U.S. 1 (1801); *Brown v. United States*, 12 U.S. 110 (1814); and J. STORY, 3 *COMMENTARIES ON THE CONSTITUTION* § 1169 (1833).

X. CONCLUSION

The preceding overview has discussed the 1990-1991 Iraq-Kuwait crisis and found that President Bush most assertively enforced the resolutions of the U.N. Security Council in rescuing Kuwait. The American part in that military showdown was not necessitated by either the U.N. Charter or the United Nations Participation Act. The U.S. role in the fighting was nonetheless constitutional, at any rate as of January 1991. In the 1990 *Dellums* case the federal judiciary had declined to curb the President's robust military policies.

Dellums comports with the post-1936/1938 federal interbranch division of labor. Thereunder the functions of an unchecked central government are severally performed by the three unchecked branches thereof. This particular mode of functionalism has facilitated the political economy program of the federal government during the past half-century at the expense of the states. The post-Operation Desert Storm musings of Profs. Glennon and Franck on how to check a runaway foreign policymaking executive are futile, because too nearly oblivious to the dynamics of the federal interbranch division of labor.

Two books produced simultaneously with Operation Desert Shield throw the Bush administration's postinvasion hostility to the threat constituted by Saddam Hussein into a longer historical perspective. The index to the 726 pages of text comprising the memoirs of President Ronald Reagan,²⁹⁷ in whose administration George Bush served as Vice-President for the eight years preceding January 20, 1989, does not even include Saddam Hussein, although he ruled Iraq throughout President Reagan's tenure. Concededly, President Reagan may not be an impressive "nuts and bolts" expert²⁹⁸ on American military policy.

Yet the 1991 memoirs of former U.S. Senator John G. Tower, former Chairman of the Senate Armed Services Committee and President Bush's own 1989 nominee for the Secretaryship of Defense, are not dissimilar. They relate Tower's intended strategy for the Bush Defense Department: "I saw that the military would be able to absorb a reasonable reduction in spending by cutting manpower, transferring some active-duty units to the reserves and *scaling back our presence in the Persian Gulf* region. Should the Soviets make good on their promises of troop and tank pullbacks from

297. R. REAGAN, AN AMERICAN LIFE (1990).

298. Memoirist Reagan quotes his diary entry of April 28, 1982, concerning his meeting a group including "Howard Bohling," *Id.* at 318, a confusion of U.S. Rep. Richard Bolling and White House Chief of Staff Howard Baker. Hertzberg, *The Child Monarch*, NEW REPUBLIC, Sept. 9, 1991, at 27, 32. Saddam Hussein was not important enough to merit a Reagan index entry, although the phantom Howard Bohling was. R. REAGAN, *supra* note 297, at 729.

Eastern Europe, I felt, additional savings could be made."²⁹⁹

The merits of redeeming oil-rich Kuwait through Operation Desert Shield and of unleashing Operation Desert Storm against Iraq (ancient Mesopotamia³⁰⁰) will come to be variously debated even by some of their participants. So could be even the most popular of foreign conflicts. Wrote one widely-hailed memoirist of another Western intervention into intra-Middle Eastern conflict, Colonel Thomas Edward Lawrence of Arabia:

[W]hen we won, it was charged against me that the British petrol royalties in Mesopotamia were becoming dubious, and French Colonial policy ruined in the Levant. I am afraid that I hope so. We pay for these things too much in honor and in innocent lives.

I went up the Tigris with one hundred Devon Territorials, young, clean, delightful fellows, full of the power of happiness and of making women and children glad. By them one saw vividly how great it was to be their kin, and English. And we were casting them by thousands into the fire to the worst of deaths, not to win the war but that the corn and rice and oil of Mesopotamia might be ours.³⁰¹

299. J. TOWER, CONSEQUENCES: A PERSONAL AND POLITICAL MEMOIR 225 (1991) (emphasis supplied).

300.

The destiny of Iraq is inextricably bound up with mystical notions of Mesopotamian antiquity. The Greeks gave Iraq the name Mesopotamia, meaning the land between the rivers. And indeed, the Tigris and Euphrates rivers form the core of present-day Iraq. Baghdad lies on the Tigris, which flows southward from Turkey to join the Euphrates, coming from Syria in the west.

J. MILLER & L. MYLROIE, *supra* note 20, at 58.

301. T. LAWRENCE, ORIENTAL ASSEMBLY 143-144 (A. Lawrence ed. 1940). This passage was suppressed until years after the late Col. Lawrence's death. J. WILSON, LAWRENCE OF ARABIA: THE AUTHORIZED BIOGRAPHY OF T.E. LAWRENCE 1026-27 n. 69 (1990). Despite this language ("English"), Col. Lawrence was born in Wales, *id.* at 20, of an Anglo-Irish father, *id.* at 941, and a Scottish mother. *Id.* at 31, 942.

I am Irish, It's not my fault, wholly, if I am not more Irish: family, political, even money obstacles will hold me in England always. I wish it were not so.

Id. at 896 (letter of Oct. 12, 1932, from T. E. Lawrence to William Butler Yeats).

