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The War Power

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stitution. . . ."[120] Relying on *Bell v. Hood*,[121] which held that the allegation of damages suffered as a result of actions of federal officers in violation of the fourth and fifth amendments stated a sufficient claim for the district court to exercise jurisdiction, the court stated that the lower court might have jurisdiction under 28 U.S.C. § 1331(a). However, the action was dismissed with leave to amend "for failure to allege a statutorily required amount in controversy exceeding $10,000."[122]

THE WAR POWER

Litigation challenging the legality of the Vietnam War has arisen in a variety of contexts. Citizens claiming their ultimate liberty is at stake,[123] taxpayers contending their money is being spent for an unconstitutional purpose,[124] young men refusing to be inducted into an army which they claim is fighting an unconstitutional war,[125] and soldiers who have received orders to report for transfer to Vietnam[126]

120 *Id.*

121 327 U.S. 678 (1946).

122 422 F.2d at 568.

123 *See* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). Plaintiff, a college professor, alleged that maintenance of the present military conflict in Vietnam absent a congressional declaration of war jeopardized his ultimate liberty, contributed to serious inflation, diminished funds available for social welfare, and led to the death and wounding of innumerable Americans, including his relatives. The court held that the plaintiff had failed to demonstrate such a personal stake in the matter as to warrant the conclusion that he had standing to sue.

124 *See* Kalish v. United States, 411 F.2d 606 (9th Cir.), *cert. denied*, 396 U.S. 835 (1969); In *Kalish*, Plaintiff claimed that a taxing statute was motivated by the need to raise funds for use in the Vietnam War effort. The court said that the taxpayer did not have standing since he failed to show that Congress in enacting the Tax Adjustment Act of 1966 had breached a specific limitation upon its taxing and spending power; In Autenrieth v. Cullen, 418 F.2d 586 (9th Cir. 1969), a class action taxpayer suit brought by conscientious objectors to the war, the court held that the Constitution does not prohibit Congress from levying taxes upon all persons, regardless of religion, for support of the general government.

125 *See* United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967). The defendant was convicted of willful failure to report for induction into the armed services. The court stated:

> Regardless of the proof that appellant might present to demonstrate the correlation between the Selective Service Act and our nation's efforts in Vietnam, as a matter of law the congressional power "to raise and support armies" and "to provide and maintain a navy" is a matter quite distinct from the use which the Executive makes of those who have been found qualified . . . . Whatever action the President may order, or the Congress sanction, cannot impair this constitutional power of the Congress.

Id. at 324.

See also Ashton v. United States, 404 F.2d 95 (8th Cir. 1968), *cert. denied*, 394 U.S. 960 (1969); United States v. Pratt, 412 F.2d 426 (6th Cir. 1969); United States v. Prince, 398 F.2d 686 (2d Cir.), *cert. denied*, 393 U.S. 946 (1968); United States v. Bolton, 192 F.2d 805 (2d Cir. 1951).

126 *See* Davi v. Laird, 318 F. Supp. 478 (W.D. Va. 1970); Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967). *But see* Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970).

all have sought their day in court and invariably have been told that they either lacked standing to sue or that a decision on the congressional war power was a political question.

The judicial doctrine of standing concerns a party's relationship to the legal issue he raises. Taxpayer suits against the war do not meet the requirements of standing. In a recent such case, *Pietsch v. President Of United States*,[127] the Court of Appeals for the Second Circuit stated:

> As to some of the war-related measures which Pietsch would have us enjoin, such as the draft, he asserts no interest in the matter beyond that of a citizen-at-large and therefore lacks standing to contest their legality. . . . The only measure which Pietsch is arguably in a position to challenge is the expenditure of funds in furtherance of the war. Under *Flast v. Cohen*, however, Pietsch's attack must assert the violation of "specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." Although more than one purpose has been attributed to Congress' war power, that power has never been seen as a "specific limitation" upon the appropriation power. Pietsch's status as a federal taxpayer therefore does not entitle him to challenge the expenditure of funds for the Vietnam war.[128] (citations omitted)

Suits by inductees also encounter the standing requirement since such persons may never receive orders for Vietnam and the draft itself is clearly authorized by Congress.[129] A young man who has already received his deployment orders, however, may be asked to give his life for a war he claims is not authorized by Congress. His position in relation to the war clause issue is certainly no less direct than that of a steel company which challenges unauthorized seizure of steel mills.[130]

The political question doctrine, on the other hand, concerns itself not with the relationship of the parties to the issue, but solely with the nature of the issue itself. The Supreme Court, in *Baker v. Carr*[131] said

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127 434 F.2d 861 (2d Cir. 1970).

128 *Id.* at 863.

129 See cases cited note 125 *supra.*

130 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The steel company challenged the President's seizure of its property in his role as Commander-in-Chief. It did not challenge the constitutionality of the Korean War itself. This suggests that the nature of the issue in any war power challenge of the Vietnam War may involve considerations of diplomacy, foreign policy and military strategy which did not exist in the *Youngstown* case.

131 369 U.S. 186, 217 (1961). For discussions of the political question doctrine as it relates to the Vietnam War see Bean, *The Supreme Court And The Political Question: Affirmation Or Abdication*; W. VA. L. REV. 97 (1969); Hughes, *Civil Disobedience And The Political Question Doctrine*, 43 N.Y.U.L. REV. 1 (1968); Velvel, *The War in Vietnam: Unconstitutional, Justiciable, And Jurisdictionally Attackable*, 16 KAN. L. REV. 449 (1968). *See also* Scharpf, *Judicial Review And The Political Question: A Financial Analysis*, 75 YALE L.J. 517 (1966).

that if any one of the following elements is inextricably involved in a case, the political question doctrine attaches:

> [a] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[132]

The focus of legal debate over the war clause in relationship to our activities in Southeast Asia has centered on the political question doctrine.[133] More specifically, should a judicial determination be made over a subtle power relationship between the legislative and executive branches concerning the conduct of our foreign policy and, if so, to what extent?[134]

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[132] Baker v. Carr, 369 U.S. 186 217 (1961). In employing some of these standards in Powell v. McCormack, 395 U.S. 486 (1969), the Supreme Court found no political question difficulty when it held that Congress had exceeded its power to judge the qualifications of of its own members. The Court stated:

> Such a determination falls within the traditional role accorded courts to interpret the law, and does not involve "a lack of the respect due a coordinate branch of government" nor does it involve an "initial policy determination of a kind clearly for non-judicial discretion." Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given that document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.

Powell v. Mc Cormack, 395 U.S. 486, 548-49 (1969).

[133] *See* Luftig v. Mc Namara, 373 F.2d 664, (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967). Circuit Judge (now Chief Justice) Burger stated emphatically that the separation of powers "established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power." 373 F.2d at 666.

But see Mottola v. Nixon, 318 F. Supp. 538 (N.D. Cal. 1970). Here the court denied a motion to dismiss on the ground of a nonjusticiable political question and stated:

> The Supreme Court has demonstrated its resourcefulness in finding ways and means of eliminating or minimizing undesirable, practical consequences that might otherwise follow major decisions charting new requirements in the field of constitutional law. For example, in *Powell v. Mc Cormack*, the Court . . . held that coercive, injunctive relief need not be granted when deemed inappropriate under circumstances, indicating that a simple declaratory decree resolving the constitutional question would be preferable. The Supreme Court has also used the device of non-retroactivity with respect to the past and the device of reasonable or deliberate speed with respect to the future. In any event, the Supreme Court would not be called upon to decide what to do about the Vietnam war—only to decide the legal question: By whose authority—the President, the Congress or both, can the Vietnam war be continued (or discontinued) and how must that authorization be expressed to comply with the plain, but very solemn and tremendously important provisions of Article 1, section 8(11).

Id. at 554.

[134] The Supreme Court has consistently denied certiorari in cases challenging the

The Court of Appeals for the Second Circuit, in the case of *Berk v. Laird*,[135] held Berk's claim that orders to fight must be authorized by joint legislative-executive action was justiciable. The court said that the war-declaring power of Congress contains a "discoverable standard calling for *some* mutual participation by Congress" and directed that Berk be given an opportunity "to provide a method for resolving the question of when specified joint legislative action is sufficient to authorize various levels of military activity."[136] On a second appeal to the Second Circuit,[137] Berk argued that the constitutional provision requires an express and explicit congressional authorization of the Vietnam hostilities.[138] In support of this construction he pointed out that the origi-

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constitutionality of the Vietnam War. This policy, as cited in notes 123-26 *supra*, has been criticized from within and without the Court. *See, e.g.*, Mora v. Mc Namara, 389 U.S. 934 (1967) (Douglas & Stewart, JJ., dissenting); Hughes, *Civil Disobedience and The Political Question Doctrine*, 43 N.Y.U.L. REV. 1 (1968).

135 429 F.2d 302 (2d Cir. 1970).

136 *Id.* at 305.

137 Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971).

138 Berk suggested three different categories of military action requiring different measures of legislative-executive cooperation. The first category includes various types of emergency action, such as repelling an attack on the United States or protecting American citizens from attack, which the President may take without any action by Congress. In the second category are placed other acts of war against organized states and aid in protecting any other nation from attack; he claims these acts may be authorized or ratified by any explicit congressional action, but not by appropriation acts, unless they explicitly and by their own terms authorize, sanction or direct military action. The Vietnam War is placed in the third category, described as hostilities of the highest magnitude as measured by numbers of men involved, amounts of equipment, and use of the most powerful weapons. Such actions, it was asserted, cannot be initiated without prior explicit Congressional authority. Berk v. Laird, 317 F. Supp. 715, 717 (E.D.N.Y. 1970).

But see 54 Dep't State Bull. 474 (1966), *reprinted in Legality of United States Participation in the Viet Nam Conflict: A Symposium*, 75 YALE L.J. 1885 (1966). The State Department argues that the actions undertaken in Viet Nam are authorized by the Southeast Asia Treaty Organization Pact and the constitutional power given the president as Commander-in-Chief of the Army and Navy. The following reasoning process is employed: At the Federal Constitutional Convention in 1787, it was originally proposed that Congress have the power to "make war." Madison and Gerry then moved to substitute "to declare war" for "to make war," leaving to the Executive the power to repel sudden attacks. Since the world has grown much smaller in the twentieth century, an attack on a country far from our shores can impinge directly on the nation's security. In the SEATO Treaty, it is formally declared that an armed attack against Viet Nam would endanger the peace and safety of the United States. Under Article VI of the Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Under our Constitution it is the President who must decide when an armed attack has occurred. He has the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Vietnam is required and that measures against the source of Communist aggression in North Vietnam are necessary, he is constitutionally empowered to take those measures without formally consulting the Congress.

For a critical analysis of this line of reasoning, see Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1783-84 (1968). Here it is argued that one of the prerequisites for unilateral presidential response even in defense

nal intent of the clause was to place responsibility for the initiation of war upon the body most responsive to popular will.[139] He further argued that without such authorization, developments committing the nation to war as a *fait accompli* became the inevitable result of presidential direction of foreign policy and that military appropriations and other war-implementing enactments lack an explicit authorization of particular hostilities.[140]

In its decision, the court stated that "[t]he test is whether there is any action by the Congress sufficient to authorize or ratify the military activity in question" and, accordingly, held that "[t]here is no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war. . . .[141]

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of the country is that the attack be so sudden that resort to Congress is militarily precluded. It is further maintained that although the President must still be left with the power to judge whether a given event constitues an imminent threat to our survival and demands a response which leaves no time to seek Congress' acquiescence, such limited discretion falls far short of authorizing assumption of his defensive war-making powers whenever the interest jeopardized is labelled a vital security interest. *See also* Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?* 55 VA. L. REV., 1245 (1969).

139 For a learned discussion of this contention, see *Indochina :The Constitutional Crisis—Part One*, 116 CONG. REC. 7117 (daily ed. May 13, 1970).

140 Professor Dan Wallace, Jr., a member of the Georgetown University Law Center, had testified at the district court hearing that rules against including substantive legislation in appropriations bills are necessary in order to prevent the appropriations committee from encroaching on the powers of the substantive committees. He also pointed out that a number of Congressmen, while opposed to the escalation of the war, voted for the bills because they felt obliged to support the forces already there and because they believed policy issues should not be decided through appropriations bills Berk v. Laird 317 F. Supp. 715, 721 (E.D.N.Y. 1970).

The administration specifically stated that the May 1965 appropriation request was not a routine request but was being made as a means of presenting the Vietnam issue. President Lyndon B. Johnson, Message to the Congress, May 4, 1965, in SENATE COMM. ON FOREIGN RELATIONS, BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM, S. Doc. No. 160-63, 90th Cong. 1st Sess. (1967). At the same time, however, the President made clear that the additional funds were needed to protect our men and supplies and to provide them with modern equipment. The possibility of a dual interpretation makes it difficult to construe such appropriations as equivalent to explicit authorization for the war. *See* Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?* 55 VA. L. REV. 1243, 1250 n.2 (1969).

Once the President has committed troops to combat, he can generally rally support even from those opposed to his policies by demanding that they back the boys in the field or presumably face political oblivion. *See also* Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1801 (1968). Even when there is no Presidential *fait accompli*, if the power over appropriations had been thought a sufficient safeguard against presidential war-making, it becomes difficult to understand why the framers were so concerned about withholding the war power from the Executive in the first place.

141 Berk v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971).

> In response to the demands of the military operations, the executive during the 1960's ordered more and more men and material into the war zone; and congressional appropriations have been commensurate with each new level of fighting. Until 1965, defense appropriations had not earmarked funds for Vietnam. In May of that year President Johnson asked Congress for an emergency supplemental

The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia."[142]

The court pointed out that the political question doctrine prevents it from choosing between an explicit declaration of war on the one hand and a resolution and war-implementing legislation on the other, as a medium of expression for congressional consent. Decisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy, and military strategy inappropriate to judicial inquiry. The court pointed out that if it were to rule that

there can be nothing more than minor military operations con-

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appropriation "to provide our forces [then numbering 35,000] with the best and most modern supplies and equipment." 111 Cong. Rec. 9283 (May 4, 1965). Congress appropriated $700 million for use "upon determination by the President that such action is necessary in connection with military activities in Southeast Asia." Pub. L. 89-18, 79 Stat. 109 (1965). Appropriation acts in each subsequent year explicitly authorized expenditures for men and material sent to Vietnam. The 1967 appropriations act, for example, declared Congress' "firm intention to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam" and supported "the efforts being made by the President of the United States . . . to prevent an expansion of the war in Vietnam and to bring that conflict to an end through a negotiated settlement . . . ." Pub. L. 90-5, 81 Stat. 5 (1967).

Id. at 1042 n.2.

Congress also extended the Military Selective Service Act with the knowledge that persons conscripted under the act would be sent to Vietnam.

> In H. Rep. No. 267, 90th Cong., 1st Sess. 38 (1967), in addition to extending the conscription mechanism, Congress continued a suspension of the permanent ceiling on the active duty strength of the Armed Forces, fixed at 2 million men, and replaced it with a secondary ceiling of 5 million. The House Report recommending extension of the draft concluded that the permanent manpower limitations "are much lower than the currently required strength." The Report referred to President Johnson's selective service message which said, ". . . that without the draft we cannot realistically expect to meet our present commitments or the requirements we can now foresee and that volunteers alone could be expected to man a force of little more than 2.0 million. The present number of personnel on active duty is about 3.3 million and it is scheduled to reach almost 3.5 million by June, 1968 if the present conflict is not concluded by then. H. Rep. No. 267, 90th Cong., 1st Sess. 28, 41 (1967).

Id. at 1042 n.3.

142 Berk v. Laird, 443 F.2d 1039, 1052 (2d Cir. 1971). It is difficult to reconcile this rationale of implied ratification by appropriations and the like with the rationale of the Supreme Court in Green v. Mc Elroy, 360 U.S. 474 (1959):

> [Congressional] decisions cannot be assumed by acquiescence or non-action . . . because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws.

360 U.S. at 507.

It is also difficult to reconcile the rationale of an implied power of the congressional branch to validate a Presidential war by various means other than an explicit declaration of war under Article I, section 8(11), with the rationale of the Supreme Court in *Youngstown*, 343 U.S. 579, 587 (1952), to the effect that no such implication would be drawn with respect to the power of the executive branch under article II.

> ducted under any circumstances, short of an express and explicit declaration of war by Congress, then extended military operations could not be conducted even though both the Congress and the President were agreed that they were necessary and were also agreed that a formal declaration of war would place the nation in a posture in its international relations which would be against its best interests.[143]

The test employed by the Second Circuit is a far cry from the "prior explicit authorization" standard upon which adjudication of the issue was sought. Once again, the political question doctrine influenced any attempt to judicially define the constitutional propriety of the means by which Congress has chosen to ratify and approve the war in Southeast Asia. The court was asked to formulate express rules limiting the President's authority in an area in which it may be desirable to have few rules.[144]

In defining the war power requirement as some mutual participation by Congress and accepting implied ratification and approval as satisfying that test, the court implies that the congressional role is one of ratification rather than initiation of policy,[145] even if that policy in-

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143 Bark v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971).

144 *See* Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 512 (1924); *cf.* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 555-56 (1966).

145 This does not mean that Congress has no role in the formation of policy. *See Indo China: The Constitutional Crisis*, 116 CONG. REC. 7117 (daily ed. May 13, 1970). The power of the purse is the last bastion of popular control of the government. Congress now has the opportunity to use this power to restore the Constitutional balance by including in authorization acts any of a number of restrictions on the use of American funds and forces in Indo China. More forceful than a resolution of one or both houses, enacting specific restrictions on the use of our military forces in Indo China and directing their withdrawal would effectively assert congressional control of the limited war in which we are now engaged. Proposed restrictive provisions are not only a legitimate exercise of Congress' money power, but pose no danger of inflexibly committing our policy to a hazardous course because (1) they include exceptions which insure the safety of our forces, and (2) they may be overridden by future congressional action if circumstances change.

On June 30, 1970 by a 58-37 vote, the Senate adopted the Cooper-Church Amendment, S. Res. 609, 91st Cong., 2d Sess., — CONG. REC. — (1970), to limit presidential action in Cambodia. The Senate's action "represented the first time legislative restrictions on the President's powers as Commander-in-Chief have been voted during a shooting war." N.Y. Times, July 1, 1970, at 1, col. 5.

Congress must still face the problem of how to effectively enforce its will upon an unwilling president. The following remarks of Senator Church highlight this dilemma:

> Congress has declared it a national policy that all American troops be withdrawn from Indochina by a date certain, once the release of American prisoners of war is assured.
>
> President Nixon has chosen to disregard the Mansfield Amendment, by saying it is without binding force and effect. . . .
>
> If it is the President's intention to set aside, in this offhand way, the Mansfield Amendment, passed by both Houses of Congress, the Congress should now enact enforcement legislation, utilizing the power of the purse, a power which belongs

volves military activity of the highest magnitude in terms of the number of troops involved.

Perhaps the court was heavily influenced by the expansion of the presidential role of Commander-in Chief during the twentieth century; the executive has regularly used military force abroad in situations such as Korea, the Formosan Strait, Lebanon, and the Dominican Republic without relying on express authorization and without constitutional challenge.[146] Various situations arise requiring different degrees of military response, and the executive department, with its vast intelligence network and diplomatic core, is in the best position to make an initial policy judgment and respond accordingly.[147] In a world

exclusively to Congress; and it should enact it in such a way as to enforce the provisions of the Mansfield amendment.

117 CONG. REC. 18, 874 (daily ed., Nov. 1971).

A group of citizens has indicated that they will move in the Federal District Court for the Southern District of New York, for an injunction directing Mr. Nixon to set a final date for withdrawal of our troops, contingent upon release of American prisoners in accordance with the Mansfield Amendment. N.Y. Times, Nov. 21, 1971, § 5, at 5, col. 2 (advertisement).

For an analysis of the judicial role in the Indochina controversy, see Ratner, *Coordinated War-Making Power — Legislative, Executive and Judicial Roles*, 44 So. CALIF. L. REV. 461, 480-89 (1971).

146 *See* Monaghan, *Presidential War-Making*, 50 B.U.L. REV. 19 (1970).

> Most writers who seek constitutionally based restrictions on the President's war-making power argue that the precedents are not compelling. Indeed, it has been suggested that there is only one prior illustration of Presidential commitment of armed forces to war without congressional authorization, namely, Korea. . . . Taken as a whole [the precedents] seem to me to add up to the following: With ever-increasing frequency, presidents have employed that amount of force that they deemed necessary to accomplish their foreign policy objectives. When little force was needed . . . little was used; when larger committments were necessary, they too were forthcoming. Whatever the intention of the framers, the military machine has become simply an instrument for the achievement of foreign policy goals, which, in turn, have become a central responsibility of the presidency. Congress has seldom objected on legal grounds, and so the only limitation upon presidential power has been that imposed by political considerations. That is the teaching of our history.

Id. at 26-27. *Cf. Legal Memorandum on the Amendments to End The War*, 116 CONG. REC. 7476 (daily ed. May 19, 1970).

On the weight to be given non-legal precedents, see Youngstown Sheet And Tube Co. v. Sawyer, 343 U.S. 579, 610 (1951) (Frankfurter, J., concurring).

> The Constitution is a framework for government. Therefore the way the framework is consistently operated fairly establishes that it has operated according to its true nature. Deeply imbedded traditional ways of conducting government cannot supplant the Constitution *or legislation*, but they give meaning to the words of the text or supply them.

343 U.S. at 610 (emphasis added).

147 The "incursion" into Cambodia is one such example. After repeal of the Gulf of Tonkin Resolution, 116 CONG. REC. 9670 (daily ed. June 24, 1970) the War in Indo-China rests legally on the President's constitutional power as Commander-in-Chief to protect the lives of American troops. It is asserted that this type of executive decision can be made without any form of congressional authorization. *See* Remarks of Assistant Attorney General William H. Rehnquist before the Ass'n of the Bar of the City of New York, *The President's Constitutional Authority to Order the Attack on the Cambodian Sanctuaries*, May 28, 1970. *Cf.* Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1796-98 (1968).

where a political situation often demands rapid changes in policy and even in a situation of gradual escalation, it would unduly hamper the conduct a foreign policy if a court set up a hard-and-fast rule requiring explicit congressional authorization whenever a change in policy is made in a situation deemed to be a "war."[148]

Significantly, the court did not rely solely on the Gulf of Tonkin Resolution as providing the requisite constitutional authorization, even though both parties debated whether it authorized the war.[149] If the court had relied on that resolution as fulfilling the constitutional requirement, its decision might have been interpreted as demanding express and explicit authorization of "war" by Congress. The court realized that such a judgment might be a political question.[150]

[148] If Article I, section 8 is interpreted to mean that there shall be no war — declared or otherwise — unless Congress takes the initiative, the problem of defining war and initiation of war must be faced. From the beginning it has been recognized that not every involvement of the armed forces can be a "war" requiring congressional action. In the modern context where international conflict has so many forms, the problem is even more difficult. See Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1774 (1968).

[149] Berk could have argued that those who voted for the Gulf of Tonkin Resolution did not envision a widening of the war and, therefore, it did not constitute prior explicit authorization of future action such as the bombing of North Vietnam. Such a theory must rely on the subjective intent of certain supporters of that resolution for the resolution itself is stated in terms of a broad grant of authority:

> The United States is therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Act of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

Even the legislative history of the Tonkin Resoultion supports the view that Congress was aware that it was extending sweeping authority to the President. When questioned by Senator Cooper as to whether the resolution gave the President advance authority to take whatever action he deemed necessary for the defense of Vietnam, Senator Fulbright responded affirmatively, 110 CONG. REC. 18,409 (1964).

Curiously, Senator Morse considered the Resoluttion a predated declaration of war and felt that it was an unconstitutional delegation of power. 111 CONG. REC. 9501 (1964). *Cf.* United States v. Curtiss Wright Export Corp. 299 U.S. 304, 324 (1936). This case has been interpreted as withdrawing "virtually all constitutional limitation upon the scope of congressional delegation of power to the President to act in the area of international relations." Jones, *The President, Congress and Foreign Relations*, 29 CALIF. L. REV. 565, 575 (1941). *See also* Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1803 (1968).

A resolution does confer authority potentially to embark on war, and therefore, the scope of authority should be clearly and unambiguously expressed. Where problems of predicability seem insurmountable, limited authority should be granted by providing for expiration and renewal after a specified time and by confining the authorization to specific areas and specific purposes.

For the view that the resolution should not be interpreted as authorizing the executive to wage an Asian war, see Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KAN. L. REV. 449, 473-79 (1968); Mottola v. Nixon, 318 F. Supp. 538, 544 (N.D. Cal. 1970) ("[T]he intent of Congress . . . was merely to support the President during a reported emergency in his announced determination to repel any attack upon American ships or personnel in Vietnam.")

[150] *See* Note, *The Supreme Court As Arbitrator In the Conflict Between Presiden-*