

Comments

The Concurrent Resolution Provision of the War Powers Resolution: *Immigration and Naturalization Service v. Chadha* and the Sources of Presidential Warmaking Power

I. INTRODUCTION

Both before and after the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*,¹ members of the government have argued that the concurrent resolution provision of the War Powers Resolution² is unconstitutional.³ The concurrent resolution provision states:

[A]t any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.⁴

In *Chadha* the Court held that a similar legislative veto⁵ provision in the Immigration and Nationality Act was an unconstitutional attempt to alter the separation of powers.⁶ It has been argued that this decision invalidates the concurrent resolution provision of the War Powers Resolution.⁷

Because the concurrent resolution provision of the War Powers Resolution allows Congress to act by unilateral resolution without presentment to the President for approval or veto, it resembles the provision held unconstitutional in *Chadha*. However, it is not for that reason unconstitutional on its face. Since the Constitution entrusts to Congress the power to declare war,⁸ the separation of powers arguments invoked by the Court in *Chadha* to invalidate the legislative veto apply with equal force to presidential warmaking. If presidential authority to make war is to exist under the Constitution, that authority cannot go unchecked. Logically, Congress, as

1. 103 S. Ct. 2764 (1983).

2. 50 U.S.C. §§ 1541-1548 (1982). The concurrent resolution provision is § 1544(c).

3. See, e.g., *United States Supreme Court Decision Concerning the Legislative Veto: Hearings Before the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 2-3 (1983) (statement of Stanley H. Brand, Gen. Counsel to the Clerk, House of Representatives); President Nixon's Message Vetoing the War Powers Resolution, 9 WEEKLY COMP. PRES. DOC. 1285 (Oct. 24, 1973); Tolchin, *House Aide Suggests Broader Impact of Court's Veto Ruling*, N.Y. Times, June 29, 1983, at A19, col. 1.

4. 50 U.S.C. § 1544(c) (1982).

5. The term "legislative veto" or "congressional veto" refers to unilateral disapproval by one or both houses of Congress of an action taken by the President or an executive or independent agency. See *INS v. Chadha*, 103 S. Ct. 2764, 2771 n.2 (1983).

6. 8 U.S.C. § 1254(c)(2) (1982); see *INS v. Chadha*, 103 S. Ct. 2764, 2788 (1983).

7. See *supra* note 3; Lungren & Krotoski, *The War Powers Resolution After the Chadha Decision*, 17 LOY. L.A.L. REV. 767 (1984); *INS v. Chadha*, 103 S. Ct. 2764, 2788 n.1 (1983) (Powell, J., concurring in judgment) (citing the War Powers Resolution as an example of legislative veto provisions probably struck down by the majority opinion). But see Ratner & Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A.L. REV. 715, 738 n.99 (1984).

8. U.S. CONST. art. I, § 8, cl. 11.

the primary warmaking body, should have power to review executive warmaking. This Comment will argue that in certain situations a legislative veto is a constitutionally permissible check on presidential warmaking power.

Presidential authority to make war may derive from several sources.⁹ Whether Congress may exercise control over an act of presidential warmaking depends on the constitutional basis of the presidential power being exercised. Each invocation of the concurrent resolution provision must therefore be analyzed to determine whether the balance of separation of powers considerations permits the legislative veto.

This Comment will begin with an analysis of the scope of the *Chadha* decision. Next, potential sources of presidential warmaking power will be identified and discussed. Finally, the situations in which invocation of the concurrent resolution provision may be constitutional will be examined.

II. THE *Chadha* OPINION

At issue in *INS v. Chadha* was a section of the Immigration and Nationality Act¹⁰ that authorized either house of Congress to overturn, by resolution, orders of the Attorney General suspending deportation of certain aliens.¹¹ The Court held that the legislative veto violated both the bicameralism and presentment requirements¹² of the Constitution.¹³ Since the War Powers Resolution requires a concurrent resolution of both houses to terminate hostilities, bicameralism is not an issue in this Comment, and the portion of the *Chadha* decision concerning bicameralism will not be discussed except insofar as it bears on the remainder of the Court's analysis.

The *Chadha* Court began its discussion by quoting the relevant portions of the Constitution.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States. . . .

Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be re-passed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.¹⁴

According to the Court, "[T]hese provisions of Art. I are integral parts of the constitutional design for the separation of powers."¹⁵ Thus, the Court's analysis

9. See *infra* notes 35-145 and accompanying text.

10. 8 U.S.C. §§ 1101-1503 (1982).

11. *Id.* § 1254(c)(2) (1982).

12. U.S. CONST. art. I, § 1 (bicameralism); *id.* § 7, cl. 2 (bicameralism and presentment); *id.* § 7, cl. 3 (presentment).

13. *INS v. Chadha*, 103 S. Ct. 2764, 2787 (1983).

14. U.S. CONST. art. I, § 7, cls. 2-3.

15. *INS v. Chadha*, 103 S. Ct. 2764, 2781 (1983).

hinged on the separation of powers, and specifically on the importance of checks on legislative power.

The Court stated that presentment of proposed legislation to the President for approval or veto serves three purposes. First, it gives to the President “‘a constitutional and effectual power of self-defense.’”¹⁶ Second, it protects the public against “‘oppressive, improvident, or ill-considered measures.’”¹⁷ Last, it “‘assure[s] that a ‘national’ perspective is grafted on the legislative process,”¹⁸ since the President is elected by all the people. According to the Court, these considerations were thought by the Framers to be “‘imperative.’”¹⁹ The separation of powers was incorporated into the Constitution “‘to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish some desirable objective, must be resisted.’”²⁰ The Court concluded that every congressional act having a legislative character and effect must be presented for presidential veto unless specifically exempted from presentment by the Constitution.²¹

Turning to the specific facts of *Chadha*, the Court determined that the legislative veto in the Immigration and Nationality Act was a legislative act, using the following analysis. The Court began with a presumption that any action of Congress is a legislative act.²² The Court then examined three characteristics of the legislative veto in question and found that they supported, rather than rebutted, that presumption. First, “[i]n purporting to exercise power defined in Art. I, § 8, cl. 4 to ‘establish a uniform Rule of Naturalization,’ the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch.”²³ Second, the veto provision was a substitute for clearly legislative action, since ordinarily Congress may intervene in the residency status of aliens only by private bill, if at all.²⁴ Without the challenged provision, Congress would not have had unilateral power to require Chadha’s deportation. Last, the Attorney General in suspending Chadha’s deportation was acting pursuant to a delegation of legislative power. Any alteration or revocation of a delegation of authority must be accomplished by legislative action subject to bicameralism and presentment.²⁵ The Court, having concluded that the legislative veto in the Immigration and Nationality Act was a legislative act, held the veto unconstitutional²⁶ because it did not fall within any of the constitutional provisions allowing action by one house without presentment for veto.²⁷

16. *Id.* at 2782 (quoting THE FEDERALIST No. 73, at 458 (A. Hamilton) (H. Lodge ed. 1888)).

17. *INS v. Chadha*, 103 S. Ct. 2764, 2782 (1983).

18. *Id.*

19. *Id.*

20. *Id.* at 2784.

21. *Id.* at 2784, 2786–87.

22. *Id.* at 2784.

23. *Id.*

24. *Id.* at 2785 & n.17.

25. *Id.*

26. *Id.* at 2788.

27. *Id.* at 2786–87.

The Court's analysis in *Chadha* appears to invalidate virtually every use of the legislative veto. Nevertheless, the constitutional allocation of the war powers is unique because Congress has sole (or at least primary)²⁸ power to prepare for and initiate²⁹ a war which only the President can conduct.³⁰ The *Chadha* decision, which applied to a legislative veto of executive action taken pursuant to an express delegation of Congress' power, should not apply when the executive action sought to be vetoed derives from a source of power shared with Congress.³¹

The *Chadha* Court based its decision on the concept of separation of powers, holding that the legislative veto in that case avoided constitutionally mandated checks and balances. The War Powers Resolution, on the other hand, created a procedural framework for presidential warmaking designed to prevent the President from avoiding constitutional checks and balances and to restore to Congress its proper share of the war power.³² If the presidential warmaking sought to be vetoed is subject to congressional approval as a matter of constitutional law,³³ denial of legislative approval is not a legislative act of the sort contemplated in *Chadha*. Additionally, since separation of powers considerations would counsel against allowing the President to veto Congress' disapproval of a presidential act that is constitutionally subject to congressional approval, the *Chadha* analysis may be inapplicable. To determine when congressional approval of presidential warmaking is required, it is necessary to examine the constitutional bases for presidential warmaking power.

III. SOURCES OF PRESIDENTIAL WARMAKING POWER

Seven sources of presidential warmaking power can be identified. The sources, which will be defined and discussed in this section, are (1) a congressional declara-

28. This Comment will not attempt to define the elusive point at which presidential prerogative must give way to legislative authority in the area of initiating combat. For recent explorations of that subject, see E. KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER (1982); W.T. REVELEY, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? (1981); A. VAN W. THOMAS & A.J. THOMAS, THE WAR-MAKING POWERS OF THE PRESIDENT: CONSTITUTIONAL AND INTERNATIONAL LAW ASPECTS (1982); Friedman, *Waging War Against Checks and Balances—The Claim of an Unlimited Presidential War Power*, 57 ST. JOHN'S L. REV. 213 (1983).

29. U.S. CONST. art. I, § 8, cls. 11–16.

30. *Id.* art. II, § 2, cl. 1. Perhaps in no other area is the division of powers either as ambiguous or as controversial. See *supra* note 28.

31. See *INS v. Chadha*, 103 S. Ct. 2764, 2781, 2785 n.16 (1983) (suggesting that the Court's attention was directed exclusively toward legislative vetoes over actions pursuant to delegated power).

32. Most proposed versions of the War Powers Resolution outlined substantive divisions of the war power as well. See, e.g., S. 1880, 92d Cong., 1st Sess. § 2 (1971) (Bentsen version); S.J. Res. 59, 92d Cong., 1st Sess. §§ 1–3 (1971) (Eagleton version); H.R. 18,137, 91st Cong., 2d Sess. § 1(a) (1970) (Quie version); H. Con. Res. 199, 91st Cong., 2d Sess. (1970) (Podell version). The bill finally enacted states in its statement of purpose and policy that

[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

50 U.S.C. § 1541(c) (1982). Yet a later section of the Resolution recites that "[n]othing in this chapter . . . is intended to alter the constitutional authority of the Congress or of the President." *Id.* § 1547(d). In any case, it is doubtful that § 1541(c) has any operative effect. See W.T. REVELEY, *supra* note 28, at 237, and sources cited therein. For discussions of the need for war powers legislation, see *War Powers Legislation: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 407–09 (1971) (statement of Sen. Horton); *Congress, the President, and the War Powers: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 270–71 (1970) (statement of Rep. Bingham).

33. See U.S. CONST. art. I, § 8, cl. 11.

tion of war; (2) other express statutory delegation of war power; (3) implied delegation of authority; (4) inherent presidential power; (5) "assumed authorization"—presidential power to exercise legislative authority in an emergency on the assumption that Congress would approve if time permitted it to meet; (6) treaty obligations; and (7) no source (unconstitutional action).

A. *Declarations of War and Express Delegations*

The concurrent resolution provision is by its own terms inapplicable when presidential war power is exercised pursuant to a "declaration of war or specific statutory authorization."³⁴ Specific statutory authorization exists when a statute "specifically authorizes the introduction of United States Armed Forces into hostilities or into . . . situations [wherein involvement in hostilities is clearly indicated by the circumstances] and states that it is intended to constitute specific statutory authorization within the meaning of" the War Powers Resolution.³⁵

Congress clearly may not retain a veto over delegated warmaking power merely by omitting any reference to the War Powers Resolution in the authorizing statute, in an attempt to avoid the exception in the concurrent resolution provision. If Congress expressly delegated war power to the President, yet attempted to retain a unilateral veto over the exercise of that power, the veto would be indistinguishable from the one struck down in *Chadha*. It would amount to an amendment or repeal of the delegating statute by unilateral congressional action.³⁶

Of course, if a President purports to act pursuant to an invalid delegation, another source of power must be found to legitimate the action. However, there are few limits on Congress' authority to delegate its constitutional powers. In the only cases in which delegations of legislative authority have been invalidated—*Panama Refining Co. v. Ryan*³⁷ and *Schechter Poultry Corp. v. United States*³⁸—the Court pointed to the absence of any standard by which the delegate could be held accountable in its exercise of delegated power.³⁹ In the area of foreign relations, the Court has upheld broad delegations of power to the President, stating that there are few constraints on Congress' authority to delegate power to a delegate that already has independent authority over the subject matter of the delegation.⁴⁰ However, it is unlikely that an authorization enabling the President to initiate war whenever he or she sees fit would be upheld. Because of the Framers' strong belief that entering war should be a considered decision,⁴¹ and because of the requirement that a delegation of power contain some standards governing its exercise,⁴² a statutory delegation of

34. 50 U.S.C. § 1544(c) (1982).

35. *Id.* § 1547(a)(1).

36. See *INS v. Chadha*, 103 S. Ct. 2764, 2780–83, 2785 & n.18 (1983).

37. 293 U.S. 388 (1935).

38. 295 U.S. 495 (1935).

39. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429–30 (1935); see *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935).

40. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–22 (1936); see also *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975).

41. See *infra* note 61.

42. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429–30 (1935); see also *Yakus v. United States*, 321 U.S. 414 (1944).

warmaking power should specify at a minimum either the nation or nations against which the President is authorized to wage war or the actions by a foreign country that will provoke a military response.

B. *Implied Delegations of Legislative Power*

Implied delegations of congressional war power have been found most often (if not only) in cases of ambiguous congressional ratifications of prior unauthorized executive action. Implied prospective delegation closely resembles assumed authorization, which will be discussed later in this Comment.⁴³

During the Vietnam War era, some courts held that several different types of congressional action implicitly ratified the President's war initiatives. While sometimes relying additionally on the more explicit Gulf of Tonkin Resolution,⁴⁴ these courts found sufficient authorization for the war in military appropriations, selective service acts,⁴⁵ and even the absence of open congressional resistance to the war.⁴⁶ In response to the argument that legislators opposed to the war might feel bound by political constraints, or by duty to soldiers already overseas, to continue military appropriations, one court stated that "Congressional pusillanimity" did not constrain the Executive to cease the undeclared war.⁴⁷

As a result of these judicial inferences of ratification, the War Powers Resolution was framed to make clear that

[a]uthority 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 . . . from any provision of law . . . , 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 [the War Powers Resolution].⁴⁸

Commentators⁴⁹ and legislators who feared that the War Powers Resolution was too weak⁵⁰ have suggested that the Resolution itself implicitly delegates to the President the authority to initiate war as he or she pleases, provided the procedural requirements of the Resolution are met. While this fear may well be justified as a practical matter, the War Powers Resolution could not be clearer in its refusal to extend a general grant of warmaking power to the President. Implied delegations, as distinguished from assumed authorization, are grants of power that arise from in-

43. See *infra* notes 57-58, 69-92 and accompanying text.

44. Pub. L. No. 88-408, 78 Stat. 384 (1964) (repealed 1971); see, e.g., *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

45. See, e.g., *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971). *But see* *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973).

46. See *Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971).

47. *Orlando v. Laird*, 317 F. Supp. 1013, 1019 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

48. 50 U.S.C. § 1547(a) (1982).

49. T. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER* 203 (1974); W.T. REVELEY, *supra* note 28, at 360 n.17.

50. 119 CONG. REC. 36,177 (1973) (statement of Sen. Eagleton); *id.* at 36,204 (statement of Rep. Green); *id.* at 36,220 (statement of Rep. Dellums); *id.* at 36,221 (statements of Reps. Abzug and Culver).

terpretation of a general statute. In the War Powers Resolution Congress has expressly dictated how its enactments are to be interpreted. Not only does the Resolution prohibit inferences of authority from statutes that do not specifically authorize the use of armed forces, but it also emphasizes that it is not to "be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of" the Resolution.⁵¹ The War Powers Resolution therefore clearly precludes the President from initiating war pursuant to an implied delegation of legislative power.⁵²

C. Inherent Powers and Assumed Authorization

The Framers' intent that the Executive should have power "to repel sudden attacks" against the United States without waiting for congressional approval has been universally accepted.⁵³ Some commentators have argued that this defensive power should include the power to send rescuing troops to the aid of United States citizens and nationals endangered abroad,⁵⁴ and at least one court has stated in dicta that in a "grave emergency" other than actual attack the President may initiate war.⁵⁵

The theoretical base of the Executive's defensive powers, however, has rarely been explored, other than as a vehicle to define the scope of those powers. Some commentators have proceeded from the idea that the Commander-in-Chief, foreign relations, and executive powers give the President inherent constitutional authority to defend the nation.⁵⁶ Others have relied on a theory of "assumed authorization" or implied consent.⁵⁷ As the concept has been formulated by these commentators, the President may initiate United States participation in war only when time precludes consultation with Congress and the danger to the United States is so great that it is a "foregone conclusion" that Congress would authorize the war.⁵⁸ The theory upon which presidential powers of defense rest deserves more attention, for it is crucial to the determination of whether Congress may intervene in presidential warmaking.

It does not appear that the Framers of the Constitution considered this point. The

51. 50 U.S.C. § 1547(d) (1982).

52. It should be noted, however, that if an implied delegation were somehow found to have occurred, presidential warmaking thereunder would not be subject to congressional veto. Once a statute had been judicially interpreted to authorize the war, the reasoning of *Chadha* would apply. Congress could change the statute and its interpretation only by the normal process of amendment or repeal.

53. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 318 (rev. ed. 1937) (motion of Messrs. Madison and Gerry).

54. See, e.g., Emerson, *The War Powers Resolution Tested: The President's Independent Defense Power*, 51 NOTRE DAME LAW. 187, 191-92 (1975).

55. *Mitchell v. Laird*, 488 F.2d 611, 613 (D.C. Cir. 1973).

56. See, e.g., Emerson, *supra* note 54, at 195-209.

57. See, e.g., W.T. REVELEY, *supra* note 28, at 221; Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 111 (1984) (citing Bickel, *Congress, the President, and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 140-41 (1971)); Friedman, *supra* note 28, at 220-23; Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1783 (1968); see also A. VAN W. THOMAS & A.J. THOMAS, *supra* note 28, at 50-51 (discussing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)); cf. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 20 (1984).

58. See Friedman, *supra* note 28, at 220-23; Note, *supra* note 57, at 1783.

congressional war power, originally the power to “make war,” was changed to the power to “declare war,” “leaving to the Executive the power to repel sudden attacks.”⁵⁹ However, no such power was expressly vested in the President. One of the delegates believed that the President would have the power to “repel and not to commence war” even if Congress were given the sole power to “make” war, and that changing “make” to “declare” would “narrow[] the [Congress’] power too much.”⁶⁰ Two concerns did surface in both the Constitutional Convention and the state ratification conventions: a need to protect the new nation’s threatened territorial integrity, and an overpowering desire to avoid another war.⁶¹ The Framers believed that by vesting the exclusive power to initiate war in the Legislature, hasty and ill-considered decisions could be avoided; yet sufficient power was reserved to the President to defend against attack.⁶²

The courts have never directly addressed the source of presidential defensive powers, and the two leading cases dealing with presidential war power—*The Brig Amy Warwick (The Prize Cases)*⁶³ and *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*⁶⁴—superficially appear to be in conflict on the issue.

The *Prize Cases* challenged President Lincoln’s authority to blockade Confederate ports without congressional approval.⁶⁵ In upholding the President’s action the Court appeared to rely on a broad notion of national self-defense. In much-quoted language, the Court stated that the President “has no power to initiate or declare a war either against a foreign nation or a domestic State. But . . . [i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force.”⁶⁶ Further, the decision of when an invasion or insurrection has reached proportions requiring defensive action is the President’s alone. “He must determine what degree of force the crisis demands.”⁶⁷ Clearly, if the President is “bound” to act,⁶⁸ the President must have inherent constitutional power sufficient to execute that duty.

The majority and concurring opinions in *Youngstown Sheet & Tube*, in contrast, are among the nation’s most ringing denunciations of presidential overreaching. Yet

59. 2 M. FARRAND, *supra* note 53, at 318–19 (motion of Messrs. Madison and Gerry).

60. *Id.* at 318 (statement of Mr. Sharman).

61. We are still an inviting object to one European power at least, and, if we cannot defend ourselves, the temptation may become too alluring to be resisted. . . . This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war is vested in the legislature at large; this declaration must be made with the concurrence of the House of Representatives. From this circumstance we may draw a certain conclusion, that nothing but our national interest can draw us into a war.

2 M. JENSEN, *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 583 (1976) (statement of James Wilson in support of ratification by the Pennsylvania Convention); 2 M. FARRAND, *supra* note 53, at 318–19 (statements of Messrs. Madison, Gerry, Sharman, Elseworth, and Mason).

62. See *supra* note 61.

63. 67 U.S. (2 Black) 635 (1862).

64. 343 U.S. 579 (1952).

65. 67 U.S. (2 Black) 635, 640–43 (1862).

66. *Id.* at 668.

67. *Id.* at 670.

68. *Id.* at 668–69.

the Justices were in substantial disagreement over the degree to which presidential emergency powers should be restricted. Before one can reconcile this case with the *Prize Cases*, the seven opinions in *Youngstown Sheet & Tube* must be examined to determine the extent of inherent presidential power.

Youngstown Sheet & Tube arose out of a protracted labor dispute in the steel industry during the Korean War. On the eve of a strike that would have shut down steel production in the United States, President Truman issued an executive order directing the Secretary of Commerce to seize the mills and keep them running. The steel companies sued to enjoin enforcement of the order.⁶⁹

The government claimed that the aggregate of the President's powers as Chief Executive and Commander-in-Chief of the Armed Forces provided sufficient authority for the seizure.⁷⁰ The majority opinion, joined by five Justices, simply ignored this contention and considered separately each potential source of power⁷¹ in upholding the district court's injunction.

The Court summarily rejected the Commander-in-Chief power as a source of presidential authority to issue the order. According to the Court, the cases cited by the government in support of this source of power held only that the Commander-in-Chief power conferred broad authority to conduct "day-to-day fighting in [an already existing] theater of war."⁷² The Court also rejected the executive power as a source of authority, stating that the power weakened rather than strengthened the claim to implied powers. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . [T]he Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."⁷³ The majority opinion thus placed strict limits on inherent presidential power.

A clear delineation between assumed authorization (although not denominated as such) and inherent presidential power arises from the remaining opinions. This distinction appears in the opinions of seven Justices, including the three-Justice dissent. Four concurring Justices emphasized Congress' earlier refusal to delegate seizure power to the President.⁷⁴ That refusal is without significance unless some type of assumed authorization is contemplated. If the challenged action lies within the President's inherent powers, no act of Congress can contract that power. Conversely, if the power were Congress' alone, it is irrelevant whether Congress considered delegating it provided it was not actually delegated. The dissenters shared the majority's conception of inherent presidential powers, and disagreed with the majority only on the proper interpretation of Congressional intent. The dissenters argued that the

69. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-83 (1952).

70. *Id.* at 587.

71. *Id.* at 587-88. This is significant in that presidential warmaking has sometimes been justified as an exercise of the aggregate of Commander-in-Chief, foreign relations, and executive powers. See A. VAN W. THOMAS & A.J. THOMAS, *supra* note 28, at 70-73.

72. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

73. *Id.* at 587.

74. *Id.* at 598-603 (Frankfurter, J., concurring); *id.* at 639 (Jackson, J., concurring); *id.* at 656-59 (Burton, J., concurring); *id.* at 662-66 (Clark, J., concurring in judgment).

President's seizure of the mills was merely an execution of the broad, declared legislative policies of providing for the national defense and controlling prices.⁷⁵ The dissent also emphasized that the President's message to Congress the day after the seizure stated that Congress was free to invalidate the order.⁷⁶ Further, the dissenters believed that in an emergency which threatens the existence of the nation, the President has the power, albeit limited, to preserve the status quo by any means necessary until Congress can act.⁷⁷

We do not now have before us the case of a President acting solely on the basis of his own notions of the public welfare. Nor is there any question of unlimited executive power in this case. The President himself closed the door to any such claim when he sent his Message to Congress stating his purpose to abide by any action of Congress, whether approving or disapproving his seizure action. Here, the President immediately made sure that Congress was fully informed of the temporary action he had taken only to preserve the legislative programs from destruction until Congress could act.⁷⁸

The *Youngstown Sheet & Tube* opinions do not delimit the concept of assumed authorization of presidential power as narrowly as commentators who assert that the power exists only when congressional approval obviously would have been given.⁷⁹ Only Justice Frankfurter's opinion can be interpreted as going so far, and it is uncertain whether that was his intention.

It is one thing to draw an intention of Congress from general language and *to say that Congress would have explicitly written what is inferred*, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.⁸⁰

Justice Frankfurter referred to the President's authority as the power to do what "Congress would have explicitly written" had it had time—a formulation that resembles some modern commentators' view of assumed authorization.⁸¹ However, in an earlier passage, Justice Frankfurter suggested that certain "authority belongs to [the President] until Congress acts."⁸² It is most likely this broader power that Justice Frankfurter contrasted with authority that Congress has "consciously withheld."

Justice Jackson's opinion more clearly defined the sources of presidential power. He described three categories of presidential action. First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress

75. *Id.* at 672, 701–04, 709–10 (Vinson, C.J., dissenting).

76. *Id.* at 667–77, 709–10.

77. The Framers did not "create an automaton [of a President] impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake. . . . [T]he Executive has the duty to do that which will preserve peace until Congress acts." *Id.* at 682, 684.

78. *Id.* at 701.

79. See *supra* notes 57–58 and accompanying text.

80. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) (emphasis added).

81. See *supra* note 58.

82. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597 (Frankfurter, J., concurring).

can delegate.”⁸³ Second, presidential actions in areas in which Congress has not spoken may rest on the President’s inherent power or on power within a “zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”⁸⁴ Last, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”⁸⁵

Justice Jackson’s “zone of twilight” included only matters to which Congress has not spoken.⁸⁶ Any congressional action would remove the presidential authority to either the first category or the third.⁸⁷ If Congress disapproves the presidential action, the President is deprived of all authority that he or she shares with Congress and might have exercised absent congressional action. In this situation, the President “can rely only upon his own constitutional powers *minus* any constitutional powers of Congress over the matter.”⁸⁸ In Justice Jackson’s view, then, Congress has the final authority over matters in which its power is shared with the President. The President may constitutionally exercise those powers without legislative approval, but only if Congress does not expressly or implicitly disapprove the presidential action.

The opinions of Justices Burton and Clark develop a similar concept of assumed authorization. In Justice Burton’s view, Congress’ considered denial of the seizure power to the President “distinguish[es] this emergency from one in which Congress takes no action and outlines no governmental policy.”⁸⁹ Justice Clark concluded that

where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but . . . in the absence of such action by Congress, the President’s independent power to act depends upon the gravity of the situation confronting the nation.⁹⁰

The dissenters’ chief disagreement with the majority and concurring opinions concerned the interpretation of congressional will, and not the theoretical bounds of presidential power. In contrast with the majority’s emphasis on the legislative history in which Congress had rejected giving seizure power to the President, the dissent emphasized the broad legislative programs of providing for defense and controlling prices.⁹¹ The dissent implicitly assumed that express legislative policies must take precedence over a silent congressional refusal of power. The dissent’s view of assumed authorization may even have been narrower than that of some of the concurring Justices, for the dissenters stated only that, “at a time when the survival of

83. *Id.* at 635 (Jackson, J., concurring).

84. *Id.* at 637.

85. *Id.* at 637–38.

86. *See id.* at 637, 639.

87. This was the situation in *Youngstown Sheet & Tube*. The President’s seizure power was “clearly eliminated” from the zone of twilight by Congress’ having spoken to the matter. *Id.* at 639 (Jackson, J., concurring).

88. *Id.* at 637 (Jackson, J., concurring) (emphasis added).

89. *Id.* at 659 (Burton, J., concurring).

90. *Id.* at 662 (Clark, J., concurring in judgment).

91. *Id.* at 672, 701–04, 709–10 (Vinson, C.J., dissenting).

the Republic itself may be at stake, . . . the Executive has the duty [and therefore the power] to do that which will preserve peace until Congress acts.”⁹²

None of the *Youngstown Sheet & Tube* opinions would extend the inherent powers of the President beyond the express language of the Constitution plus a possible power of territorial self-defense.⁹³ Three of the opinions cautioned against accretions of power, no matter how slight, in any branch of the government.⁹⁴ The dissent’s repeated assertions that the President was merely preserving legislative programs until the Legislature could act indicate that those three Justices were also unwilling to expand inherent presidential powers.⁹⁵

One potential source of inherent presidential warmaking power, not at issue in *Youngstown Sheet & Tube*, remains: the power to conduct foreign relations. The constitutional provisions giving the President sole power (subject to Senate approval) to make treaties and appoint ambassadors,⁹⁶ together with the inherent power of any nation to conduct foreign relations,⁹⁷ are generally regarded as rendering the President “the sole organ of the federal government in the field of international relations.”⁹⁸ Commentators have relied on the broad language of *United States v. Curtiss-Wright Export Corp.*⁹⁹ for the proposition that warmaking power is included within the President’s powers of international relations.¹⁰⁰

However, nothing in *Curtiss-Wright* would authorize the President to go to war without congressional approval. While the Court held that the government’s powers in external affairs were not limited to powers expressly granted by the Constitution,¹⁰¹ it emphasized that inherent foreign relations powers, “like every other

92. *Id.* at 682, 684.

93. Does the President, in such a situation, have inherent constitutional power to seize private property which makes congressional action in relation thereto unnecessary? We find no such power available to him under the present circumstances. The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President’s constitutional power to meet such catastrophic situations.

Id. at 659 (Burton, J., concurring). “[T]he emergency did not create power; it merely marked an occasion when power should be exercised. And the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than the Congress, had the constitutional authority to act.” *Id.* at 629 (Douglas, J., concurring). See also *id.* at 649–51 (Jackson, J., concurring); *id.* at 587–88 (majority opinion).

94. *Id.* at 633–34 (Douglas, J., concurring); *id.* at 593–94 (Frankfurter, J., concurring) (The Framers “rested the structure of our central government on the system of checks and balances. For them the doctrine of separation of powers was not mere theory; it was a felt necessity. . . . The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”); *id.* at 649–50 (Jackson, J., concurring) (“The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work”) (footnotes omitted).

95. See *supra* notes 91–92 and accompanying text.

96. U.S. CONST. art. II, § 2, cl. 2.

97. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

98. *Id.* at 320.

99. 299 U.S. 304 (1936).

100. See, e.g., Emerson, *supra* note 54, at 202.

101. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

governmental power, must be exercised in subordination to the applicable provisions of the Constitution."¹⁰² As Justice Jackson pointed out in *Youngstown Sheet & Tube*, "Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress."¹⁰³ The constitutional scheme of separation of powers makes it clear that a power is not vested in the Executive merely because it is a natural attribute of sovereignty.¹⁰⁴ The same inherent powers of government relied on in *Curtiss-Wright* to support the President's foreign relations power were cited in another case¹⁰⁵ to uphold Congress' power to deprive persons of citizenship.¹⁰⁶ The inherent power of the government to conduct international relations does not vest in the President the power to declare war. In the absence of contrary expressions by the courts or the Framers, there is no justification for altering the divisions of power created by the express language of the Constitution.¹⁰⁷

The *Prize Cases* are thus reconcilable with *Youngstown Sheet & Tube*. The holding of the *Prize Cases* was limited to a presidential power to "resist force by force"¹⁰⁸ in the case of an attack on United States soil. In any other situation, the President "has no [inherent] power to initiate or declare a war either against a foreign nation or a domestic State."¹⁰⁹ Nor is either of these cases inconsistent with later judicial assertions that "in a grave emergency [the President] may, without Congressional approval, take the initiative to wage war."¹¹⁰ Depending on the nature of the emergency, the President may act pursuant to inherent defensive power or assumed authorization. The *Prize Cases* control when inherent defensive power is exercised, while *Youngstown Sheet & Tube* governs all other assertions of presidential warmaking power.

It is helpful to identify the constitutional language that permits the President to defend the territorial integrity of the United States. The government has a constitutional duty to "protect each [state] against Invasion."¹¹¹ It is natural, then, that the Executive should have inherent power to do so; since self-defense is constitutionally required, no congressional approval is necessary.¹¹² In any situation other than actual or imminent invasion of United States territory by foreign or

102. *Id.* at 320.

103. 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

104. *See id.* at 587 (majority opinion); *id.* at 640-41 (Jackson, J., concurring).

105. *Perez v. Brownell*, 356 U.S. 44 (1958).

106. *Compare id.* at 52 (quoting *Mackenzie v. Hare*, 239 U.S. 299, 311-12 (1915)), with *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936) (quoting *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915)).

107. Though it has been argued that past failures of Congress to repudiate presidential warmaking constitute authority for a broad interpretation of presidential powers, *see* Emerson, *supra* note 54, at 200-01; U.S. Dep't of State, *Authority of the President to Repel the Attack in Korea*, 23 DEP'T ST. BULL. 173 (1950), the majority opinion in *Youngstown Sheet & Tube* pointed out that while practice may serve as a guide to interpretation, it cannot overrule express constitutional language. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952); *see also id.* at 610 (Frankfurter, J., concurring). Professor Friedman argues persuasively that past inaction of Congress shows no intent to cede power to the President and should not be construed as doing so. Friedman, *supra* note 28, at 237-45. Furthermore, *Chadha* itself struck down a device that had been employed by Congress for 50 years. *See* Act of June 30, 1932, ch. 314, § 407, 47 Stat. 382, 414 (repealed 1966) (the first legislative veto). The *Chadha* Court emphasized that habituation is not the same as constitutionality. *INS v. Chadha*, 103 S. Ct. 2764, 2779 n.13 (1983).

108. 67 U.S. (2 Black) 635, 668 (1862).

109. *Id.*

110. *Mitchell v. Laird*, 488 F.2d 611, 613 (D.C. Cir. 1973) (dicta).

111. U.S. CONST. art. IV, § 4.

112. *See* 2 M. FARRAND, *supra* note 53, at 318 (statement of Mr. Sharman).

rebellious domestic forces, no language in the Constitution, the cases, or the debates at the Constitutional Convention supports an inherent constitutional authority for the President to initiate war. As Alexander Hamilton stated, "it belongs to Congress only to go to war" even when the United States or its citizens have received "provocations or injuries" short of actual or threatened attack.¹¹³ If the President may go to war in the absence of actual or imminent invasion,¹¹⁴ the only power available to her or him is assumed congressional authorization.

1. *Legislative Response to Exercise of Inherent Presidential War Power*

Before considering whether a legislative veto over presidential warmaking commenced pursuant to inherent powers may be constitutional, it must be determined whether Congress has any constitutional power to review such actions. When foreign invaders have reached United States soil, it is apparent that Congress has no such power, for the Congress, no less than the President, is bound by Article IV's guarantee of protection to the States.¹¹⁵ Should it appear that "surrender is the best way to save what remains of the country,"¹¹⁶ the surrender must be agreed upon, not by unilateral resolve of Congress, but in the same manner as all treaties—by the President "by and with the Advice and Consent of the Senate, . . . provided two thirds of the Senators present concur."¹¹⁷ Although some commentators have argued that at least preemptive strikes¹¹⁸ are congressionally reviewable (because of the potential for abuse of presidential discretion in deciding when an invasion is imminent),¹¹⁹ Congress may never intervene in the exercise of the President's inherent powers whether the question is when to defend or, for example, what strategies to use.¹²⁰

The issue remains, however, whether the President's inherent defensive power permits unlimited warmaking on the theory that war is war, whether commenced by foreign aggression or by congressional authorization, and therefore it may be pursued until ended by treaty.¹²¹ Language in the *Prize Cases* certainly suggests this result. The President "does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a

113. A. HAMILTON, WORKS 249–50 (H. Lodge 2d ed. 1903), quoted in A. VAN W. THOMAS & A.J. THOMAS, *supra* note 28, at 37.

114. As stated earlier, it is not the aim of this Comment to define the allocation of war powers between the President and Congress.

115. But see A. VAN W. THOMAS & A.J. THOMAS, *supra* note 28, at 55 (asserting that congressional ratification is necessary and repudiation is possible even when the President exercises inherent powers in entering war).

116. W.T. REVELEY, *supra* note 28, at 199.

117. U.S. CONST. art. II, § 2, cl. 2; see 2 M. FARRAND, *supra* note 53, at 319 (motion of Mr. Butler to give the power to make peace to the whole Congress; statement of Mr. Gerry, seconding the motion that the whole Congress is less likely than the Senate alone to "be corrupted by an Enemy" and "consequently give up part of the U. States").

118. I.e., military action to forestall an imminent attack, as opposed to repulsion of an actual attack.

119. A. VAN W. THOMAS & A.J. THOMAS, *supra* note 28, at 55–56; Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1285–86 (1969).

120. Professor Reveley cites the congressional repudiation of the Mexican War as precedent for the reviewability of preemptive strikes. Reveley, *supra* note 119, at 1260 & n.48. But, as another commentator points out, Congress ratified and authorized the war during its course, and only stated that it was "unnecessarily and unconstitutionally begun" in an amendment to a resolution of thanks to General Taylor. Note, *supra* note 57, at 1780 & n.50.

121. See Note, *supra* note 57, at 1779–81 (arguing that the *Prize Cases* in addition to the Mexican War dictate this result).

foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be 'unilateral.'''¹²² However, in that case the Court limited its statements of presidential authority to the power to defend. The President may and must "resist force by force"¹²³ and "meet [the war] in the shape it present[s] itself."¹²⁴ The power to declare war still rests with Congress; the President's inherent authority is limited to the constitutional duty to protect the states from attack.

Unfortunately, under this analysis the difficult factual determination of when invasion is no longer imminent must be made. Once the attacking forces have been subdued to the point that invasion is no longer a serious threat, the President's defensive authority is at an end. Any further retaliation must be authorized by Congress.¹²⁵ Yet the President has discretion to determine whether a foreign or internal threat is great enough to warrant military response.¹²⁶ This proposition follows from the necessity for instantaneous action. Allowing the President to respond to imminent invasion, yet first requiring a factual finding by Congress that invasion is truly imminent, would be anomalous.

After an initial attack has been repulsed, however, Congress will have had time to meet and decide whether further measures are appropriate.¹²⁷ Should Congress then be able to issue findings of fact, which are binding on the President, as to the imminence of the threat? Generally, the Framers' desire to avoid war should create a presumption in favor of congressional action. Here, however, the equally weighty fear of invasion balances the scales. When a bona fide factual disagreement between the President and Congress exists, more than a concurrent resolution should be required to force the President to cease allegedly defensive actions. The President deserves deference because of his or her foreign policy powers and ultimate responsibility, as Commander-in-Chief, to defend the nation against attack. For this reason, if a President in good faith has exercised defensive powers to forestall or repel an attack, and continues to believe that an attack against the United States is seriously threatened, a bill subject to presidential veto and accompanied by findings that such an attack is not in fact imminent should be required to terminate presidential warmaking.

2. Legislative Response to Presidential Warmaking under Assumed Authorization

As discussed above, assumed authorization exists when the President, although lacking inherent or delegated war powers, may take any action not inconsistent with the expressed (or possibly implied) will of Congress to preserve order until Congress

122. 67 U.S. (2 Black) 635, 668 (1862).

123. *Id.*

124. *Id.* at 669.

125. *Cf.* Congress' exclusive power to grant letters of marque and reprisal. U.S. CONST. art. I, § 8, cl. 11. In certain situations (an unlikely example is an invasion of all of North America that continues against Canada and Mexico after having been defeated in the United States), the President may be able to invoke assumed authorization until Congress acts, even when the threat of actual invasion of the United States is no longer imminent.

126. *See* The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862); Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 121 (1984) (citing *Martin v. Mott*, 25 U.S. (12 Wheat.) 19 (1827)).

127. For example, Congress was able to declare war on Japan within one day of the attack on Pearl Harbor. Joint Resolution of Dec. 8, 1941, Pub. L. No. 77-328, 55 Stat. 795.

can meet.¹²⁸ Since the President is not exercising inherent power, Congress is not constitutionally precluded from ending United States participation in the hostilities in this context. The issue under consideration in this Comment is whether Congress may do so by concurrent resolution, or whether it must use normal legislative procedures. To answer this question, the test of *INS v. Chadha* must be applied: Is the concurrent resolution a legislative act?

The analysis must begin, as the *Chadha* Court's did, with the presumption that any action taken by Congress is a legislative act.¹²⁹ Although the Court in *Chadha* did not enunciate standards for overcoming this presumption, it is helpful to consider the three aspects of the legislative veto the Court found persuasive in *Chadha*.

First, does the concurrent resolution have "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch?"¹³⁰ In the broadest sense, the resolution obviously has that purpose and effect. In one stroke, it revokes the status of the United States as a belligerent and alters the rights and duties under both domestic and international law of the hostile nation, the United States armed forces, and the President. As a matter of constitutional law, however, the legal rights and duties of these entities were, from the beginning, subject to ratification by Congress and based on assumptions concerning what Congress would do were it able to act. No action taken by the President can change the constitutional command that Congress alone has the power to declare war. The legal rights and duties of all persons entangled in the conflict are the product of necessity, created by the inability of Congress to convene in time. Once an express utterance of Congress removes the necessity, the rights and duties either cease to exist or are called into new being by a declaration of war or similar act.

Second, is the character of the congressional action supplanted by the concurrent resolution such that Congress could terminate United States participation in the hostilities by concurrent resolution in the absence of the provision?¹³¹ The answer to this question is similar to the previous one. Since presidential warmaking under assumed authorization is subject to the will of Congress as a matter of constitutional law, Congress has inherent power to terminate any such military action without presidential approval. The War Powers Resolution merely provides a procedural framework within which Congress can act to disapprove the war.

Last, was the President's warmaking power delegated to him or her by Congress?¹³² Obviously it was not, and this is the key to the constitutionality of the concurrent resolution. The President, in initiating war without inherent power to do so, is exercising a power that the Constitution gives exclusively to Congress, without the authority of a legislative delegation. As Professor Reveley points out, the legislative process "runs in reverse"¹³³ when authorization is assumed. Necessity confers on the Executive the power to act before congressional approval is obtained; yet

128. See *supra* notes 69-92 and accompanying text.

129. *INS v. Chadha*, 103 S. Ct. 2764, 2784 (1983).

130. *Id.*

131. *Id.* at 2785.

132. *Id.* at 2786.

133. W.T. REVELEY, *supra* note 28, at 198.

necessity does not write statutes that can be repealed only by act of Congress subject to presidential veto. The requirement that Congress must declare war is not forever abandoned merely because Congress was unable to gather before the President thought action necessary.

Apart from the criteria discussed in *Chadha*, it is clear that a congressional veto of assumed presidential warmaking authority is an extraordinary act. Rather than acting to create new legislation, Congress is dispelling an assumption that legislation was intended by Congress. Necessity permits the President to act without prior approval, but necessity does not suspend the Constitution. The separation of powers considerations that the Court found compelling in *Chadha* are doubly implicated when an emergency allows the President to exercise a power that the Constitution commits to Congress alone. As the Court declared in *Chadha*, "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."¹³⁴ "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."¹³⁵ As Justice Jackson stated in *Youngstown Sheet & Tube*, "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them."¹³⁶ If assumed presidential authority to make war could be revoked only by statute, the President could initiate war at any time with the support of only thirty-four people (one-third of the Senate to block override of a veto).¹³⁷ In order to preserve the separation of powers, presidential warmaking, when exercised pursuant to assumed authorization, must remain subject to the exclusive power of Congress to declare or refuse to declare war. When the President claims assumed congressional authorization to initiate war, the concurrent resolution provision is constitutional.¹³⁸

D. Treaty Obligations

International agreements obligating the United States to go to war upon the happening of some event (typically an attack against another of the signatories) provide a final potential source of presidential warmaking power. Commentators have argued that treaties of this kind do not obviate the constitutional requirement of a congressional declaration of war,¹³⁹ and the case law seems to support this result.¹⁴⁰

In general, treaties are self-executing whenever self-execution is "the intent of the signatory parties as manifested by the language of the instrument, and, if the

134. *INS v. Chadha*, 103 S. Ct. 2764, 2784 (1983).

135. *Id.* at 2788.

136. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring).

137. See Friedman, *supra* note 28, at 244 n.87.

138. It is irrelevant that, as some commentators have argued, legislative overreaching is as much to be feared as usurpations by the Executive. See, e.g., Lungren & Krotoski, *The War Powers Resolution After the Chadha Decision*, 17 LOY. L.A.L. REV. 767, 779-80 (1984). This is, of course, true. The checks and balances in the Constitution reflect the Framers' general fear of any branch's growing too powerful. However, it can hardly be called "overreaching" for one branch to respond to another branch's usurpation of its constitutional power.

139. A. VAN W. THOMAS & A.J. THOMAS, *supra* note 28, at 81; Note, *supra* note 57, at 1798-99.

140. See *infra* notes 141-44.

instrument is uncertain, recourse must be had to the circumstances surrounding its execution."¹⁴¹ However, treaties and statutes are accorded an identical level of deference by the courts, so that if a treaty and a statute are inconsistent the one ratified later in time controls to the extent of the inconsistency.¹⁴² Most importantly, it has been repeatedly held that treaty obligations are in all respects subordinate to the requirements of the Constitution.¹⁴³ Insofar as war power is allocated by the Constitution, therefore, treaties do not supply an independent source of presidential warmaking power.

It might be argued that treaty obligations create an opportunity for the exercise of assumed authorization. Congress has precluded this result, however, in the War Powers Resolution. "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 . . . from any treaty heretofore or hereafter ratified unless such treaty is implemented by [specific statutory authorization]."¹⁴⁴ Thus, treaties obligating the United States to go to war must be implemented by legislation and do not authorize the President to act without congressional approval.

E. *Unconstitutional Action*

If a President's warmaking is without constitutional basis, may Congress terminate the war by concurrent resolution? The analysis is quite similar to that applied to presidential warmaking under assumed authorization. In this instance, the resolution would not have the intent or effect of altering legal rights or duties of persons outside the legislative branch. The President has no legal right to conduct the war, and the resolution merely determines the duties of persons subordinate to both the President and the Constitution.¹⁴⁵ In the absence of the concurrent resolution provision, Congress could certainly terminate United States participation in the hostilities by concurrent resolution. Such a move would be equivalent to express denial of the ratification that is necessary to constitutionalize the President's action. Again, since the President has already usurped congressional powers, the legislative process runs in reverse, and Congress must exercise a veto over the President's actions in order to preserve its exclusive power to declare war. Finally, the President is not acting pursuant to any delegation of power; no congressional act must be amended or repealed in order to deny the Executive's warmaking power. The separation of powers is implicated most strongly when the President has no basis on which to exercise Congress' power to declare war. Together, these factors would certainly overcome the presumption that the veto is an ordinary legislative act.

141. *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976).

142. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *see also Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

143. *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (plurality opinion); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Powell v. Zuckert*, 366 F.2d 634, 640 (D.C. Cir. 1966); *see also United States v. Minnesota*, 270 U.S. 181, 207-08 (1926).

144. 50 U.S.C. § 1547(a) (1982).

145. *See Ratner & Cole, The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 *Loy. L.A.L. Rev.* 715, 739 n.99 (1984).

Concurrent resolution may in fact be the best means by which Congress can stop executive overreaching in the war powers arena. Impeachment is slow, cumbersome, and politically sensitive; wholesale suspension of defense appropriations is not only politically untenable, but might leave the nation vulnerable to an actual attack.¹⁴⁶

IV. CONCLUSION

The Supreme Court's decision in *INS v. Chadha* is not so broad that all potential invocations of the concurrent resolution provision of the War Powers Resolution are invalidated. The President's war powers are unique among all the constitutionally delegated powers in that they spring from a variety of interrelated sources. The President's inherent warmaking authority, however, is limited to the defense of the territorial integrity of the United States. In other situations, when Congress has not spoken or is unable to act, presidential authority to initiate war may be assumed. Because of the importance of Congress' role in declaring war and the need for a check on presidential power, if the President acts unconstitutionally or pursuant to assumed authorization, Congress may constitutionally exercise control, not subject to veto, over a presidential decision to go to war.¹⁴⁷

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146. The Court suggested in *Chadha* that even when the action sought to be vetoed exceeds delegated power, it can be challenged only through judicial review and not by congressional veto. *INS v. Chadha*, 103 S. Ct. 2764, 2785 n.16 (1983). However, this is true only when the executive or independent agency purports to act pursuant to a delegation of legislative power. When separation of powers is in question, the courts are precluded by the political question doctrine from reviewing the executive action before Congress has declared the action unauthorized. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (*per curiam*).

147. The reasoning of this Comment would also apply to the automatic termination provision of the War Powers Resolution, 50 U.S.C. § 1544(b) (1982). This section requires the President to terminate the use of United States armed forces after 60 days "unless the Congress (1) has declared war or has enacted a specific authorization . . . , (2) has extended by law such sixty-day period, or (3) is physically unable to meet." When a President acts pursuant to assumed authorization, this section simply indicates when authorization can no longer be assumed. It is not congressional inaction after the use of armed forces that acts as a constraint on the President; rather, the section is a prior statutory guide to interpretation of Congress' actions. (Recall that in *Youngstown Sheet & Tube* it was Congress' refusal to act in the past that was deemed a denial of authorization. *See supra* note 74 and accompanying text.) When the President acts unconstitutionally, the automatic termination provision avoids a political question stalemate by indicating to the courts Congress' refusal to ratify the action.

