

THE SUPREME COURT AND THE TEMPLE OF DOOM: A SHORT STORY

*Rodney A. Smolla**

"I am not the first man in this office who has found it necessary to construe liberally his inherent power as Commander-in-Chief."

The Secretary of State always felt least comfortable when the President waxed historical; the President was a fierce revisionist, and always to his own ends. He did not appreciate the Secretary's own, more subtle sense of precedent in international affairs. "Yet, Mr. President," the Secretary responded diffidently, "the exercise of your inherent powers, whatever they may be legally, will still involve substantial political risk. The decision you are contemplating will not play well in Congress or in the media."

From the President's expression the Secretary knew instantly that he had blundered in shifting to the political plane. "Mr. Secretary," said the President, "I'll handle the politics, and I'll handle the goddamn Congress, and I'll handle the media, and I'll even handle the God-blessed Constitution. You handle our allies and the U.N. And if they can't be handled, screw 'em. No President with guts has ever gotten a bad shake from the American people. Americans don't give a damn if a President is wrong once in a while—hell, they know politicians—but they absolutely will never forgive a President who can't make up his damn mind. Harry Truman always *looked* like he knew what he was doing, and Jimmy Carter always looked like he didn't. Carter probably had twice Truman's brainpower, but the people thought he was a pussyfooter. Now I am not a pussyfooter, you understand? Moscow has sent out the signal for the final push in El Salvador. This is the Cuban missile crisis all over, this is the Monroe Doctrine all over, and I am *not* going to sit by and concede this hemisphere to the reds one tin-horse banana republic at a time."

No reply was called for.

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The rest of the cabinet was silent—not out of embarrassment for the Secretary, for there was a certain relish in his humiliation—but in the quiet tension that precedes a momentous decision. The President turned to the other side of the cabinet table and addressed the Secretary of Defense. “Would you go over, one final time, the exact placement of our forces, the initial deployment plan of the Joint Chiefs, and the various invasion schedules?” The phrasing was a question, but the tone a command; the President was placing his personality on a wartime footing, and he obviously enjoyed it.

As the Secretary of Defense impressed the President and the rest of the Cabinet with a masterfully precise, orderly, and self-confident presentation, the Secretary of State’s mind wandered. He wished he’d had the courage to challenge the President’s assumptions. But a challenge would have been ineffective even if the logic and moral force of the arguments were compelling. With this President an argument needed the extra leverage of a threatened resignation. Henry Kissinger had prevailed many times with the resignation threat. But the current Secretary of State was no Kissinger to this President: this President was his own Kissinger. If he tendered his resignation, it would simply be accepted. Like Cyrus Vance and Alexander Haig, the most recent to resign as Secretaries of State over matters of “principle,” the principle would be less remembered than the failure to survive a four-year term. And if his personal esteem was not enough to sway any votes in the room, least of all the President’s, surely any inherent logic of his arguments would pale next to the seductive excitement surrounding the Commander-in-Chief’s exercise of the war power. While talk of troop placements and timetables filled the room, the Secretary of State mused over arguments that might have been. . . . Our allies cannot be “handled,” Mr. President. If they were not with us in invading Grenada or mining Nicaragua they will not be with us in igniting all of Central America. . . . The American people *have* given presidents a bad shake for being decisive. . . . “Give ’em hell, Harry” sounds better every year, but people forget that in Truman’s second term his popularity was the lowest of any American president since records were kept—not even Richard Nixon in the heart of Watergate ever sunk so low. . . . Carter’s public image may have exuded malaise, and maybe the public will never forgive him for Iran, but he also avoided a middle-eastern war—for him Camp David was more useful than Camp Lejeune. . . . Mr. President, this is not the Cuban missile crisis, you are not John Kennedy, and Americans have changed since 1962. . . . I believe, Mr. President, that

your invocation of the Monroe Doctrine, although consistent with popular mythology, is inconsistent with the actual historical record. . . . What you are actually invoking, sir, is not the Monroe Doctrine itself, but the big stick Teddy Roosevelt corollary to the Monroe Doctrine. . . . As I have written in scholarly journals, sir, Roosevelt perverted the Monroe Doctrine by invading Panama in 1903 and helped create a mentality that has indelibly alienated us from Latin America. . . . Teddy Roosevelt stated—I remember his exact words—that “adherence to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.”

The Secretary of State wished he had the courage to press these arguments, to say that the President thought he was a cowboy just like Teddy Roosevelt had, but that these days cowboy Presidents were capable of a lot more harm. But he did not have the courage, and it wouldn't have made any difference anyway. The matter was already decided. Perhaps it had been decided as the landslide returns came in at the last election. The counsels of war were in place.

“The Speaker is furious,” Marsha Lepcott said, in a voice that did not quite manage to conceal her own furor. “When he spoke to the President last night the President all but promised that no troops would move without consulting the congressional leadership—and now this.” As the Speaker's chief aide, she had just returned from a hastily convened five a.m. meeting at the Speaker's home. The rest of his legislative staff had been roused from bed and ordered to report to work immediately; they were now assembled in his spacious office suite. Among them were George Newton, a graduate of the law school and street life of Berkeley, a sixties casualty turned lawyer, kept on by the Speaker (whom Newton called “The Ayatollah,” except to his face) as his resident parliamentarian and one-man think tank.

“We've just gotten more from the AP wire, Marsha, and this thing is a helluva lot bigger than we thought an hour ago,” said Newton. “We'd better get the Ayatollah here right away.”

Lepcott took the Associated Press dispatch from Newton and began to read the news for herself:

SPECIAL BULLETIN

Managua, Nicaragua (AP)—The United States launched a massive surprise invasion into four Central American nations early Tuesday morning, landing by

sea and air on the soil of El Salvador, Nicaragua, Honduras, and Guatemala. The sudden attacks appear to be the beginning of large-scale coordinated military intervention into the Central American region, and come against the backdrop of the past four weeks of increasing violence, tension and chaos in El Salvador.

American troops have landed in substantial force—the number of troops appears to be between twenty and twenty-five thousand—on Pacific Ocean beaches southwest of Managua, the capital city of Nicaragua. They are advancing rapidly toward the capital. Heavy bombardment of the main Nicaraguan airbase near Managua preceded the amphibious assault.

American helicopter and paratrooper units had landed at 2:15 a.m. EST in a daring nighttime raid on the airport in San Salvador. A massive invasion of troops was taking place simultaneously near the small Salvadoran port town of La Libertad, which is connected by a paved highway to the capital city. Communications in and out of El Salvador are now apparently severed and no further details are available.

By 2:30 a.m. Guatemalan officials had confirmed that U.S. forces were conducting a “search and destroy” mission against an alleged stronghold of leftist guerilla forces from El Salvador and Cuban support troops near Chiquimulilla, Guatemala, located about fifty miles northwest of the Salvadoran border. A surprise United States search and destroy attack was also conducted during the night on a Cuban controlled guerilla sanctuary in the mountainous Ocotepague region of Honduras, about ten miles north of the border between El Salvador and Honduras.

Lepcott looked up from the news dispatch and, with an audible edge of anger told Newton, “The Speaker will be here in an hour. He wants a briefing on his options; he’s planning to meet with the party caucus later this morning. There are rumors that the President will go on national television sometime around noon to announce and justify the invasion. The Speaker wants to have his reaction to the speech set before it starts. So what are our options?”

Newton did not pause before responding in his usual quiet, slightly pedantic voice. “From a legal perspective, our first line of attack is the War Powers Resolution. Under the resolution the President can introduce troops into hostilities in only three situations: after a congressional declaration of war, by specific statutory authorization, or in a national emergency created by an attack on United States territory or its armed forces. The resolution requires consultation with Congress in every possible instance in which American forces are introduced into hostilities or situations in which hostilities are imminent. The President must report to the Speaker of the House and President Pro Tem of the Senate within forty-eight hours after American forces are utilized with a detailed explanation. So in this case the President has violated the resolution from top to bottom. There was no consultation; in fact, there was misconsultation, since the President deliberately misled

the Speaker. And more fundamentally, there was no constitutional authority to launch the attack."

"What about his inherent authority as Commander-in-Chief?" Lepcott asked.

"Inherent authority is simply something presidents have concocted over the years to justify their own usurpations of Congress's power over war," Newton said sarcastically, "The War Powers Resolution does not recognize any such inherent authority."

"Well that's all fine and good, but it's not exactly as if the President is acting on blank historical slate, is it? I mean hasn't every president from Abraham Lincoln to Ronald Reagan launched troops into combat under the inherent power? You know how much the Speaker loves to quote Abraham Lincoln."

"I didn't say," said Newton, "that this invasion is *unusual*—just that it's unconstitutional and in violation of the War Powers Resolution."

"Well, you seem awfully cocksure. I'm not even sure that most Americans don't prefer to leave it all to the President."

"You said the Speaker wants to know his options, and I'm telling you what they are. Whether he has the political courage to utilize them, I have no idea—that he will have to decide for himself."

The Chief Justice of the United States was working unusually late, making final corrections on a draft opinion. One of his law clerks knocked softly on the door to his chambers and then stuck his head inside. "Mr. Chief Justice," said the clerk, "the President is coming on TV in a few seconds to discuss the invasion; I thought you might want to turn it on."

The Chief Justice nodded his appreciation and turned on the set that he kept in his office. As the President spoke the Chief Justice thought of how the world had grown more bellicose in recent years. He thought of body bags in Beirut lifted by stunned marines from the rubble; AC-130 gunships spraying the beaches of Grenada with cover fire as army rangers were dropped from the skies, their parachutes punched with bullet holes from Cuban machine guns: these the images of war for a nation moving slowly back into its early Cold War role as the anticommunist policeman of the world. But they were necessary images, he thought. The Chief Justice shared the President's two consuming preoccupa-

tions: the first, that the source for most of the world's trouble is communism in general and the Soviet Union in particular; the second, that to counter the global Soviet threat the United States must be able and willing to use its military power on short notice, wherever necessary.

"Now there was a time," the President was saying at that moment, "when our national security was based on a standing army here within our own borders and batteries of artillery along our coast, and of course a navy to keep the sea lanes. The world has changed. Today our national security can be threatened in far-away places." The Chief Justice nodded his silent agreement.

"Within the course of the last years," the President continued, "a cascade of international events has brought the evils of Soviet foreign policy into sharp focus. The Soviet Union in cold blood used a heat-seeking missile to shoot down South Korean airline flight 007. After the United States deployed MX missiles in Western Europe, a deployment essential to the security of our European allies, the Soviets broke off arms control negotiations. Terrorists bombed the U.S. Marine headquarters at the Beirut airport, murdering 229 marines, and American forces were forced to exchange fire with Syrian forces in the Bekaa Valley, forces armed and advised by Soviet military experts. Six thousand American soldiers landed in the tiny Caribbean resort island of Grenada, to depose a capricious communist government that was about to become a Soviet-Cuban colony, a bastion to export terrorism and undermine democracy. Soviet efforts to prop up the Sandinista government in Nicaragua, an oppressive regime that Nicaraguans do not want, became increasingly visible. And attempts to destroy the anticommunist government in El Salvador grew in intensity. Our intelligence sources tell us that Mexico will be next."

As he listened to the President's description of his decision to invade Central America, the Chief Justice thought that it was fortunate that most real Americans agreed with the President's fervent anticommunism, his perception of the Soviet Union, and his willingness to employ American forces to extinguish communist brushfires around the globe. Isolationist and pacifistic streaks have always existed in the American character, and they were deeply enlarged by the disillusionment of Vietnam. But the increasing aggressiveness of the Soviet Union, particularly its attempted conquest of Afghanistan and its hard-nosed reassertion of power in Poland, reinvigorated the domino theory in the consciousness of much of mainstream America. And the feelings of impotence and frustration created by the Iranian hostage crisis,

feelings exacerbated by the bungling ineptitude that followed, left many Americans both willing to endorse the future use of force and anxious for a military victory. The Chief Justice listened with a swelling sense of patriotic pride as the President turned to a map of Central America and explained how the massive invasion would root out once and for all the communist cancer that was spreading through Central America.

The senior editor of the *Washington Post*, Rube McClellan, reread the copy that his best young investigative reporter, Susan Marks, had handed him.

"If this is true," McClellan said, "public support for the invasion will begin to unravel. You are claiming that the President will blockade Cuba if the invasion bogs down in the Salvadoran jungles, and that the blockade plan calls for a full-scale nuclear alert, and issuing a Nixon-type 'madman ultimatum' to the Russians not to interfere, because the President may just be crazy enough to push the button if they do."

"That is exactly my information," said Marks.

"That may be your information, Susan, but this is incendiary material. We can't run it unless we're absolutely sure—and you won't name your source. And even if you did, your source might not be good enough."

"What if I told you that my source is unimpeachable and that he has shown me a White House memorandum that substantiates his story?"

"I'd say I still won't even consider printing the story until I know who the source is," said McClellan.

Marks could see that she plainly had no chance unless she was frank with McClellan. "I got this information personally from the Secretary of State."

McClellan leaned way back in his chair and shut his eyes. Marks knew not to disturb his thought. After a few moments, McClellan stood up from behind his desk, a signal that there would be no argument over his decision. "For now," he said, "we do not run this story."

When Marks had left the office, McClellan buzzed his administrative assistant over the intercom. "Joan, get me the Secretary of Defense on the phone immediately; tell him I have some urgent information for him."

The presidential press secretary read with satisfaction the opening story in the morning *New York Times*:

A *New York Times*/CBS News opinion poll conducted over the last three days indicates that the American public on the whole supports the actions of the President in Central America. The questions and poll results are summarized below:

1. Do you agree or disagree with the President's initial invasion in Central America?

Agree
60%

Disagree
30%

Don't Know
10%

2. Do you agree or disagree with the President's announced policy of expanding the conflict throughout Central America and the Caribbean area if he deems it necessary?

Agree
58%

Disagree
32%

Don't Know
10%

3. Do you agree or disagree with the President's announcement that he will not give in to Soviet Union threats or intimidation concerning continuation of the Central American war?

Agree
72%

Disagree
25%

Don't Know
3%

4. Do you agree or disagree with the announced threat of the Speaker of the House to seek a concurrent resolution passed by the Senate and House of Representative ordering the President to terminate hostilities?

Agree
30%

Disagree
65%

Don't Know
5%

The President's instincts for what would wash with the American public were uncanny, the Press Secretary thought. And this poll would make handling the assholes in the White House press corps a helluva lot easier at this morning's briefing.

The only problem with the "MacNeil-Lehrer NewsHour," thought the Senior Associate Justice of the United States Supreme Court as he watched his favorite television news show, was that sometimes it was too much like the Socratic dialogues of his long by-gone law school days: to every parry a thrust, to every point a counterpoint, to every debate two sides. The MacNeil-Lehrer team could make mass murder seem like an issue on which rea-

sonable minds could differ. The Associate Justice thought with some disgust of his own Chief's private views on the Central American war, disclosed the previous day over lunch. Television commentator Robin MacNeil was setting the stage for the debate on the war issue, a debate that the Associate Justice regarded as having only one intelligent side.

"On March 5 of this year," MacNeil was saying, "United States military forces launched a substantial military attack on four central American nations: Nicaragua, El Salvador, Honduras, and Guatemala. In the six days that have passed since that attack, the military conflict has threatened to envelope the whole of Central America. As of this evening's broadcast, United States land, air, and naval forces are engaged in fierce combat in Nicaragua, El Salvador, Guatemala, Costa Rica, Panama, and Honduras. Additionally, the Reuters news agency tonight reports that the Central American war has, in the last several hours, spread to the Caribbean Sea and threatens to ignite a worldwide conflict of potentially devastating magnitude. Naval and air forces of the United States have this afternoon engaged in several skirmishes, Reuters reports, with Cuban forces. Yesterday, the American aircraft carrier *John F. Kennedy* came close to exchanging fire with a Soviet ship, when the Soviet destroyer refused to yield to the *Kennedy*'s command that it leave the three-mile zone surrounding the *Kennedy*. Although the destroyer retreated, the Soviet Union has placed its entire worldwide military apparatus on the highest level of alert, and has publicly warned the United States that a nuclear confrontation is possible if events continue to grow more bellicose. The conflagration in Central America and the Caribbean has created a level of global military tension as high as any since the Cuban missile crisis of 1962. Jim?"

"Thank you Robin," Jim Lehrer said, looking up from his notes at the camera. "During this same six-day period the level of internal political tension within the United States itself has escalated to a degree unmatched since the height of the Watergate scandal. The military crisis in Central America has precipitated a constitutional crisis of sorts on the domestic front, as Congress in a rare display of independence has geared up to attempt to countermand the President's decision to invade Central America. Against the background of this crisis, rumors have begun to circulate in the Capitol that the Supreme Court will be asked to render judgment as to the legality of the continuing prosecution of the Central American war. Tonight, we explore the Central American war, and the question of who, under the United States Consti-

tution, has the final authority over the use of American armed forces. Robin?"

"Thank you, Jim. Although the open introduction of regular units of the United States armed forces into the Central American arena began six days ago, the actual genesis of the current American military involvement dates back to the first term of Ronald Reagan, during which the United States steadily increased covert "paramilitary" operations in both Nicaragua and El Salvador. With me here in New York is Professor Linda Seith, a professor of Constitutional and International Law at Columbia University. Welcome, Professor Seith."

"Thank you, Robin."

"Professor Seith, the Speaker of the House of Representatives announced today that a majority of the members of the House and Senate agree that hostilities in Central America should cease immediately. There are now reports that tomorrow morning the House and Senate will vote by concurrent resolution, pursuant to the War Powers Resolution of 1973, that all United States forces in Central America be withdrawn immediately. The President's press secretary stated today that such a resolution would be unconstitutional and not binding on the President. Who is correct?"

"Well, Robin, the potential constitutional crisis posed by the events of the last several days is in part the result of the cloudiness of American constitutional law, a cloudiness caused by a conflict between the letter of the constitutional text and actual historical practice. Before the recent crisis most Americans probably assumed that on an issue so fundamental as the power to wage war, the basic outlines of constitutional law would be reasonably clear. Yet in the 210th year of the Republic the critical constitutional questions about the war power remain unsettled. What is the President's inherent power to order American armed forces into combat? No one is really sure. What is the scope of Congress's power to countermand the President? The War Powers Resolution of 1973 gives Congress absolute power, but the resolution itself may be unconstitutional. When Congress acts to reverse a presidential commitment of troops, may it do so by a concurrent resolution device not subject to presidential veto? Again, the War Powers Resolution says yes, but Supreme Court decisions from several years ago would appear to make such a Congressional veto invalid. What effect does the War Powers Resolution have generally on the balance of constitutional power that would otherwise exist? This question has never been authoritatively decided. Finally, what role should the judiciary play in disputes over the

allocation of the war power between the President and Congress? It is not at all clear that the Supreme Court would intervene."

"Well, Professor Seith, if prior to the events of last week one were to have polled a group of reasonably well-informed Americans and asked them if the Constitution allows the President to send American troops into hostilities, wouldn't the overwhelming number probably have said yes? Isn't the President, after all, the Commander-in-Chief, and hasn't every President in recent memory used troops on his own initiative?"

"Robin, it is true that neither the Korean nor Vietnam Wars were fought pursuant to formal congressional declarations. The average American must surely assume that the invisible and omniscient "they" would not have let these wars slip by if they knew these wars were unconstitutional. The critical "theys" on this question, however, are the members of Congress. The fact is that in this century they have never made timely and forceful objections to a president's unilateral decision to send United States troops to war. As Justice Robert Jackson remarked in *The Steel Seizure Case*, a Supreme Court decision that declared President Harry Truman's seizure of the steel mills during the Korean War unconstitutional, the power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers. In the words of Napoleon, 'the tools belong to the man who can use them.'"

The Associate Justice turned the television off. His blood pressure couldn't take much more of the debate. He hated this President, who so cavalierly took the nation into war. The Constitution seems so strong, he thought, but in the end it is so weak, as weak as the question "whom do the generals obey?" There were also, after all, eloquent constitutions in Central America. His thoughts turned from a President he hated to a President he loved, perhaps too much. In their excessive admiration of John Kennedy perhaps he and other Americans had given away too much control. Perhaps the actions of this President whom he detested were nothing but the logical terminus of what most presidents since John Kennedy had understood. Kennedy's charm, his good looks, and his showdown with Krushchev during the Cuban missile crisis embodied the two salient facts of the modern presidency: presidents can command the media and control the armed forces. Perhaps, thought the Associate Justice, the explanation of one of his favorite writers, Garry Wills, was correct. The "Appearances Presidency" that began with John Kennedy had an inherent tendency to break down traditional restraints on authority. Ken-

ney's most indelible mark on the presidency was to turn Marshall McLuhan's remark that the "medium is the message" into a political formula. The image projected by Kennedy had become the country's self-image. And now—as witnessed by the morning's public opinion poll results—the image projected by this President, the image of the benign but forceful policeman of the world, had become America's new image of itself. Neither the Congress nor the Supreme Court has any comparable ability to dominate the national mood through style alone. The Associate Justice shuddered as he wondered what would happen if that style were to be translated into defiance of the Congress and the Court.

The current President has brilliantly exploited the Kennedy legacy, the Justice thought, combining tough, hard-line anticommunist rhetoric with graceful "aw, shucks" charm. As the balance of power in the American press had shifted from print to television, the balance of power in American politics had shifted to the President. When American troops invaded and conquered Grenada, Reagan barred American journalists from the island for two days. He turned the entire Grenada episode into far more than a lopsided but trivial military victory. But Grenada was not quite the same as this war. For most Americans Grenada remained obscure and quaint, about as much a threat to the United States as the Kingdom of Freedonia in the Marx Brother's movie *Duck Soup*. To all but the sea-and-ski set, the tiny Caribbean nations that assisted in the invasion were as obscure as Grenada itself. The line-up sounded more like a travel brochure than a military alliance: Antigua, St. Lucia, St. Vincent, Dominica, Jamaica, and Barbados—it was laughable. Now that episode was being repeated on a grander and far more sinister scale. But could it be stopped?

The Speaker of the House was listening with minor irritation to the ranking senator at the ad hoc meeting of the congressional party leadership.

"I know that we have, as the Speaker pointed out, a broad bipartisan coalition on this thing," the Senator was saying. "I know, in other words, that we have the votes. My question is whether it is fair to the country to put the President to the embarrassment of a congressional countermand. And my ultimate fear is even worse—what if he disobeys us? What if we take the issue to the Supreme Court and lose? Then what becomes of congressional oversight? Or what, God forbid, if we win in the Supreme

Court, and the President ignores the Court's order? Is it fair to our boys, already caught in the crossfires of battle, to imperil them through constitutional crossfires at home?"

"The President would never disobey the Court's mandate, if it comes to that," interrupted the Speaker. "Even Nixon obeyed the Supreme Court's order to surrender the tapes."

"How do you know that?" the Senator challenged. "Nixon obeyed, but were you sure he would? Some say he toyed with calling the 92nd Airborne into Washington. And plenty of Presidents have flouted or skirted Supreme Court mandates. The problem is as old as *Marbury versus Madison*, or Lincoln's defiance of Chief Justice Taney when Lincoln suspended the writ of *habeas corpus*."

The Speaker winced. He hated having people use Lincoln against him. But the lapse in his control was only fleeting. "Senator," said the Speaker, "your fears are not frivolous, but if we don't force the President to choose between brute power and the constitutional process, then brute power will have won anyway, because fear of it is enough to back us down. A majority of this Congress wants no war in Central America. If we cannot enforce our will in this case, the constitutional role of Congress in decisions to go to war is a dead letter."

The Senator was not completely willing to retreat. "But with all respect, Mr. Speaker, perhaps we could maintain our role with a less aggressive and less potentially traumatic course. Under the War Powers Resolution's automatic sixty-day pullout provision, the troops must be pulled out after sixty days unless Congress acts affirmatively to authorize further hostilities. We could simply send the President the message that no such authorization would be forthcoming."

The Speaker's aides had prepared him for this argument. "So you advocate, Senator, the path of least resistance, which is to really do nothing, which gives the President a blank check to destroy Nicaragua, El Salvador, Guatemala, Honduras, and maybe even Cuba, if he can get it done in sixty days. He might even destroy the whole world, which he could probably do in about sixty minutes."

The Senator started to protest but the Speaker cut him off. It would be his meeting now. "Unfortunately, Senator, even the simplest option isn't simple. For one thing, to accede to the sixty-day option is to accept the President's war, and it undercuts the moral force of the position that the war is unconstitutional. And to use your own point, sir, the longer American troops are embat-

bled the tougher it becomes for Congress to abandon them out there. The more the war goes on the more the inertia is with the President. That is what we learned from Vietnam. There's also a second problem with the sixty-day option: it's the "who starts the clock" problem. Does the sixty-day clock start ticking as soon as the first marines hit the beach, or do we first have to start it running?"

"You're apparently the expert, Mr. Speaker," said the Senator. "What's the answer?"

"The resolution says nothing whatsoever about Congress having to start the clock. The language of the resolution starts the clock automatically when hostilities begin. But when Reagan sent troops to Lebanon we all acted like the sixty-day provision would not be activated without an affirmative vote starting the clock. And in a lawsuit brought by thirty congressmen in 1983 against Ronald Reagan for his secret war in Nicaragua, the lower court said that the clock did not start on its own. The court left an out, saying that the clock might start on its own in a less ambiguous situation—but how do we know what a court would do this time?"

"We could handle the clock problem by simply voting to start it," the Senator said.

"Sure we could," said the Speaker. "But what's the point? There is still the danger that after sixty days the President may continue to fight, claiming the War Powers Resolution is totally unconstitutional. So then we are in court all over again, and it's the same face-off. But in the meantime, we've had sixty days of misguided war and death, to which we would have acceded."

No one else motioned to speak for several moments. The Senator then stated simply, "Though with reservations, I accept the Speaker's position."

The Speaker was pleased. The caucus was unified; the concurrent resolution ordering an immediate cessation of all hostilities and pullout of all troops would pass both houses of Congress.

The Secretary of State was almost jealous of the Attorney General, who knew the art of always appearing to exercise independent judgment, while telling the President precisely what he wanted to hear.

"And so, Mr. President, since the congressional pullout resolution violates the Supreme Court's legislative veto decision in *INS versus Chadha*, and since it is inimical to your constitutional

power as Commander-in-Chief, I would recommend that you declare it a legal nullity, an unconstitutional act, and ignore it."

"That sir," said the President, "is precisely what I intend to do." The President paused, to let the impact of his decision sink in. He then spoke again. "I have one final bit of business before the cabinet meeting is disbanded. It seems that our contingency plans regarding Cuba and the Soviets have mysteriously leaked to the *Washington Post*."

My God, thought the stunned Secretary of State. Did he *know*? As the President glanced around the table, had the President's gaze lingered an extra second on him?

"I know," the President continued, "that the need to bring in staff on these matters makes leaks a problem. Luckily we have contained the leak for now. But as the Sergeant used to say on "Hill Street Blues," 'Let's be careful out there!'" The President smiled and let his eyes wander around the room as he rose to his feet, signaling the end of the meeting. As his eyes fleetingly met those of the Secretary of State, they seemed, ever so slightly, to narrow.

As Susan Marks reread her lead story for the *Washington Post* on the Supreme Court's decision, she again asked herself whether she should put into it the additional information that she had obtained. Her "special relationship" with the Secretary of State had already caused both of them terrible embarrassment. The Secretary's disclosures to her had somehow gotten back to the President, almost certainly through her own editor. Now the same relationship with the Secretary had put a new light on one of the most extraordinary Supreme Court opinions in history. The Secretary had an old and intimate friend on the Court, the Senior Associate Justice. Unbeknownst to anyone, even the Justice's own clerks, the Secretary and the Justice had "collaborated" on the Justice's opinion. The two had concocted a bizarre strategy: the Senior Associate Justice, though deeply opposed to the President's war and firmly convinced of its illegality, would vote for the President, but his opinion would be so cast as to prod the Congress to remove the President from office.

The Secretary and the Justice felt the impact of their opinion would depend on the slant taken by the media. They wanted Susan to portray the Court's action as a virtual command to Congress to impeach. She was convinced that their already surreal strategy could not sustain any additional weight. There was too

much chance that blatantly manipulating the tone of her article would backfire. Better to underplay the hand, to write a story that let the justices' opinions speak for themselves. In an hour her story would hit the newsstands in a special edition:

THE WASHINGTON POST

by Susan Marks

Only days after the initiation of litigation against the President by the Senate and House of Representatives, the Supreme Court announced a decision upholding the challenge to the legality of the Central American war.

The expedited litigation process was extremely unusual; legal scholars have pointed to the Court's decisions in President Truman's seizure of the steel mills during the Korean War and the Nixon Watergate tapes decision as among the few prior examples of such swift action.

The Court's split decision was embodied in two opinions. Three Associate Justices joined in the opinion of the Chief Justice, holding that the President's actions in invading Central America were within his inherent power as Commander-in-Chief, and ruling that the concurrent resolution ordering a pullout was an unconstitutional use of the legislative veto device.

The Senior Associate Justice wrote the only other opinion, holding that the case was "nonjusticiable" because it dealt with a question that could only be resolved through the impeachment process. He also wrote, however, that the President had exceeded his power under the Constitution, and that the Congress's concurrent pullout resolution was legally binding on the President.

Four dissenting Justices, who did not author any separate opinions, joined in those aspects of the Senior Associate Justice's opinion that declared the President's actions illegal. But they did not join in the Senior Associate Justice's view that the Supreme Court had no power to do anything about it.

The only constitutional remedy for the President's usurpation of power, the Senior Associate Justice wrote, was impeachment. Combined with the Chief Justice's opinion, this unusual split produced five votes in favor of the President, even though a different majority of five Justices actually held that the President's use of military force had exceeded his constitutional authority, and that the concurrent resolution ordering a pullout was binding on the President. Excerpts from both opinions are printed below.

The opinion of the Chief Justice began by stating that "history has created a gloss on the powers of the President as Commander-in-Chief that cannot be ignored by this Court. Although history alone cannot alter the constitutional text when that text is clear, time does work changes in the twilight zones of constitutional law. The inherent power of the President to commit American armed forces to combat exists in such a zone of twilight." The Chief Justice's opinion then reviewed the historical "gloss" that has come to surround the power of the President as Commander-in-Chief:

The Constitution provides that the Congress shall have the power "To declare War," "To raise and support Armies," "To provide and maintain a Navy," and "To make Rules for the Government and Regulation of the land and naval forces." The Constitution also declares, however, that "The President shall be Commander in Chief of the Army and Navy of the United States." Alexander Hamilton in *The Federalist No. 69* wrote that the division of war power contemplated by the cold language of the Constitution is that the Congress shall have the power to initiate war, and the President the power to conduct war previously initiated by the Congress. Hamilton thus

contrasted the constitutional scheme with the authority of the British monarch:

"The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military forces, . . . while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature."

History, however, has not maintained the neat division between the declaring and waging of war, and not even Alexander Hamilton himself thought that the text was intended to straight-jacket the President in times when decisive action was necessary. The language of the Constitution notwithstanding, American presidents have constantly engaged American military forces in "undeclared wars," relying on claims of inherent presidential power to utilize American military force without congressional authorization.

Three theories have been used to justify presidential war making: the "self-defense" or "sudden attack" theory, the "neutrality" theory, and the "collective security" theory. President Jefferson sent a squadron of American frigates to the Mediterranean to protect our American ships in response to a declaration of war against the United States by the Bey of Tripoli. Jefferson, unlike most Presidents after him, did have doubts about his power as President to respond against Tripoli in the absence of congressional authorization. Interestingly, however, Hamilton eschewed the sharp division between congressional and presidential war powers that he had expressed in his *Federalist* essay, and instead criticized Jefferson's hesitancy, contending that although the Constitution vested in Congress the power to declare war, when another nation made war upon the United States we were already in a state of war and no declaration by Congress was required. This was the first invocation of the "self-defense" justification for the presidential use of force without congressional approval. In 1863, the Supreme Court in *The Prize Cases* sustained President Lincoln's blockade of Southern ports at a time when Congress was not in session. The Court acknowledged that the President "has no power to declare a war," but held the "[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." Although the President "does not initiate the war," the Court stated, he "is bound to accept the challenge without waiting for any special legislative authority." The dissent in *The Prize Cases* took a far more circumscribed view of presidential war-making power, arguing that "this great power . . . is reserved to the legislative department by the express words of the Constitution. It cannot be delegated or surrendered to the Executive." The view of the dissent, however, has never been accepted by this Court. The holding in *The Prize Cases* has never been undermined, and in fact the actions of American Presidents have gone well beyond the self-defense theory used by Jefferson and Lincoln.

The second theory supporting "undeclared war" was the "neutrality theory." It evolved in the nineteenth century as a justification for sending troops into foreign countries to protect United States nationals and property, and it worked a substantial expansion of the President's war power. When American forces were sent to a foreign nation to secure the safety of American citizens and their property, the troops were "neutral" with regard to any conflicts within the nation; they were merely acting as security guards to be interposed to protect American interests.

Since 1945 a third justification for presidential war making has evolved,

the "collective security" theory. Under this theory, presidential decisions to employ military force without congressional authorization have been defended as within the executive's power under collective security agreements such as NATO and SEATO. Once the United States enters into either a formal treaty or informal executive agreement that commits the United States to a mutual defense obligation, the President, if he regards the nation's obligations under the collective security agreement triggered, may on his own initiative commence war. Recent Presidents have given the term "collective security," expansive definition, and today the collective security theory will legitimately justify any colorably rational unilateral presidential use of armed force.

The actions of Presidents in this century have steadily eroded the congressional role in decisions to employ military force. The momentum of presidential war making that began in this century with Theodore Roosevelt's Panama excursion in 1903 was greatly accelerated when President Truman ordered troops to South Korea to fight the North Koreans without obtaining a declaration of war, on the thin rationale that the conflict was not a war but a "police action." Truman made no personal statement explaining his authority under the Constitution, but his administration through a State Department bulletin asserted that "the President, as Commander-in-Chief of the Armed Forces of the United States, has full control over the use thereof." Although the Court in *The Steel Seizure Case* would not permit use of the President's authority to prosecute the Korean War as a bridge to an ambiguous assertion of the presidential power in the *domestic* sphere, the Justices in their opinions also studiously avoided any intimation that the Korean War was itself unconstitutional. In justifying Truman's actions in Korea, Secretary of State Dean Acheson emphatically declared that "not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution."

Although at times recent Presidents have relied on highly generalized resolutions from Congress to justify armed intervention—President Kennedy's quarantine against Cuba during the Cuban missile crisis was justified on the basis of a prior joint resolution and the OAS treaty, President Johnson's ordering of Marines to Santo Domingo was justified first on a neutrality theory and later as a fulfillment of obligations under the OAS charter, and the War in Vietnam was carried on by Johnson pursuant to the Gulf of Tonkin Resolution—the modern reality has been to make Congressional approval a formality to be observed if and when a sitting President deems fit. Even if the Gulf of Tonkin Resolution were accepted as a sort of inartful declaration of war, for example, the fact remains that Richard Nixon continued to sustain the war after the resolution was repealed outright in January of 1971, a repeal that he signed himself. Once the Gulf of Tonkin Resolution was repealed, President Nixon's continued use of armed force in Vietnam was done without any explicit congressional authority, yet judicial challenges to the constitutionality of the Vietnam War were repeatedly rebuffed.

In sum, recent history has developed a sort of national ambivalence about the war power. Although the pious cliché that only Congress can declare war is usually recited, it seems to have been either widely believed or conceded that as a practical matter Presidents may simply use the armed forces as they see fit. This historical evolution has been the unavoidable consequence of the emergence of the United States as a dominant military power. Today our nation is a shining city on a hill, the world's preeminent bastion and defender of democracy. As a dominant nuclear power the

United States is far different today than it was as a fledging new nation in 1789, and the powers of the Presidency have by necessity grown with the power of the nation. The position of the Senate and the House of Representatives in this litigation is that this Court must turn a blind eye to the realities of the nuclear age, and instead mire the constitutional power over war in an anachronistic and mechanistic literalism. Our Constitution—indeed our nation—would not have survived long in the face of such rigidity. In the words of John Marshall, it is, after all “a *Constitution* we are expounding.” We hold that the invasion of Central America, and the continued conduct of that war, are permissible exercises of the Presidential power pursuant to the President’s authority as Commander-in-Chief.

We turn next to the question of whether the concurrent resolution passed by the Senate and the House of Representatives is sufficient to countermand the President, binding him to terminate hostilities. Our review of this question is narrow. We do not have before us a statute passed after overriding a Presidential veto, by a two-thirds majority of both houses. We need not reach the question of whether such a statute would constitutionally bind the President. We have instead a resolution passed by a simple majority of both houses, ordering immediate cessation of hostilities and a troop pull-out as expeditiously as possible consistent with the safety of the troops. The President in a message to both houses stated that he was unable to determine from the form of the resolution whether or not it was intended to be treated by him as a bill which had been presented to him for his approval or disapproval, or a resolution not intended for formal presentment to him. He stated, however, that if it were a bill, then his message to both chambers was that it was disapproved. If it were not a bill, then his message to both chambers was that it was not constitutionally binding upon him. Upon receiving this message, the Senate voted by a vote of 67 to 33 to override the President’s veto, a two-thirds majority. In the House of Representatives, however, the override motion carried by less than the necessary two-thirds majority. Both chambers then voted to commence this litigation, relying on the War Powers Resolution of 1973.

Doubts about the legality of the Vietnam War, and the apparent futility of attempted judicial intervention, formed the background for the War Powers Resolution of 1973. The War Powers Resolution was intended as a dramatic and forceful reassertion of the constitutional moorings of the respective war powers of the Congress and the President. The Resolution was intended to “fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities.” The Resolution states that the President has the power to introduce United States armed forces into hostilities, or situations where imminent involvement in hostilities is clearly indicated, in three situations: (1) after a Congressional declaration of war; (2) by specific statutory authorization; or (3) in a national emergency created by attack upon the United States, its territories or possessions, or its armed forces. The Resolution requires consultation with Congress “in every possible instance.”

Section 5 of the resolution sets forth two mechanisms for terminating a war begun by the President. The Resolution purports to limit whatever power the President may have inherently or may have been delegated (by section 2(c) of the Resolution itself) to wage “short wars” on his own, to wars of 60 days duration. More importantly, it provides that *at any time* after American troops become engaged in hostilities outside of the United States, Congress can order the troops removed by concurrent resolution. The power

of Section 5(c) comes from the fact that it can be invoked instantly to stop an incipient war effort, and that it becomes legally effective *without* the concurrence of the President. The joint resolution allowed for in Section 5(c) is a legislative veto device that does not include presentment to the President and thus is not subject to presidential countermanding.

Since 1973 Presidents have in substance ignored the War Powers Resolution. President Ford, for example, defended the Mayaguez rescue mission, carried on without observing the War Powers Resolution requirements, as "ordered and conducted pursuant to the President's constitutional executive power and his authority as Commander-in-Chief of the United States Armed Forces." President Carter did not appear constrained by the War Powers Resolution in declaring his "Carter Doctrine" in 1980, that any "attempt by an outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States," to be "repelled by use of any means necessary, including military force." In Grenada and Lebanon, President Ronald Reagan did not observe the War Powers Resolution. In Lebanon, Reagan originally took the position that the War Powers Resolution was inapplicable. Only after the Marine Massacre did he agree to an 18 month compromise to govern the Marines' length of stay.

The House and Senate first argue that whatever the Presidents *inherent* powers as Commander-in-Chief may be, the War Powers Resolution has trimmed those powers back to the three enumerated authorizations for use of force set forth in the Resolution itself. Since the current Central American war is not being fought pursuant to any explicit congressional authorization, or declaration of war, and since it is not in response to an attack on the United States, in territories, possessions, or forces, the Senate and House maintain that it is illegal.

We find this analysis seriously flawed, both as a matter of statutory interpretation and as a matter of constitutional law. The War Powers Resolution states in Section 2 that "It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution." Section 8(d)(1) of the resolution further states that "Noting in this Resolution—(1) is intended to alter the constitutional authority of the Congress or of the President." The expressed intent of the Resolution itself is thus that it is *not* to alter the pre-existing division of constitutional authority. Yet the limitations on presidential use of armed forces of Section 2(c) of the Resolution seemingly does purport to constrict the power of the President to something less than his constitutional authority would otherwise be. We resolve this inconsistency within the statute by construing the limitations of Section 2 of the Resolution, which is labeled the "Purpose and Policy" section of the statute, as merely precatory, and not legally binding on the President. In doing so we follow the familiar canon that a statute should whenever possible be construed so as to save it from constitutional infirmity.

More fundamentally, however, we hold that even if the limitations in section 2(c) were intended to be legally binding, they would be unconstitutional. Congress cannot amend the Constitution by statute. In Part I of this opinion we liberally construed the President's inherent powers as Commander-in-Chief. Congress cannot subtract from the powers that the Constitution reserves to the President.

The Senate and House of Representatives finally maintain that even if the President did have inherent authority to invade Central America, and even if Section (2) of the War Powers Resolution could not of its own force restrict that authority, that the concurrent resolution, passed 10 days ago pursuant to section 5(c) of the War Powers Resolution, requires that the President terminate the war. On this point there is no question but that the House

and Senate are correct in interpreting the statute. Section 5(c) of the statute quite clearly authorizes the concurrent resolution device that has been employed in this instance.

We hold, however, that section 5(c) of the War Powers Resolution is an unconstitutional use of the legislative veto device we declared invalid in *Immigration and Naturalization Service v. Chadha*, *Process Gas Consumers v. Consumers Energy Council of America*, and *United States Senate v. Federal Trade Commission*. In *Chadha*, which involved a one-house veto, and in the subsequent two-house veto cases *Process Gas* and *FTC*, we held that legislative vetoes, of which section 5(c) of the War Powers Resolution is a prime example, undermine the role of the President in the legislative process, as prescribed by the Presentment Clauses, run afoul of the principle of bicameralism, and violate the principle of separation of powers. In *Chadha* this Court first relied upon "presentment clauses" of Article I, which provide that:

"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 repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill." The Senate and House in this case are attempting to override the President's veto without the necessary two-thirds majority. This the Constitution does not permit.

In the case of the one-house legislative veto at issue in *Chadha*, the second objection was that one house was permitted to do what the Constitution requires of two. Although it might appear that the two-house veto at issue here would avoid any bicameralism objections, our affirmances of the lower court ruling in *Process Gas* and *FTC*, which had declared two-house vetoes unconstitutional, makes it clear that the two-house veto is in no stronger constitutional position than its one-house cousin. Although we wrote no opinion in the two-house veto cases, our summary affirmance quite clearly shows that a majority of this Court rejected Justice White's dissent, in which he tried to salvage the two-house veto mechanism. We finally note that the two-house veto is actually on *weaker* constitutional grounds than its one-house counterpart. Two-house vetoes suffer from the embarrassing irony of less resemblance to the traditional legislative process than one-house vetoes. Normally one house acting alone can block any attempt to alter the status quo, by refusing to pass a bill. In the two-house veto situation, a change in the status quo can come about with the concurrence of the President and just one house, since the disapproval of two houses is necessary to defeat it.

In sum, Section 5(c) is an unconstitutional legislative veto, and the concurrent resolution ordering the President to cease the war is an unconstitutional act, which the President may ignore.

The only other opinion in the case was authored by the Senior Associate Justice of the Court. The highlights of his opinion appear below:

I disagree with every element of the Chief Justice's opinion. I believe that the President violated both the letter and spirit of the Constitution and the War Powers Resolution when he invaded Central America. I further believe that the concurrent pullout resolution is binding on the President. My four dissenting Brethren join in Parts I and II of my opinion, in which I state my disagreement with the Chief Justice, and with the President. My

four dissenting Brethren and I, although in agreement on the merits of this dispute, are nonetheless in disagreement as to the appropriate remedy. My dissenting Brethren would issue an order from this Court that the President withdraw the troops, as Congress has commanded. In Part III of this opinion, which they do not join, I state my view that the only available remedy for the President's violation of the Constitution and his defiance of Congress is impeachment.

I turn first to the issue of the President's inherent power as Commander-in-Chief.

The most famous analysis of inherent presidential authority is that of Justice Robert Jackson in *The Steel Seizure Case*. Jackson identified three levels of presidential power. First, when "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 can delegate." Second, when "the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority or in which its distribution is uncertain." Third, when "the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb. . . ." In *The Iranian Assets Case*, the Supreme Court indicated that it still found Justice Jackson's tripartite analysis to be the most useful starting point for analysis.

Under Justice Jackson's analysis, claims of inherent presidential war-making power were entitled to greater deference *before* the War Powers Resolution, when presidential use of military force without congressional approval fell into the "twilight zone" of type two—that area in which Congress has been silent and the division of power uncertain. But since the Constitution gives only to Congress the power to declare war, and since the necessary and proper clause attaches to the war power, Congress must have the power to reinforce the constitutional division by acting *in advance* to move war-making from area two of Jackson's analysis into area three—that sphere in which the President's power "is at its lowest ebb."

In an outstanding recent discussion of inherent Presidential power, Professor Erwin Chemerinsky has suggested that claims of inherent presidential authority be assessed under three different tests: their effects on the language of the Constitutional text, their functional effects on the performance of each branch of government, and their effects on maintaining presidential accountability. Measured against this highly insightful standard, the War Powers Resolution as it presently stands fares very well. The consistency of the Resolution with the paper division of authority is total; Congress has exclusive power to declare war under the words of the text. The *functional* effects of the War Powers Resolution are reasonably balanced. The President is not at all disabled from pursuing his function as Commander-in-Chief, and he retains power to act immediately in a genuine emergency, when the nation, its forces, or possessions are under attack. Note that the most devastating of all wars, a nuclear exchange, is actually permitted by the language of the Resolution, in response to an enemy attack. It is true that the Resolution does not allow intervention under the "neutrality" or "collective security" theories. But it would be a very rare occasion for armed intervention ever to be *immediately* necessary under either of those theories, and thus the President has no legitimate excuse for not obtaining congressional authorization when one of those theories forms the predicate for his actions. Nor does the 60-day automatic cut-off period in any way hamper the President's functions as Commander-in-Chief. The 60-day period is in effect a very loose Congressional delegation of authority to the President, in which he is given a relatively free

hand to deal with short term emergencies *in response to attack*. To avoid the danger that the response to a trivial attack might lead us into a protracted war (in retrospect the Tonkin Gulf incident is a chilling case in point), Congress has written an insurance policy that requires reexamination after the first 60 days. Since the Constitution on its face leaves the President with no authority to launch an undeclared war, presidential attacks on the 60-day compromise do not ring with much authority. Finally, the entire War Powers Resolution serves the enormously important value of accountability. Half the nation ought not be forced to take to the streets to force undeclared wars to an end.

This is the strongest moral case for the War Powers Resolution: the decision to wage war should remain essentially democratic in an open society, and Presidents should not be free to invoke dubious claims of "inherent power" to avoid the democratic process. The Resolution merely restores to the Congress power that the Constitution originally placed with it, power that has by slow historical degree slipped away from Congress and been added through accretion to the presidency. Congress will probably make use of the veto capability to terminate hostilities very rarely—prior to this crisis it had never once been formally invoked since 1973—but the threat of such use is vital in restraining nondemocratic executive action in the sphere of governmental activity in which democratic approval is the most morally compelling: the decision to fight a war. The threat and its moderating effect on the actions of presidents is not illusory. When Congress informally demonstrated its willingness to veto the sale of 14 Hawk Missile batteries to Jordan in 1975, for example, the President backed down. And more recently, threats of congressional intervention in the Lebanon crisis forced Ronald Reagan to approach Congress to obtain a negotiated 18 month compromise. Presidents have not shown a willingness to so involve the Congress out of the goodness of their Oval Office hearts. Some formal threat of a veto of presidential wars is essential. In an era in which American presidents are periodically tempted to launch military escapades at odds with the preferences of the elected representatives of the American people, the case for reinvigorating formal congressional restraints not subject to presidential override is compelling. The Constitution has its own theory of how best to check the dog of war; it is to place the war power in the hands of the most democratic branch of government. A return to original constitutional values—a return that ironically is essentially *conservative*—is the best prospect for peace in an increasingly bellicose world.

In Part II of his opinion the Senior Associate Justice discussed the pullout resolution:

The issue of inherent presidential power aside, the Chief Justice invokes *Chadha* to hold the concurrent resolution unconstitutional. Because the two-house veto avoids the requirement of presentment, the Chief Justice reasons that it violates the literalist analysis of *Chadha* without more. When the President sends troops into hostilities in violation of the War Powers Resolution he changes the real world status quo. In attempting to countermand that status quo by joint resolution, Congress surely acts within the core of the "spirit" of the Constitution—since only Congress was supposed to be able to engage our forces in hostilities in the first place—but under the Chief Justice's analysis of *Chadha* it appears that Congress nonetheless violates the constitutional letter.

But it does not follow inexorably from *Chadha* that the War Powers Resolution veto is invalid. Nearly two centuries ago, this Court in *Hollingsworth v. Virginia* rejected a challenge to the validity of the Eleventh Amendment on the grounds that the amendment was invalid because it was

proposed to the states by Congress in a joint resolution that had never been presented to the President for signature. The Court stated simply that "the negative of the President applies only to ordinary legislation. He has nothing to do with . . . amendments to the Constitution." Thus, not all joint actions by Congress require a presentment to the President to be valid.

The soundest analysis is that the War Powers Resolution veto is different from the sort of veto in *Chadha*, precisely because it deals with a constitutional power (declaration of war) that exists only in the Congress and cannot be delegated to or usurped by the President. It is one thing to say that Congress may not use the veto device to reverse the administrative action of the President or an agency when that administrative action is taken under the color of previously delegated authority. As Chief Justice Burger demonstrated in *Chadha*, such use of the veto does in effect "relegislate" without going through the constitutional process of legislation. But when the President sends troops to invade a foreign nation without prior congressional authorization he invades not only that nation, but the exclusive constitutional province of the Congress. When Congress countermands such an action, merely recapturing that which it never legally surrendered, what possible sense does it make to allow the *President* to veto (either explicitly, or by ignoring the concurrent resolution) that action?

In the final section of his opinion, a section in which no one else on the Court joined, the Senior Associate Justice explained why he was unwilling to issue an order directing the President to end the war:

Despite my view that the President's action in invading Central America was unconstitutional, and that the concurrent withdrawal resolution is binding on the President, I am not willing to vote with my four dissenting Brethren, who would have this Court directly order the President to stop the war. I am instead of the view that the only remedy available to the Senate and the House of Representatives is impeachment. Therefore, although I disagree with everything said on the merits in the four-Justice opinion authored by the Chief Justice, I nonetheless reluctantly vote with that plurality in refusing to issue any judgment against the President in this case.

This litigation is unlike *United States v. Nixon*, in which Richard Nixon's resistance to a subpoena of the Watergate tapes on a claim of Executive Privilege was held justiciable by this Court. The *Nixon* case involved an attempt by the President to avoid the normal rules of the judicial process itself, and although the shadow of parallel legislative activity in the form of the impeachment hearings of the House Committee on the Judiciary surely formed part of the historical and political backdrop of the *Nixon* decision, the fact remains that the actual dispute in that case was not between the President and Congress, but between the President and the Judiciary in a criminal prosecution. In this instance, however, we are dealing with a dispute that pits the President directly against the Congress. We are asked to settle a dispute between two other coequal branches of Government on a matter related to foreign affairs. In *Goldwater v. Carter*, in which Senator Barry Goldwater sued President Jimmy Carter, claiming that he had violated the Constitution in terminating a United States treaty with Taiwan, we voted that the case was nonjusticiable. We should do the same in the case before us.

This does not mean that the nation has no recourse against this President for his unconstitutional prosecution of the Central American war. The Constitution, to the contrary, has provided its own special form of dispute resolution for this very type of situation. If the members of the House of Representatives believe that I and my four dissenting Brethren are correct in holding that the President has grossly abused his power, then they should vote to impeach the President, an act that can be accomplished through a

simple majority vote. If two-thirds of the Senate agree that the President's usurpation of power is extraordinarily dangerous and reprehensible, they may vote for his removal from office. It is worth noting that in the effort to override the veto of the concurrent pullout resolution, the override carried by a simple majority in the House, and by a two-thirds majority of the Senate. If the same voting pattern were to hold in an impeachment process, this President would be removed from office.

The Supreme Court should not presume to do Congress's work, or fight its battles. This President's defiance of Congress has been extraordinary. But the remedy for such extraordinary defiance is not for Congress to hide behind this Court. The Constitution has armed Congress with its own remedy for such defiance; it is up to the Congress to determine for itself whether it has the resolve and will to employ that remedy.

The Chief Justice had been morose since the announcement of the Court's decision. He had thought that he had secured a victory for the President, but the critical fifth vote of the Senior Associate Justice had been a trap, and the jaws of the trap were squeezing shut. The Speaker of the House had railroaded a bill of impeachment through the House, and head counts in the Senate did not bode well for the President. Tensions in Central America, and with the Soviets, were at a fever pitch. The Chief Justice's only solace was that the American public continued to support the President, although the number of "undecided" responses had risen alarmingly. Now the President had summoned him to the oval office, for an unusual "off the record" conference.

"Mr. President," said the Chief Justice, "I'm almost ashamed to be here—I feel as if I'm responsible for the fix you're in."

"Don't blame yourself, Bob," said the President in an easy, relaxed tone, as he poured himself and the Chief Justice a pair of stiff drinks. "If you didn't have the votes, you didn't have the votes. Your opinion was great; it was an excellent statement of sensible constitutional law, and I think it will capture the hearts of the people and maybe even provide my salvation."

"You're too generous, as always," the Chief Justice replied. "But talking about votes—the rumors on the hill are that you don't have them."

"That's why you're here, Chief—"

"And my presence here, it goes without saying, must remain strictly between the two of us," the Chief Justice interrupted. "I know the Speaker must have spies in the White House. If news of this meeting ever got out, they would be impeaching my ass, too. And I don't say that because that's important to me personally—you know I'll do whatever I can to be of service to you and the

nation—but if news got out that the presiding judicial officer in the impeachment proceeding and the accused in the dock of the Senate were secretly conferring prior to the trial, it would be a debacle for the Constitution, for the Court, and for your Presidency.”

“Don’t worry, Chief; no one knows you’re here. Even my secretary thinks I’m taking a nap.”

“Well, you don’t look like you need one,” said the Chief Justice. “In this storm you’ve been calmer than all of us.”

“I have the clearest conscience; I am only serving the nation according to my lights. Before we sit down to business, though, I want you to know again that I completely appreciate your concerns, but even more I admire your courage—I need your counsel; the country needs it. Your presence here is in the highest tradition of the Court. John Marshall would be proud.”

“Well then,” said the Chief Justice, “I hope you’ve got some kind of plan. How does the impeachment look?”

“Not good. I’ve already had my ‘Barry Goldwater’ speech—just like Goldwater told Nixon he had no hope in the Senate, I’ve been told that I have the firm support of only fifteen Senators, and the soft support of maybe five more. The heavyweights in my own party are urging me to cave-in.”

“It’s a tragedy,” said the Chief Justice, “And it’s a frightening moment for the world.”

“At the moment, I’m afraid, the impeachment is the least of my troubles. This morning we received two ominously conflicting messages from the Kremlin. The first a personal note from the Soviet Premier, delivered to me directly by the Soviet Ambassador. It indicated that although their public rhetoric would continue to quite aggressively condemn our ‘imperialist war of aggression’ in Central America, the Soviets would not intervene militarily in our ‘sphere of influence.’ The tone was conciliatory, calming, and reasonable. Then, one hour later, we received a new message from the Soviet Embassy, by special courier. This note was signed by the Foreign Minister, as ‘official representative’ of the Union of Soviet Socialist Republic. It said—let me read this to you—the Premier’s previously expressed sentiments ‘did not represent the official views of the Soviet government.’ The note sternly warned that ‘the Soviet people would not permit the United States to ride roughshod over the right of self-determination of the people of Central America and Cuba’; and that the Soviet Union ‘would employ whatever means are necessary to stop the war of aggression.’ At exactly the *second* that the Soviet

Embassy attache entered the White House compound, the entire Soviet military apparatus went on its highest state of nuclear alert. We cannot contact the Ambassador, and we cannot reach the Premier, or anyone else, on the hot line. The Kremlin is for the moment in an information blackout. We don't know who's in control—or even if anyone's in control. My Joint Chiefs are beside themselves; they don't know whether to run, shit, or go blind."

"What on earth are you going to do?"

"I don't know, Bob, I just don't know. But how the hell am I supposed to fend off World War III while I spend my days at some bullshit trial in the Senate? It's insane. You know as well as I do that I haven't committed an impeachable offense. And the Vice President will carry on my policies if they do dump me. The damn thing would accomplish nothing. And the Joint Chiefs see the whole thing, at this moment of nuclear crisis, as a direct threat to national survival. They say they're not about to let the nation surrender to the Soviets because of some political squabble. This morning they tried to sell me on a plan. It scared the hell out of me . . . but they may be right."

The Chief Justice's heart was pounding, but he tried to force himself to stare at the President in a well-practiced judicial poker face. "Exactly what, Mr. President, are they urging?"

"They want me to go on the air to explain to the American people the two Soviet messages we have received, and to impress upon them the danger that nuclear war may be imminent, and that such a war is even more possible if the leadership in the United States appears to be faltering. They want me to declare a national military emergency, and pursuant to that declaration to state that until the current military emergency is over that I, as Commander-in-Chief, will ignore as legally nonbinding any further prosecution of the impeachment process. Once the military crisis is over, the impeachment will resume. The Vice-President, members of the Cabinet, Joint Chiefs, and President Pro-Tempore, on behalf of himself and twenty senators, would endorse the plan. They would like your endorsement also. They would like for you to state that in your role as presiding judicial officer of the impeachment trial, you would find the declaration of national emergency legally and constitutionally sufficient to suspend the impeachment process, and accordingly will rule out of order any attempt to commence the trial."

"My God," said the Chief Justice. "They're talking about a goddamn coup d'etat! And the Vice-President! I'm amazed at

him for encouraging them—he went to Yale. And to think that they'd think I'd be a part of this, I mean, the law, the Constitution, is my life, my religion. Surely *you* don't think—"

"Hold it right there! I respect the Constitution every bit as much as you do, and I'll goddamn preserve, protect, and defend it. I would never ask you to take any action that would impair the essential constitutional structure. But remember Lincoln, only this time we're facing Armageddon. The Constitution won't be worth much if there's no country left."

For the first time, the Chief Justice was genuinely confused; he wasn't sure where the President was heading.

"Anyway," the President continued somberly, "I didn't call you here to give you a sales pitch. What the hell am I going to do? You know the country can't stand this impeachment proceeding, not in this crisis. One way or another the impeachment issue *has* to be put aside. Hell, Bob, I don't know what to do. I'm just asking for a little *time*, I need somebody to buy me, to buy us, some *time*."

In the silence that followed the Chief pondered his response.

The conspicuous red phone on the President's desk began to buzz.