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# THE DOG THAT RARELY BARKS: WHY THE COURTS WON'T RESOLVE THE WAR POWERS DEBATE<sup>†</sup>

Jonathan L. Entin<sup>††</sup>

There is a certain irony about the stimulating papers by Louis Fisher and Peter Shane: the political scientist, Fisher, makes a normative constitutional argument of the sort typically made by legal scholars;<sup>1</sup> the legal scholar, Shane, makes an institutional and policy analysis of the sort typically made by political scientists.<sup>2</sup> Nevertheless, these papers share a common theme: that the President does not and should not have unfettered or unilateral power in the war-making area. Both also focus on war powers rather than other aspects of foreign affairs such as treaties and executive agreements, but their approaches have implications for those issues as well.<sup>3</sup> The reader will, I hope, forgive me for not providing a detailed critique of the common theme of these papers and for not

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† With apologies to Sherlock Holmes. Cf. SIR ARTHUR CONAN DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335, 349 (1930) ("a dog was kept in the stables, and yet, though someone had been in and had fetched out a horse, he had not barked enough to arouse the two lads in the loft").

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1. Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237 (1997).

2. Peter M. Shane, *Learning McNamara's Lessons: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281 (1997).

3. The years since World War II have seen notable changes in the government's approach to international agreements. Many such agreements, including those relating to the North American Free Trade Agreement and the World Trade Organization, were not approached as treaties subject to ratification by a two-thirds majority of the Senate but under special procedures requiring only a simple majority in both houses of Congress. For contrasting evaluations of these developments, compare Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* 108 HARV. L. REV. 799 (1995), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

exploring some of the larger implications of that theme for the making and implementation of foreign policy.<sup>4</sup>

Instead, I want to emphasize one particularly striking feature of both papers: the dearth of references to judicial decisions. Fisher cites three district court rulings that held the Korean conflict to be a "war" for purposes of insurance coverage<sup>5</sup> and a district court case on the legality of United States involvement in Operation Desert Storm without a declaration of war.<sup>6</sup> Shane provides the almost obligatory reference to *Youngstown Sheet and Tube Co. v. Sawyer*<sup>7</sup> in a single footnote but cites no other judicial decisions.

The paucity of citations to cases is no accident, and I make this observation without intending criticism of either author. Instead, I believe that this feature of the papers is instructive, especially for lawyers who have come to think almost reflexively that the Constitution means only what the Supreme Court says it means. Indeed, I want to make two principal points relating to this aspect of the papers: (1) courts are unlikely to play a very large role in resolving debates over the respective roles of Congress and the President in matters of war and foreign affairs; and, (2) that is a good thing.

## I.

Let me begin with why the judicial role in this area is likely to be modest. In doing so, I recognize that the federal courts—including the Supreme Court—have decided some well-

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4. There is a wide range of views about the relative powers of Congress and the President in the field of war and foreign affairs. See, e.g., JOHN HART ELY, WAR AND RESPONSIBILITY 48-50, 61-66, 115-38 (1993); GORDON SILVERSTEIN, IMBALANCE OF POWERS 123-38 (1997); ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION 109-20, 129-69 (1991).

5. *Carius v. New York Life Ins. Co.*, 124 F. Supp. 388 (S.D. Ill. 1954); *Gagliomella v. Metropolitan Life Ins. Co.*, 122 F. Supp. 246 (D. Mass. 1954); *Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420 (S.D. Cal. 1953). See Fisher, *supra* note 1, at 1264 & n.126. All three cases involved claims under double-indemnity provisions of life insurance policies that contained an exclusion for deaths resulting from acts of war; all three courts held that the Korean conflict was a war despite the absence of a formal declaration of war by Congress.

6. *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990). See Fisher, *supra* note 1, at 1267 & n.140. Fisher also quotes, in his discussion of the Korean War, a phrase from *de Geofroy v. Riggs*, 133 U.S. 258 (1899), which involved the application of a treaty between the U.S. and France to a property dispute in the District of Columbia. See Fisher, *supra* note 1, at 1260 & n.105.

7. 343 U.S. 579 (1952). See Shane, *supra* note 2, at 1283 & n.11.

known national security cases. The list is familiar—the Steel Seizure case,<sup>8</sup> the Pentagon Papers case,<sup>9</sup> the Iranian hostage case,<sup>10</sup> and the Espionage Act cases arising out of World War I,<sup>11</sup> just to name a few. But these cases are exceptions to the pattern of making military and diplomatic policy without meaningful judicial guidance.

One reason these cases are unusual is that there are various procedural and jurisdictional obstacles to litigating over war powers and foreign affairs. The first of these obstacles is *standing*. The judicial power of the United States encompasses only cases and controversies.<sup>12</sup> Accordingly, neither the President nor Congress may obtain advisory opinions on war and foreign affairs questions.<sup>13</sup> Instead, an appropriate plaintiff who alleges a legally cognizable injury (along with the requisite causation and redressability) must be found.<sup>14</sup> Most citizens will lack standing to contest the constitutionality of a military or diplomatic operation because they will be asserting a generalized grievance. That is the lesson of *Schlesinger v. Reservists Committee to Stop the War*,<sup>15</sup> which rejected a challenge to the Vietnam War premised on the susceptibility to undue executive branch influence of members of Congress who were also members of the military reserve. Even before that ruling, numerous lower courts rejected other suits filed by citizens asserting a wide variety of objections to that conflict.<sup>16</sup>

Of course, some individual plaintiffs might have standing. One possibility is a member or group of members of Congress. Until recently, the Supreme Court has managed to avoid deciding whether members of Congress have standing to litigate separation of powers disputes against the executive branch. The Court finessed

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

9. See *New York Times Co. v. United States*, 403 U.S. 713 (1971).

10. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

11. See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

12. See U.S. CONST. art. III, § 2, cl. 1.

13. This is not to suggest that courts always refrain from offering nonbinding comments on such issues in the course of dismissing cases on procedural or jurisdictional grounds. See, e.g., *Dellums v. Bush*, 752 F. Supp. 1141, 1145-46 (D.D.C. 1990).

14. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41-42 (1976).

15. 418 U.S. 208 (1974).

16. See, e.g., *Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); *Campan v. Nixon*, 56 F.R.D. 404 (N.D. Cal. 1972).

that issue in *Bowsher v. Synar*,<sup>17</sup> which arose under a statute—the Gramm-Rudman-Hollings Act—that purported to confer standing on any member of Congress. The Court concluded that an individual plaintiff did have standing and therefore viewed resolution of the congressional standing issue as unnecessary to disposition of the case on the merits. The Court also avoided this question in *Burke v. Barnes*,<sup>18</sup> a case involving United States policy in Central America. I shall return to this case shortly.

In the last week of its most recent term, while this essay was in press, the Court ruled that members of Congress did not have standing to challenge the constitutionality of the Line Item Veto Act.<sup>19</sup> The decision in *Raines v. Byrd*<sup>20</sup> rejected the argument that this statute prevented individual members of Congress from exercising their constitutional right and duty to vote on legislation.<sup>21</sup> The reasoning in *Raines* raises questions about whether members of Congress would have standing to litigate disputes over war powers and foreign affairs.<sup>22</sup> The grievance in such instances

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17. 478 U.S. 714, 721 (1986).

18. 479 U.S. 361 (1987).

19. 2 U.S.C.A. §§ 691-692 (West Supp. 1997).

20. 65 U.S.L.W. 4705 (U.S. June 26, 1997).

21. *Raines*, 65 U.S.L.W. at 4708, 4709-10; see also *id.* at 4711 (Souter, J., joined by Ginsburg, J., concurring in the judgment); *id.* at 4713 (Stevens, J., dissenting); *id.* at 4713-14 (Breyer, J., dissenting). The Court reached this conclusion even though the Line Item Veto Act specifically authorized "[a]ny Member of Congress" to challenge the statute's constitutionality. 2 U.S.C.A. § 692(a)(1) (West Supp. 1997). An identical provision appeared in the Gramm-Rudman-Hollings Act. See *supra* text accompanying note 17.

22. This is not the place for a detailed assessment of the *Raines* Court's reasoning. Nevertheless, at least one aspect of that reasoning seems curious. The Court concluded that the injury alleged by the plaintiffs in that case was not legally cognizable in substantial part because of "historical practice": in analogous interbranch confrontations "no suit was brought on the basis of claimed injury to official authority or power." *Raines*, 65 U.S.L.W. at 4710. Interestingly, all of the examples discussed in the opinion involved alleged encroachments on the President; none involved claims that might have been asserted by members of Congress or implicated a statute purporting to confer standing on the affected party. See *supra* note 21. The Court went on to say that "[i]t [never] occurred" to the aggrieved chief executives in those separation of powers disputes to seek judicial resolution of the issues. *Raines*, 65 U.S.L.W. at 4710. Although I believe that litigation is generally an undesirable method for resolving disagreements between Congress and the President, see *infra* notes 43-50 and accompanying text, the Court's conclusion that the absence of litigation implies recognition that interbranch differences do not implicate legally cognizable harms does not follow. The President or members of Congress might decide to eschew litigation for many reasons that have nothing to do with their perceptions about the law of standing. They might fear that they will lose on the merits, that the judicial process (however expeditious) will take too long, or that they will appear weak or ineffectual by resorting to the courts rather than engaging in political self-help. See Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W.

would be analogous to that in *Raines*—that executive action interfered with the members' right to vote on matters committed to Congress rather than the President.

The *Raines* Court did not lay down a blanket rule precluding congressional standing in all cases, however. Chief Justice Rehnquist's majority opinion strongly suggested that "legislators whose votes would have been sufficient to defeat" a particular policy would have standing to sue "on the ground that their votes have been completely nullified."<sup>23</sup> On this reasoning, for example, a majority of either house might have standing to challenge a presidential troop deployment in violation of the War Powers Resolution because the deployment prevented them from voting on the question.<sup>24</sup>

Beyond *Raines*, most of the law of congressional standing has arisen in the United States Court of Appeals for the District of Columbia Circuit, which has recognized standing for members of Congress in some cases,<sup>25</sup> although hardly in all.<sup>26</sup> To put it mildly, the concept of congressional standing has been controversial.<sup>27</sup> Moreover, even in some cases where the D.C. Circuit has found that a member of Congress has standing, that court has declined to reach the merits under another—also controver-

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RES. L. REV. 1595, 1598-1600 (1997).

Although this aspect of the Court's opinion is significant, accepting the majority's interpretation of historical practice is not essential to the conclusion that the *Raines* plaintiffs lacked standing. See *Raines*, 65 U.S.L.W. at 4711-12 (Souter, J., joined by Ginsburg, J., concurring in the judgment).

23. *Raines*, 65 U.S.L.W. at 4709 (footnote omitted). The opinion also emphasized that the case did not involve a situation in which the congressional plaintiffs had been "singled out for specially unfavorable treatment." *Id.* at 4708 (citing with approval *Powell v. McCormack*, 395 U.S. 486 (1969)).

24. Cf. *Dellums v. Bush*, 752 F. Supp. 1141, 1150-51 (D.D.C. 1990) (deferring, on ripeness grounds, a challenge to Operation Desert Shield because congressional plaintiffs did not represent a majority of their colleagues); see *infra* notes 38-39 and accompanying text. The *Raines* Court's reasoning might not require that the plaintiffs include an actual majority of either house (a showing that such a majority exists might suffice), but resolution of that question is beyond the scope of this essay.

25. See, e.g., *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994); *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom. Burke v. Barnes*, 479 U.S. 361 (1987); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973).

26. For a very recent example of a congressional-plaintiff case that was dismissed for lack of standing, see *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997).

27. See, e.g., *Barnes*, 759 F.2d at 45-56 (Bork, J., dissenting); *Moore v. United States House of Representatives*, 733 F.2d 946, 957-61 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 469 U.S. 1106 (1985).

sial—avoidance technique known as equitable discretion. Under this doctrine, a court could decline to hear a case brought by a congressional plaintiff who satisfies Article III's standing requirements.<sup>28</sup>

Another plausible challenger to a military operation might be an individual soldier subject to orders to report to a combat zone. Such a plaintiff is likely to be able to assert a direct, personal injury—exposure to hostile fire causing risk to life and limb in violation of constitutional requirements.<sup>29</sup> It is unclear how many such plaintiffs might exist. As Dean Ely has remarked, there are powerful disincentives for members of the armed forces to bring such a lawsuit: career officers would risk sacrificing their careers, while enlisted personnel would be challenging authority in ways that are fundamentally inconsistent with the values and ethos promoted by their training and indoctrination.<sup>30</sup> But however unlikely it might be that any particular member of the armed forces would sue, a lawsuit requires only one plaintiff.

So let's suppose that a proper plaintiff can be found. A court might still decline to resolve the merits on grounds of *nonjusticiability* (i.e., the political question doctrine). The political question doctrine has had few scholarly defenders<sup>31</sup> and has been distinctly

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28. The concept of equitable discretion was proposed by then-Chief Judge Carl McGowan of the D.C. Circuit, see Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981), and first applied in *Riegle v. Federal Open Market Comm.*, 656 F.2d 873, *cert. denied*, 454 U.S. 1082 (1983). The concept generated withering criticism from some members of the D.C. Circuit. See *Barnes*, 759 F.2d at 59-61 (Bork, J., dissenting); *Moore*, 733 F.2d at 961-64 (Scalia, J., concurring). For a thoughtful critique, see Sophia C. Goodman, Note, *Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment*, 40 CASE W. RES. L. REV. 1075 (1990).

29. See, e.g., *Massachusetts v. Laird*, 451 F.2d 26, 29 (1st Cir. 1971); *Berk v. Laird*, 429 F.2d 302, 306 (2d Cir. 1970); see also *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.) (rejecting challenge to legality of Vietnam War by active-duty servicemen without discussion of standing), *cert. denied*, 404 U.S. 869 (1971). Members of the active forces or of the reserve who have not been ordered to a combat area might not have standing, however. See, e.g., *Mottola v. Nixon*, 464 F.2d 178 (9th Cir. 1972). And draftees might not have standing to assert the illegality of a military action as a defense to a charge of refusing to report for induction. See *Rusk v. United States*, 419 F.2d 133, 136 (9th Cir. 1969); *United States v. Pratt*, 412 F.2d 426, 427 (6th Cir. 1969), *cert. denied*, 401 U.S. 1012 (1971); *Simmons v. United States*, 406 F.2d 456, 460 (5th Cir.), *cert. denied*, 395 U.S. 982 (1960); *United States v. Mitchell*, 369 F.2d 323, 324 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967); *United States v. Kirschke*, 339 F. Supp. 834, 835 (E.D. Pa. 1972).

30. See ELY, *supra* note 4, at 56-57.

31. For representative criticism, see Louis Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597 (1976); Robert F. Nagel, *Political Law, Legalistic Politics: A*

out of favor in the Supreme Court lately.<sup>32</sup> But several challenges to the Vietnam war foundered on this point, among them a number brought by members of Congress<sup>33</sup> as well as others by various individuals, including members of the armed forces.<sup>34</sup> So did a challenge to United States involvement in El Salvador during the first Reagan administration.<sup>35</sup> To be sure, there are some cases in which courts treated such claims as justiciable,<sup>36</sup> but a plurality of the Supreme Court relied upon the political question doctrine in *Goldwater v. Carter*,<sup>37</sup> an important foreign policy case involving the President's unilateral termination of a defense treaty with Taiwan. In short, there is now a sufficient body of precedent in the war powers area that the justiciability problem must be taken seriously.

Two remaining procedural hurdles relate to the timing of litigation, and both could pose major difficulties to anyone seeking to invoke the judiciary in military or diplomatic disputes. The first is *ripeness*—the problem of going to court too soon. That was the difficulty in *Dellums v. Bush*,<sup>38</sup> where an injunction was sought to prevent the President from initiating hostilities against Iraq in what was then known as Operation Desert Shield (and later as Operation Desert Storm) without first securing a declaration of war from

*Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031 (1985). But see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 260-379 (1980) (arguing that the courts should treat separation of powers and federalism disputes as nonjusticiable); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988).

32. See, e.g., *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 456-59 (1992); *Davis v. Bandemer*, 478 U.S. 109, 121-27 (1986); *INS v. Chadha*, 462 U.S. 919, 940-43 (1983); *Baker v. Carr*, 369 U.S. 186, 217 (1962). The only recent case in which the Court has relied upon the political question doctrine is *Nixon v. United States*, 506 U.S. 224 (1993), which dealt with the procedures by which the Senate conducts impeachment trials.

33. See *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

34. See, e.g., *DaCosta v. Laird*, 448 F.2d 1368, 1370 (2d Cir. 1971) (per curiam), *cert. denied*, 405 U.S. 979 (1972); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Head v. Nixon*, 342 F. Supp. 521 (E.D. La.), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972); *Davi v. Laird*, 318 F. Supp. 478 (W.D. Va. 1970).

35. See *Crockett v. Reagan*, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (per curiam).

36. See *Massachusetts v. Laird*, 451 F.2d 26, 33-34 (1st Cir. 1971);

37. 444 U.S. 996, 1002-06 (1979) (Rehnquist, J., joined by Burger, C.J., and Stewart & Stevens, JJ., concurring in the judgment).

38. 752 F. Supp. 1141 (D.D.C. 1990).



Congress. The district court held that the congressional plaintiffs had standing, that the suit should not be dismissed on grounds of equitable discretion, and that the dispute was justiciable, but concluded that the case was premature because a majority of Congress had not yet acted. Accordingly, there was no interbranch confrontation and no need for judicial action.<sup>39</sup> I do not mean to suggest that the analysis in *Dellums* is necessarily beyond criticism,<sup>40</sup> but I do think that this precedent should serve as a warning that some courts might find ripeness an appealing way to avoid resolving war powers issues.

The other timing problem is *mootness*—the case might be brought too late. That phenomenon is illustrated by *Burke v. Barnes*,<sup>41</sup> to which I referred earlier in discussing congressional standing. That case involved a challenge brought by members and leaders from both sides of the aisle in the House of Representatives as well as by the Senate to President Reagan's purported pocket veto of a bill conditioning continued United States aid to El Salvador upon presidential certification of human rights improvements by the Salvadoran government. By the time the case reached the Supreme Court—the district court had dismissed the case on summary judgment but the D.C. Circuit reversed on the ground that the pocket veto was ineffective—the appropriations bill to which the certification provision had been attached expired by its own terms. Accordingly, no legal controversy existed; the Court ordered the suit dismissed as moot. Of course, not all such challenges will involve time-limited measures of this sort, but the often stately pace of litigation should serve as a reminder that national security cases can often be overtaken by events.<sup>42</sup>

Certainly these procedural hurdles can be overcome, but let us not exaggerate the prospects that the judiciary will be very aggres-

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39. See *id.* at 1150 (citing *Goldwater v. Carter*, 444 U.S. at 997-98 (Powell, J., concurring in the judgment)).

40. See ELY, *supra* note 4, at 58-60.

41. 479 U.S. 361 (1987).

42. A good example of mootness requiring the dismissal of a case concerning national security is the government's abortive effort to prevent publication of a magazine article about the hydrogen bomb. An underground newspaper published essentially the same information while the litigation was pending in the court of appeals, thereby prompting the government to abandon its case. See Jonathan L. Entin, Note, *United States v. Progressive, Inc.: The Faustian Bargain and the First Amendment*, 75 NW. U. L. REV. 538, 541 n.11 (1980) (discussing *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.), *dismissed as moot*, 610 F.2d 819 (7th Cir. 1979)).

sive in this area. The Supreme Court's track record in national security cases has been notably deferential. Examples of this judicial deference abound. Consider the Espionage Act cases that arose during World War I,<sup>43</sup> the Japanese internment cases during World War II,<sup>44</sup> and such Cold War decisions as *Dennis v. United States*.<sup>45</sup> As to Vietnam, the few courts that addressed the merits of legal challenges to the war invariably upheld government policy.<sup>46</sup> Indeed, even Dean Ely has a modest conception of the judicial role in this area, advocating no more than a judicial remand to Congress for twenty days or so when troop deployments are at issue.<sup>47</sup>

## II.

Let me turn now to my other main point—that we should be grateful that the judiciary cannot resolve all the questions that might arise in the war and foreign affairs area. If courts cannot serve as the ultimate arbiter, these questions will have to be worked out largely through political accommodation and negotiation. These accommodations and negotiations will necessarily reflect the differing constitutional views of each branch and of the particular leaders of those branches at any given time. There is by now a huge literature on the legitimacy of—even the necessity for—constitutional interpretation by nonjudicial officers.<sup>48</sup>

Particularly in the separation of powers disputes that are likely to arise in this area, excessive reliance on the judicial process has undesirable consequences. For one thing, courts have had difficulty rendering consistent or principled decisions on questions of legisla-

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43. See *supra* note 11.

44. See *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

45. 341 U.S. 494 (1951). On the other hand, there were other Cold War era cases that narrowed the government's authority to act in the name of national security. See, e.g., *Kent v. Dulles*, 357 U.S. 116 (1958); *Yates v. United States*, 354 U.S. 298 (1957).

46. See, e.g., *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *DaCosta v. Laird*, 448 F.2d 1368, 1369-70 (2d Cir. 1971) (*per curiam*), *cert. denied*, 405 U.S. 979 (1972).

47. See ELY, *supra* note 4, at 54-67. Professor Koh urges a somewhat more expansive, yet still limited, judicial role; his proposal contemplates enactment of a framework statute authorizing suits by either concerned citizens acting as private attorneys general or members of Congress who are authorized to sue under the statute. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 181-84 (1990).

48. One of the other papers in this symposium contains an extensive bibliography. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1465-66 n.37 (1997).

tive-executive relationships.<sup>49</sup> For another, interbranch negotiations recognize the political contingencies of many military and diplomatic disputes.<sup>50</sup> Finally, even if all procedural and jurisdictional barriers discussed in Part I can be overcome, the pace of even expedited judicial review is likely to be too slow to make much difference in many fast-moving situations.<sup>51</sup>

Most significant, reliance upon the political process to resolve questions about war powers and foreign affairs recognizes that an effective government requires a degree of interbranch comity that is inconsistent with frequent reliance upon the judiciary as referee.<sup>52</sup> Our system rests upon a complex set of unexpressed understandings and an uncoded but shared sense of limits.<sup>53</sup> Understandings are unexpressed and the sense of limits is uncoded because participants in the political process tend to appreciate the desirability of avoiding internecine conflict and because both structural and institutional factors usually dampen the inevitable conflicts that do arise.<sup>54</sup>

Judicial decisions, by contrast, raise the stakes of any particular conflict by clearly identifying winners and losers through formal explanations that presumably will control similar disputes in the future. The prospect of litigation encourages advocacy of extreme positions for short-term advantage in court and attacks on the legitimacy or good faith of other views.<sup>55</sup>

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Let me be clear that in our system, with its commitment to "uninhibited, robust, and wide open" debate on public issues,<sup>56</sup> no thoughtful observer can believe that "politics [is] bean bag."<sup>57</sup> Nevertheless, we ought to recognize that even if war is too impor-

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49. See Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 186-212 (1990).

50. See Jonathan L. Entin, *Congress, the President, and the Separation of Powers: Rethinking the Value of Litigation*, 43 ADMIN. L. REV. 31, 51 (1991).

51. See ELY, *supra* note 4, at 57.

52. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 108-16 (1972).

53. See Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 391 (1976).

54. See Entin, *supra* note 50, at 52.

55. *Id.* at 52-53; see also ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES* 18-22 (1989).

56. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

57. See FINLEY PETER DUNNE, *MR. DOOLEY: IN PEACE AND IN WAR* xiii (1898).

tant to be left to the generals, we usually have little choice but to leave the subject largely to the politicians rather than to judges. Whether or not we agree with everything that the principal papers by Fisher and Shane have to say, we can be grateful that they have reminded us of this basic fact.