

# Review Essay

## The Congressional War Powers: A Theory in Search of a Practice

TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW by Francis D. Wormuth and Edwin B. Firmage. Dallas, Texas: Southern Methodist University Press, 1986. Pp. xi, 347. \$27.50.

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The subtitle of *To Chain the Dog of War*—"The War Power of Congress in History and Law"—accurately foretells both the virtues and vices of this study. The authors present a thoroughly-researched refutation of the theory that the President possesses an independent war-making authority under the United States Constitution. Their refutation is both historical and legal: historical in its reliance on the Framers' intent in establishing a formal structure of congressional predominance, and legal in its strict allegiance to these formal structural rules. Unfortunately, the authors do not succeed in moving beyond this premise of a formal and, at least with respect to the eighteenth century, defensible structure of congressional ascendancy to assess its modern legitimacy. They demonstrate the manner in which modern Presidents and Congresses, including President Reagan and the Congresses of the 1980's, have ignored or violated the formal structure. They do not, however, develop or fully consider the institutional pressures that seem to undermine this structure regardless of who makes up Congress or who occupies the White House. Nor do they adequately make the case for the legitimacy of the formal structure in the context of realities confronting contemporary America.

### I. The Theory of Presidential War Powers Under the Constitution

The first two-thirds of *To Chain the Dog of War* carefully and accurately dismantles the argument that the President as Commander-in-

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## The Congressional War Powers

Chief is authorized under the Constitution to initiate war or to approve unilaterally acts of war in the interests of national security or defense. The authors begin with an examination of the language of the Constitution and the intent of the Framers conveyed through that language. As Professors Wormuth and Firmage establish, neither the meaning of the language nor the Framers' intent was in doubt at the time the Constitution was ratified. The plan of the Constitution was to vest in Congress the power to initiate war. The President's constitutional authority to engage in war or to commit acts of war was to derive only from affirmative action taken by Congress. The sole exception to this scheme was a limited presidential authority to repel sudden attacks upon the nation, and even this limited authority depended upon the willingness of Congress to provide the means of repulsion.

That this was the general plan and framework of the Constitution is rarely denied by even the most ardent proponents of an independent presidential war-making power. Indeed, given the ample documentation of the Framers' perception of what they intended to create, and given the language and structure of the Constitution consistent with that intent, there is very little constitutional text or history to support the views of those who advocate presidential war power. At best, these theorists can claim that the placement of the power to initiate war is ambiguous because of the cryptic language of article II, which grants the President authority as Commander-in-Chief. The granting of this authority may give the impression that the President is vested with substantial and perhaps unchecked war-making powers. But this argument cannot withstand historical scrutiny. The office of Commander-in-Chief was in no way designed or expected to be a locus of policy-making or a repository of independent war-making power.<sup>1</sup>

Wormuth and Firmage do a thorough job of exploring the Framers' intent and of explicating how that intent was translated into the language of the Constitution. Particularly useful are the chapters discussing the pre-constitutional evolution of the theory of separation of powers, the congressional war powers as set forth in the Constitution, the governing of the armed forces, and the Commander-in-Chief clause. Each contains sufficient historical detail to put to rest any lingering doubt about the

1. Alexander Hamilton described the very limited nature of the Commander-in-Chief's authority. The President's power:

would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; 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.

THE FEDERALIST NO. 69, at 465 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original).

original allocations of war-making authority. While much of the primary source material is familiar—after all, the *Federalist Papers*, the records of the Federal Convention of 1787, and the records of the state ratifying conventions are not recent discoveries—the presentation is comprehensive and thoughtful. Indeed, the familiarity of the material makes the case against a constitutionally-based presidential power all the more convincing.

*To Chain the Dog of War* is not a revisionist look at constitutional history. It is a straightforward and well-documented study leading to a conclusion surprising only to those who have not bothered to consider it previously or who fervently wish it were otherwise: if the President enjoys an independent war-making power, the source of that power can be found neither in the text of the Constitution nor in the hearts and minds of those who drafted and ratified it.

James Madison stated the point succinctly:

The constitution supposes, what the history of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.<sup>2</sup>

Indeed, as Wormuth and Firmage demonstrate, the Framers would have had it no other way. Congress was to make policy, including the policy of whether to engage in war; the President would execute that policy. In response to a motion made at the Federal Convention of 1787 that the entire power to make war be vested in the President, Elbridge Gerry remarked that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”<sup>3</sup> The motion received no second.

## II. The Theory of Historical Legitimization of Presidential War Powers

Yet there is no denying that the constitutional model of legislative predominance has given way to an imperial presidency with regard to military matters. The motion that shocked Gerry in 1787 has become the reality of 1987. Beginning with the Korean War, the executive branch has insisted on a presidential prerogative to initiate and prosecute war. Obedience to the role of Congress has been formalistic at best. The residual checks left to Congress—such as appropriations—have become

2. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), reprinted in 6 J. MADISON, WRITINGS 312 (G. Hunt ed. 1906).

3. M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (rev. ed. 1966).

## The Congressional War Powers

largely ineffective when counterpoised against a President at war. Vietnam, the secret war in Cambodia, and the invasion of Grenada were all justified, at least in part, by theories of independent presidential power derived from the Commander-in-Chief clause.<sup>4</sup> Since neither the Constitution nor the events surrounding its adoption provide even minimal support for this claim of raw and virtually unlimited power, alternative theories have been interposed to bridge the gap between the Constitution and modern presidential practice.

Specifically, the defenders of this form of presidential power argue that the practice of presidential war-making has a long and respected history and has created a pattern of practice that has indelibly altered the constitutional framework. This is a theory of amendment or alteration by historical legitimation: although the Framers intended to create a governmental structure in which primary responsibility for war-making rested in Congress, long-term presidential practice to the contrary has redefined the relative roles of the legislative and executive branches.<sup>5</sup> In addition, these theorists legitimately point out that times have changed since 1787. Perhaps the Constitution must adapt to comport with modern realities.

In chapters entitled “Lists of Wars” and “Naval Landings,” Wormuth and Firmage trace the lineage of the historical legitimation argument from its humble birth in 1912 to its full-blown explication during the administrations of Lyndon Johnson and Richard Nixon.<sup>6</sup> What began as a modest international law justification for the protection of U.S. citizens residing abroad—J. Reuben Clark, Jr.’s theory of “interposition”<sup>7</sup>—evolved into a doctrine of presidential prerogative to initiate war in the interests of national security. This all too brief exposition of the genesis of a theory provides a wonderful, although ultimately depressing, insight into the confluence of mistake, fabrication, wishful thinking, and constitutional doctrine. If a position is argued incessantly and with conviction—regardless of its moorings in fact and law—in time it becomes part of the fabric of legitimate discourse. Its initially contrived underpinnings become the bulwarks of acceptable, if not established, doctrine.

4. See, e.g., Department of State, *The Legality of the United States Participation in the Defense of Viet-Nam*, 75 YALE L.J. 1085, 1100 (1966) (Vietnam); Letter to the Speaker of the House and President Pro Tempore of the Senate, Oct. 25, 1983, 2 PUB. PAPERS: RONALD REAGAN 1512, 1513 (1983) (Grenada).

5. See, e.g., Monaghan, *Presidential War-Making*, 50 B.U.L. REV. 19 (Special Issue 1970).

6. F. WORMUTH & E. FIRMAGE, *TO CHAIN THE DOG OF WAR* 133-60 (1986) [hereinafter cited by page number only].

7. See J. CLARK, *THE RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES* (1912).

At the core of the historical legitimation theory is the claim that on approximately 150 occasions Presidents have engaged in war without prior congressional approval. The problem, as the authors point out, is that a vast majority of the actions cited were not taken unilaterally and certainly were not wars or even acts of war in any classical sense. Most involved the rescue of U.S. citizens by naval forces, and many of those rescues were authorized by statute. To suggest that these relatively modest undertakings have drastically altered our governmental structure is simply not credible. The authors convincingly establish that the historical legitimation thesis is unsound both factually and legally. Certainly there have been violations of the constitutional structure, but these violations cannot be labelled amendatory. They deserve repudiation, not passive assimilation.

This historical analysis is not unique to Wormuth and Firmage. Others have used the same approach and reached the same conclusions. Arthur Schlesinger's excellent and readable *The Imperial Presidency*<sup>8</sup> issued identical warnings based on similar grounds. Likewise, in 1967, the Senate Committee on Foreign Relations reached analogous conclusions.<sup>9</sup> Wormuth and Firmage add some details to these earlier studies, but their basic points are the same. Yet, despite the clear weight of this research and scholarship, despite articulated and well-documented fears about the imperial presidency, and despite the lessons of Vietnam, the public continues to accept and even embrace the notion of a President unshackled by the strictures of formal constitutionalism. Not surprisingly, Presidents follow this cue.

Surely, as the authors suggest, the invasion of Grenada was a stark violation of the Constitution's formal separation of powers.<sup>10</sup> The invasion and overthrow of the government of Grenada went well beyond the arguably legitimate premise of an attempt to rescue American citizens. A comparison of Thomas Jefferson's constitutional reticence in responding to the Barbary pirates with Ronald Reagan's exuberant, unilateral invasion of a foreign sovereignty underscores the extent to which the constitutional structure has been turned on its head. The President's claim of control over the Grenada invasion showed no deference to Congress. Indeed, one merely has to substitute the Soviet Union for Grenada

8. A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1973).

9. S. REP. NO. 797, 90th Cong., 1st Sess. (1967) (recommending a reassertion of Congress's constitutional authority over the use of the armed forces); see also STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., *THE WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE COMMITTEE ON FOREIGN AFFAIRS* (Comm. Print 1982).

10. See Ides, *Congress. Constitutional Responsibility and the War Power*, 17 *LOY. L.A.L. REV.* 599, 632-42 (1984) (discussing the constitutionality of the invasion of Grenada).

## The Congressional War Powers

to appreciate the breadth of the asserted constitutional authority. Nonetheless, the articles of impeachment introduced against President Reagan by Representative Ted Weiss went all but unnoticed.<sup>11</sup> The public approved of the invasion; apparently the Constitution did not merit even an afterthought.

My own students in constitutional law are more than moderately surprised when I suggest that Congress, and not the President, has the sole authority to initiate war. They counter that although Congress has the authority, the President has the power. Thus, due to the collapse of constitutional structure in the war-making area, the Constitution may simply have to conform to present-day perceptions and realities favoring the President. Along with the proponents of presidential power, they argue that in a world plagued by international intrigue, terrorism, military adventurism, and the menace of nuclear war, the war powers must reside in a highly-centralized authority such as the presidency. The cumbersome institution of Congress is ill-suited to the task. Thus, the Constitution must adapt.

Unfortunately, the authors do not adequately address this argument. In fact, *To Chain the Dog of War* appears to be premised upon a theory of constitutional law that denies at the outset such elasticity. Stated simply, this theory posits that the Constitution itself is the fundamental law of the land and binds the government until amended or repealed. It does so regardless of the current effectiveness of any particular provision or structure. Such a theory, assuming it is not applied woodenly, is commendable and will usually be met with general approbation by conservative thinkers. It is founded on the notion that ours is a government of law and not of expediency. However, when uttered in the context of the war powers, these basic principles seem to lose some of their attraction, at least for those who are comfortable with the current *de facto* placement of those powers and who are willing to sacrifice the niceties of formalism to what they perceive to be the critical needs of a powerful nation in the modern world. The authors' failure to confront this argument is doubly unfortunate since it represents the most compelling and disconcerting component of the presidential prerogative arsenal. Indeed, so long as this point remains unrebutted, the formal constitutional structure will exist as a theoretical possibility only.

11. H.R. Res. 370, 98th Cong., 1st Sess., 129 CONG. REC. 1:5446-47 (1983).

### III. The Argument for Congressional Ascendancy

The final two chapters of *To Chain the Dog of War* do address, although somewhat indirectly, the argument that the demands of modern society justify the avoidance of the formal constitutional structure insofar as the war powers are concerned. Yet they do not present a fully explicated defense of the formal structure in a modern setting. Instead they suggest, in very general terms, the superiority of a system that places primary responsibility in Congress. The first of these chapters, entitled "The War Power in the Nuclear Age,"<sup>12</sup> argues briefly that the advent of modern technology, in particular nuclear weaponry, calls for more, not less, congressional oversight. Citing the cataclysmic effects of nuclear war, the authors reasonably assert that the concerns which animated the Framers are even more relevant today than they were in a time of sabers and single-shot rifles. The final chapter, ironically entitled "The Presidency as an Ideal Type,"<sup>13</sup> focuses on the personality of the President and its relationship to the corruption of power. Here the authors attempt to validate the Framers' decision to place the bulk of the war powers in the legislative branch by demonstrating that, by and large, the occupants of the White House are not psychologically fit for the task.

There is certainly some merit to the authors' general observation. The power to make war was seen by the Framers as the most dangerous of all powers vested in government. History has more than confirmed that perception. In times of war our most cherished liberties are strained to the breaking point.<sup>14</sup> The horrors of war speak for themselves. The deliberative legislative process was seen by the Framers as a vital safeguard against the precipitous unleashing of this ruination. The executive, on the other hand, was deemed to be naturally prone to war and, therefore, a threat to life, liberty, and property. It would seem logical, then, that as war becomes more catastrophic and the presidency more prone to aggrandizement of power, the extent of legislative authority and responsibility should be increased rather than diminished.

Despite the merits of these general observations, however, neither chapter would convert an unbeliever. This is so largely because the au-

12. Pp. 267-77.

13. Pp. 279-92.

14. See, for example, *Schenck v. United States*, 249 U.S. 47, 52 (1919), in which Justice Holmes, writing for the Court, observed, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." See also *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding against constitutional challenge a law excluding individuals of Japanese ancestry from a specified military area).

## The Congressional War Powers

thors avoid assessment of two critical concerns: the willingness and the ability of Congress to assert its formal authority in a manner consistent with national interests. The authors provide a few general suggestions as to how Congress may control what they describe as presidential excesses, for example, through the use of budget oversight, advice and consent, joint resolutions, and, ultimately, impeachment.<sup>15</sup> These suggestions are unremarkable and, to a certain extent, miss the point. Congress undoubtedly has the legal authority to place checks upon the President. The question is whether it has the political will to do so in a meaningful way. For example, if the invasion of Grenada violated the Constitution, the violation consisted not simply of the President's order to invade a foreign nation, but also of Congress's failure to respond in any serious manner to this incursion. Certainly if Congress took seriously its constitutional responsibility, it would have at least held hearings and issued a report on the constitutionality of the invasion. Although the authors mention the fact that Congress has failed to shoulder its burdens, they never explore the crucial problem of congressional reluctance to exercise the authority conferred upon it. As Justice Jackson observed in *Youngstown Sheet & Tube Co. v. Sawyer*, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures of independent presidential responsibility."<sup>16</sup>

The War Powers Resolution<sup>17</sup> illustrates clearly this lack of congressional resolve. At a time when the public was beginning to entertain serious concerns about unchecked presidential power, the best Congress could muster was a resolution which confirmed rather than disparaged that power. The 1983 debacle in Lebanon and the invasion of Grenada illustrate the Resolution's ineffectiveness as a check on unilateral presidential initiative. On another occasion, I summarized the impact of the Resolution as follows: "[The President] should consult; he must report; but in all events the decision to engage in military action is in his hands."<sup>18</sup> Indeed, it is fairly clear that one of the driving forces behind adoption of the Resolution was a desire to short-circuit several proposed measures that would have checked presidential authority more effectively.<sup>19</sup>

15. Pp. 274-75.

16. 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

17. 50 U.S.C. §§ 1541-43 (1982).

18. *Ides, supra* note 10, at 630. See generally Symposium: The War Powers Resolution, 17 *LOY. L.A.L. REV.* 579 (1984).

19. *Ides, supra* note 10, at 624-26.

The authors' attitude toward the Resolution is somewhat equivocal. On one occasion they call it a "tardy rebuke" for presidential excess.<sup>20</sup> On another, they describe it as a "strong congressional restatement of the constitutional moorings of the war powers."<sup>21</sup> Yet they conclude in a later chapter, as part of a very cursory discussion, that the Resolution creates an unconstitutional delegation of congressional authority to initiate war.<sup>22</sup> I agree with the latter characterization, although I would state it more strongly: the War Powers Resolution embraces the status quo of presidential initiative in the war-making sphere and, in so doing, completely subverts the basic structure of our constitutional system of government. Unfortunately, the authors' love/hate relationship with the Resolution obscures for them its tragic shortcomings. That attitudinal confusion may also explain their failure to explore or even to consider the institutional pressures that make Congress reluctant to exercise or, according to some, incapable of exercising its constitutional responsibilities.

On a rather different note, the authors' instinct to resuscitate the nondelegation doctrine in the context of war powers is an idea well worth considering. Application of that doctrine in the appropriate circumstances could provide substantial guidance as to the contours of congressional authority and responsibility. Moreover, an overall rethinking of nondelegation seems particularly called for in light of the roadblocks to congressional oversight created by the majority opinion in *Immigration and Naturalization Service v. Chadha*.<sup>23</sup> Unfortunately, the cases upon which Wormuth and Firmage rely are, constitutionally speaking, ancient history. The modern nondelegation doctrine is almost toothless. It may be, however, as Justice White suggested in his *Chadha* dissent, that the Court will now have to rethink its willingness to permit broad delegations in light of the *Chadha* holding.<sup>24</sup> Yet the larger questions still remain of whether the judiciary is willing to intervene in military matters and whether such intervention is desirable.

#### IV. The Possibilities of Judicial Intervention

In some ways, judicial intervention is attractive. The Supreme Court can play a vital role in educating both the public and the legislative branch on the contours of constitutional authority. Although the Court cannot force Congress to act responsibly, it can, on occasion, nurture the

20. P. 15.

21. P. 246.

22. Pp. 215-17.

23. 462 U.S. 919 (1983).

24. *See id.* at 984-89 (White, J., dissenting).

## The Congressional War Powers

seeds of that responsibility. *Brown v. Board of Education*<sup>25</sup> presents an example of this phenomenon. The critical impact of the *Brown* decision was not the desegregation of public schools, but its galvanizing effect on our constitutional perceptions of equal protection and civil rights. While *Brown* did not create the civil rights movement, it placed that movement squarely within the context of the Constitution. In passing the Civil Rights Acts of 1964 and 1968, as well as numerous other civil rights statutes, Congress took its cue from *Brown*'s simple but eloquent conclusion that separate was inherently unequal. That perception is now firmly embedded in our collective constitutional psyche and is unlikely to be easily erased. In the same way, a strong Supreme Court opinion on the war powers issue could alter our assumptions about unchecked presidential power and at the same time inspire Congress to exercise the authority conferred upon it by the Constitution. Conversely, the Court could cast these assumptions in stone.

Wormuth and Firmage argue that the political question doctrine should not bar judicial review of exercises of the war power. Certainly a legitimate argument can be made in this regard. Professor Louis Henkin has argued persuasively that legitimate applications of the political question doctrine establish only that the action being challenged is within the constitutional authority of the branch attempting to exercise the power.<sup>26</sup> Under this formulation, a separation of powers challenge to a unilateral presidential war initiative would present a political question only if the President were acting within the confines of his or her constitutional authority. The authors seem to agree with Henkin's approach and reject the prudential or normative prong of the political question doctrine under which a court would decline even to consider whether the President was acting within the confines of his or her constitutional authority, deferring instead to the President's own determination. This more limited version of the political question doctrine is consistent with a theory of judicial review that places the judiciary in the position of protector of the Constitution.<sup>27</sup> I happen to agree with this view in theory. Yet one must concede that the federal judiciary has not accepted it in practice. The Supreme Court's firm reluctance even to consider the constitutionality of the Vietnam War is a case in point.<sup>28</sup>

25. 347 U.S. 483 (1954).

26. See Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

27. See THE FEDERALIST NO. 78 (A. Hamilton) (C. Rossiter ed. 1961).

28. See, e.g., *Mora v. McNamara*, 389 U.S. 934 (1967) (Stewart, J. and Douglas, J., dissenting from a denial of certiorari).

One must also consider the dangers of judicial review. Despite the benefits that could be achieved through judicial vindication of congressional primacy in war powers, one cannot ignore the possibility that judicial review would result in a repudiation of that primacy. Realistically, given the current composition of the Supreme Court, the latter is a more likely result than the former (if the Court were to reach the merits at all). Moreover, considering the institutional magnetism of the presidency, a ruling by the Court in favor of congressional power might provide no more than transitory relief. As Justice Jackson once noted:

I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.<sup>29</sup>

In fact, it is not clear that even Congress, at least when acting independently, can effectively prevent this slippage.

## Conclusion

In short, although Wormuth and Firmage have done an admirable job of setting out the formal constitutional allocations of the war power, the reader is left upon completion of *To Chain the Dog of War* with an uncomfortable feeling of dissatisfaction. Historical and legal explications are valuable to the extent that they engender doubt regarding embedded perceptions of presidential autocracy. But, quite obviously, something more is needed if a return to the formal constitutional structure is contemplated. It is simply not enough to present yet another scholarly jab at conventional wisdom. So long as accepted constitutional practice conflicts with the structure created by the Constitution, such practice will color our perceptions of constitutionality regardless of the weight of scholarship.

It therefore seems apparent that proponents of the allocation of war power according to the formal constitutional structure have a specific set of tasks before them. First, they must connect the formal theory of separation of powers with the concerns that animate current political thinking. An initial step in this direction would be the integration of the structure of separation of powers, an abstract theory at best, with the

29. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

more tangible and accessible concepts of individual liberty and representative democracy. It is fundamentally wrong to approach a violation of separation of powers simply as an imbroglio between the executive and the legislature. The structure of our government, no less than the limitations imposed by the Bill of Rights, was designed to promote freedom. Indeed, Alexander Hamilton argued vigorously that this structure was the only effective bulwark against encroachments on liberty.<sup>30</sup> Our modern concern with individual liberty as a limitation on state power has led us to ignore Hamilton's image of a freedom-enhancing constitutional structure. Moreover, individual rights, such as freedom of speech and freedom of the press, go hand in hand with the collective structural right of separation of powers. Both promote and protect the ideals of a participatory and responsive representative democracy. Regardless of which branch is responsible, a violation of separation of powers is a violation of our most basic liberty interests.

Second, proponents of the formal constitutional structure should also examine closely those rare instances in modern history in which Congress asserted its dominance vis-à-vis the President in order to determine the precise factors that woke Congress from its usual state of dormancy. Why, for example, did Congress eventually confront the President on the prosecution of the war in Southeast Asia? The Watergate investigations, although not war-related, represent a similar example of the assertion of congressional power. Yet within a very few years after Watergate and the greatly exaggerated demise of the imperial presidency, Congress failed to object to the unilateral invasion of Grenada. What factors led to Congress's unwillingness to confront the Commander-in-Chief on this unconstitutional excursion? Why, with respect to the same President, has Congress been willing to pursue the Iranian arms transactions with great vigor? Is it simply a question of the ends in some circumstances being unacceptable? Is it the public's response that emboldens Congress? What role do the media—and the related problem of access to information—play in this modern separation of powers scheme?

Finally, there must be some demonstration that Congress is not only willing to accept the burdens of authority imposed by the Constitution, but that it is capable of doing so in a manner consistent with national interests. A few long-term assertions of such responsibility would go far toward achieving that goal. One possibility is for Congress to adopt Dr. Jeremy Stone's proposal to create a special congressional committee to

30. See THE FEDERALIST NO. 84 (A. Hamilton) (C. Rossiter ed. 1961).

regulate the first use of nuclear weapons.<sup>31</sup> In this manner, Congress would directly and actively shoulder some of the burden imposed upon it by the Constitution.

In short, the formal Constitution must be brought into the twentieth century, both theoretically and practically. Without such an effort, no amount of analysis of the Framers' intent will effectively alter the presidential domination of the war machine.

31. See Stone, *Presidential First Use Is Unlawful*, 56 FOREIGN POL'Y 94 (1984).