

## THE STEEL SEIZURE CASE: ONE OF A KIND?

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By confronting President Harry Truman and striking down his effort to seize the steel mills needed to prosecute the Korean War,<sup>1</sup> the Supreme Court adhered to its longstanding practice of accepting and deciding cases dealing with the war power. Yet over the next half century the courts systematically sidestepped this type of case. In this essay, we will explain why the Court asserted itself in 1952 and why the modern Court seems incapable, or unwilling, to decide fundamental constitutional issues regarding the allocation of the war power between Congress and the President.

Before turning to the 1952 steel seizure, we need to flag a dispute. Some defenders of presidential war power do not regard *Youngstown* as a foreign affairs case. Instead, they view it as a case about the “taking of private property without due process of law.”<sup>2</sup> Others, who think that Congress and the courts should check presidential war-making, call *Youngstown* “the *Brown v. Board of Education* of foreign affairs litigation.”<sup>3</sup> But no matter how one characterizes *Youngstown*’s precedential significance, the Court’s willingness to assert itself can be traced, in part, to the Justices’ then-customary practice of adjudicating

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

2. John Norton Moore, Frederick S. Tipson, Robert F. Turner, *National Security Law* 773 (Carolina Academic Press, 1990).

3. David Cole, *Youngstown v. Curtiss-Wright*, 99 Yale L.J. 2063, 2081 (1990). See also Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* 105-13 (1990).

war-making disputes, disposing of them as they would any other legal or constitutional dispute.

Section I of this essay explains why we think this is so, calling attention to a host of factors contributing to the Court's repudiation of the seizure. Section II builds upon this analysis. Following a brief discussion of how Supreme Court decision-making is tied to social and political forces, we explore why today's Court is loath to assume its traditional role in our system of checks and balances. In particular, pointing to fundamental changes in executive-legislative relations over the past fifty years, we explain how the modern Court has altered its decisionmaking. In Section III, we suggest that this reversal, while understandable, is undermining our system of constitutional governance. In our view, no branch should hold a monopoly over the initiation of war.

## I. JUDGES CONFRONT TRUMAN

President Harry Truman took the initiative in June 1950 to order U.S. forces to Korea. By acting solely on his interpretation of presidential power, Truman became the first president to involve the Nation in a major war without receiving specific authorization from Congress.<sup>4</sup> Nevertheless, had the Steel Seizure Case reached the courts in late 1950 or early 1951, judges—leery to hinder prosecution of the war—might have sidestepped a judicial resolution of the issue.<sup>5</sup> At that time, Congress and the nation backed the president's initiative.<sup>6</sup> However, by the time Truman issued his 1952 executive order taking control of certain steel companies, a cluster of military, legal, and political factors conspired to markedly erode presidential power and embolden the judiciary.

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4. See Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 Am. J. Intl. Law 21 (1995); David Gray Adler, *Foreign Policy and the Separation of Powers: The Influence of the Judiciary*, in Michael W. McCann and Gerald L. Houseman, eds., *Judging the Constitution: Critical Essays on Judicial Lawmaking* 172 (Scott, Foresman and Co., 1989); Louis Fisher, *Congressional Abdication on War and Spending* 20-21, 50 (Texas A & M U. Press, 2000) ("*Abdication*") (distinguishing Korea from instances where presidents had acted without Congress's approval); Edward S. Corwin, *The President's Power*, New Republic 16 (Jan. 29, 1951).

5. See Paul A. Freund, *The Supreme Court 1951 Term-Foreword: The Year of the Steel Case*, 66 Harv. L. Rev. 89, 90 (1952) (discussing how the Supreme Court could have slowed down the Steel Seizure litigation). For additional discussion, see notes 76-77.

6. See Fisher, *Abdication* at 42-44 (cited in note 4); James L. Sundquist, *The Decline and Resurgence of Congress* 107-10 (Brookings Institution, 1981).

The context of the case put the President's power as Commander in Chief front and center. Truman's executive order was drafted almost entirely as a military imperative. The second paragraph pointed out that "American fighting men and fighting men of the United Nations are now engaged in deadly combat with the forces of aggression in Korea."<sup>7</sup> The weapons and materials needed for that effort "are produced to a great extent in this country, and steel is an indispensable component of substantially all of such weapons and materials."<sup>8</sup> A work stoppage, he warned, "would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field."<sup>9</sup> The first of seven paragraphs ordering the Secretary of Commerce to seize the steel mills directed him to take possession of all such plants "as he may deem necessary in the interests of national defense."<sup>10</sup>

For proponents of unilateral presidential war-making, Truman's seizing of the steel mills could not have come at a worse time. By 1952, the United States had reached a stalemate in Korea, resulting in heavy American casualties and providing little hope for success.<sup>11</sup> With public opposition to his war swelling, Truman's standing in public opinion reached its nadir.<sup>12</sup> The Korean issue, "not crooks or Communists," "cut deepest" with the voters.<sup>13</sup> For example, the high point of the 1952 presidential campaign came on October 24 when Dwight D. Eisenhower denounced Truman's war, promising to end it by "go[ing] to Korea."<sup>14</sup>

Dissatisfaction with the war destroyed Truman's popularity and had much to do with Eisenhower's landslide victory. It also called attention to the fact that, legally, Truman had been skating on thin ice throughout the Korean conflict.<sup>15</sup> He claimed to

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7. Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952).

8. *Id.*

9. *Id.* at 3141.

10. *Id.*

11. T.R. Fehrenbach, *This Kind of War: A Study in Unpreparedness* (Macmillan Co., 1963); Richard S. Kirkendall, *Harry S. Truman, Korea and the Imperial Presidency* (Forum Press, 1975).

12. William H. Rehnquist, *The Supreme Court* 191 (2001 ed.).

13. Stephen E. Ambrose, 1 *Eisenhower: Soldier, General of the Army, President-Elect 1890-1952* at 569 (Simon & Schuster, 1983). See also David McCullough, *Truman* 913 (Simon & Schuster, 1992).

14. Quoted in McCullough, *Truman* at 912 (cited in note 13).

15. For a detailed analysis, see Fisher, 89 Am. J. Intl. Law (cited in note 4); Louis

be acting in response to a resolution adopted by the United Nations Security Council.<sup>16</sup> But that claim was false. Truman had committed U.S. forces before the Council called for military action. As his Secretary of State Dean Acheson later admitted, "some American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution."<sup>17</sup> More significant, Truman ignored Congress's statutory command in the U.N. Participation Act of 1945, that Congress (through legislation or a joint resolution) first approve the deployment of forces in a U.N. initiated action.<sup>18</sup> For this reason, Truman pointed to his December 1950 proclamation of a national emergency as legal authority for seizing the steel mills, not the U.N. authorization of military action.<sup>19</sup>

Truman was on shaky legal footing for another reason. In large measure, his decision to seize the steel mills was tied to his refusal to make use of two statutory remedies prescribed by Congress.<sup>20</sup> By invoking the Taft-Hartley Act, for example, Truman could have temporarily enjoined steel workers from striking and, in this way, could have averted a work stoppage without seizing control of the steel mills. But Truman, a friend of labor, had earlier vetoed Taft-Hartley.<sup>21</sup> Indeed, instead of following Taft-Hartley procedures, Truman referred the steel dispute to the Wage Stabilization Board. And when that effort failed, Truman again refused to invoke Taft-Hartley—claiming both that it was unfair to labor (who had already postponed striking) and that the "greed[ ]" of steel companies threatened "our whole price control program."<sup>22</sup>

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Fisher, *Presidential War Power* 70-91 (U. Press of Kansas, 1995).

16. 1950 Pub. Papers 492.

17. Dean Acheson, *Present at the Creation: My Years in the State Department* 408 (W.W. Norton & Co., 1969).

18. U.N. Participation Act of 1945, 59 Stat. 621, sec. 6. After ordering U.S. troops to Korea, Truman considered presenting a joint resolution to Congress to permit lawmakers to voice their approval, but decided against it. 7 *Foreign Relations of the United States* 282-83 nn. 1 & 2, 287-91 (1976). It should be noted that some members of Congress, including Senate majority leader Scott Lucas, told Truman that he could act without legislative authorization. See Fisher, *Abdication* at 44 (cited in note 4). But even if Truman felt that the exigencies surrounding his June 1950 decision required immediate action, there was nothing that prevented him from returning to Congress at a later date. That way he would not violate a clear legislative command.

19. Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952).

20. See Maeva Marcus, *Truman and the Steel Seizure Case: The Limits of Presidential Power* 77-78 (Duke U. Press, 1994) (discussing the national emergency dispute provisions of the Taft-Hartley Act and the Selective Service Act).

21. See McCullough, *Truman* at 565-66 (cited in note 13).

22. 1952-53 Pub. Papers 249. The Wage Stabilization Board had recommended an hourly increase of 26 cents. McCullough, *Truman* at 897-98 (cited in note 13). In re-

Against this backdrop, Truman had a hard time convincing the nation that the steel seizure represented a national emergency instead of a labor dispute. Newspapers repeatedly declared that the “United States government was no longer a ‘neutral referee’ in labor-management dispute[s].”<sup>23</sup> *Time* magazine accused Truman of acting “primarily as a politician, not as a President . . . Politician Harry Truman was obviously operating on the axiom of political arithmetic that there are more votes in Big Labor than in Big Steel.”<sup>24</sup> And the *Nation* argued that “a just settlement of a labor dispute” is not enough to excuse the president’s “arbitrary exercise of executive power.”<sup>25</sup>

Making matters worse, Truman’s initial defense of the steel seizure was grounded in an ambitious theory of unlimited presidential power, namely, “that the president’s power was absolute unless some provision of the Constitution expressly denied authority to him.”<sup>26</sup> One week after the seizure, at a news conference on April 17, a reporter asked: “Mr. President, if you can seize the steel mills under your inherent powers, can you, in your opinion, also seize the newspapers and/or the radio stations?” Truman never flinched: “Under similar circumstances the President has to act for whatever is for the best of the country. That’s the answer to your question.”<sup>27</sup> Three days later, at another news conference, Truman claimed that the president “has very great inherent powers to meet great national emergencies.”<sup>28</sup> More telling, when asked if he recognized the “danger” to our liberties by substituting inherent presidential power for the written law, Truman responded: “Well, of course I do . . . But when you meet an emergency in an emergency, you have to meet it.”<sup>29</sup> In other words, Truman was not merely asserting authority over certain domestic activities, but was announcing an overarching theory of presidential emergency authority that cut across every area, domestic and foreign.

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sponse, the steel companies demanded a \$12 a ton increase to the price of steel (as a condition to their agreeing to the Board’s recommendation on wages). *Id.* at 898. Accusing the companies of being “profiteer[s],” Truman thought the price of settling this labor dispute was simply too high. *Id.*

23. Marcus, *Truman and the Steel Seizure Case* at 90 (cited in note 20).

24. *Id.* (quoting *Time* 23 (Apr. 21, 1952)).

25. *Id.* at 89 (quoting the *Nation* 393 (Apr. 26, 1952)).

26. Rehnquist, *The Supreme Court* at 190 (cited in note 12).

27. Pub. Papers (1952-1953) at 272-73 (Truman).

28. *Id.* at 290.

29. *Id.* at 294.

The public reaction was swift and savage. The great majority of newspapers rejected this sweeping doctrine of executive power. An editorial in the *New York Times* rebuked Truman for creating “a new regime of government by executive decree,” a system of government that was inconsistent “with our own democratic principle of government by laws and not by men.”<sup>30</sup> The *Washington Post* predicted that Truman’s action “will probably go down in history as one of the most high-handed acts committed by an American President.”<sup>31</sup> Other newspapers weighed in with various forms of denunciation, excoriating Truman for trying to exercise “dictatorial powers.”<sup>32</sup> The *Atlanta Constitution* called Truman’s order “dangerous”; the *Boston Herald* objected to Truman’s effort to “dictatorially” bypass Congress by making his own law; the *Christian Science Monitor* accused him of precipitating “a constitutional and political crisis”; and the *Detroit Free Press* warned that unless someone stopped Truman’s exertion of power “our whole constitutional system is doomed to destruction.”<sup>33</sup>

Truman soon recognized that his definition of emergency power was too high-flying and ill-defined to sit well with the public. He pointed out, for example, that Congress could pass legislation “reject[ing] the course of action I have followed in this matter.”<sup>34</sup> These efforts to define executive power in a less ominous light, however, were quickly dispelled by Justice Department attorneys. In district court, Assistant Attorney General Homer Baldrige told Judge David A. Pine that President Truman had sufficient power under the Constitution to seize the steel mills. It seemed to Baldrige that “there is enough residual power in the executive to meet an emergency situation of this type when it comes up.” Pine’s reaction was chilling: “I think that whatever decision I reach, Mr. Baldrige, I shall not adopt the view that there is anyone in this Government whose power is unlimited, as you seem to indicate.”<sup>35</sup>

Baldrige refused to back off, as prudence or political judgment might have dictated. He advised Pine that there were

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30. Editorial, *The Seizure Order*, N.Y. Times 28 (Apr. 10, 1952).

31. 98 Cong. Rec. 4034 (1952).

32. Id. at 4033 (New York Daily Compass).

33. Id.

34. 1952-53 Pub. Papers 284. Truman also acknowledged that he was bound by the rule of law. Instead of bold and blustery statements about inherent power, Truman spoke of presidential powers as “limited, of course, by the provisions of the Constitution, particularly those that protect the rights of individuals.” Id. at 301.

35. H.R. Doc. No. 534 (Part I), 82d Cong., 2d Sess. 258 (1952).

only two limitations on executive power: "One is the ballot box and the other is impeachment." When Judge Pine asked whether he was arguing that when a "sovereign people" granted powers to the federal government, "it limited Congress, it limited the judiciary, but did not limit the executive," Baldrige cheerfully replied: "That's our conception, Your Honor."<sup>36</sup> Judicial review was not a limitation? Pine pursued the point, asking whether if the President determines that an emergency exists, "the Courts cannot even review whether it is an emergency." Baldrige's response: "That is correct."<sup>37</sup>

Judge Pine lost little time in jettisoning this theory of "unlimited and unrestrained Executive power."<sup>38</sup> In striking down the executive order on April 29, Pine set about demolishing the theory of an emergency power that is not subject to judicial review: "To my mind this [theory] spells a form of government alien to our Constitutional government of limited powers" and, consequently, to recognize it "would undermine public confidence in the very edifice of government as it is known under the Constitution."<sup>39</sup>

Pine's blistering opinion was embraced by the press and, ultimately, the public. A *Washington Post* editorial spoke of the opinion as one "that will long be remembered in the annals of free government."<sup>40</sup> Perhaps more significant, as *The New York Times* contended, Pine's opinion shifted attention away from the labor dispute in the steel industry and to "the question of constitutional powers and relationships."<sup>41</sup> Indeed, by suggesting that the "awful results" of a strike "would be less injurious to the public" than recognition of the president's claim of unbounded power,<sup>42</sup> Pine's opinion prompted the "first serious questioning in the press of the extent of the emergency."<sup>43</sup> An editorial in *The Wall Street Journal*, for example, suggested that the only proof offered by Truman was his pronouncement that an emergency existed.<sup>44</sup>

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36. Joseph A. Loftus, *President's Power Is Not Restricted, Says U.S. Lawyer*, N.Y. Times, 1 (Apr. 26, 1952). See also Joseph Paull, *U.S. Argues President Is Above Courts*, Wash. Post 1 (Apr. 25, 1952).

37. H.R. Doc. No. 534 (Part I) at 371-72.

38. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569, 577 (D.D.C. 1952).

39. *Id.* at 576-77.

40. Editorial, *Steel Injunction*, Wash. Post 16 (Apr. 30 1952).

41. Editorial, *Government Under Law*, N.Y. Times 26 (Apr. 30, 1952).

42. 103 F. Supp. at 577.

43. Marcus, *Truman and the Steel Seizure Case* at 131 (cited in note 20).

44. *Id.* at 131 (discussing Wall St. J. at 8 (Apr. 30, 1952)).

The consequence of all this was quite devastating to the president. Gallup Polls showed that growing public disapproval of the seizure was tied to the Pine decision. And this popular reaction "traveled through the higher courts . . . [becoming] an important element in the legal decision-making process."<sup>45</sup> The administration tried to turn the tide of public opinion but could not. Scrambling for a more publicly (and judicially) acceptable definition of presidential authority, executive officials now entirely jettisoned the sweeping arguments made before the district court. In particular, rather than rely on the president's inherent powers, the government also argued that the president was simply putting into effect the defense programs authorized by Congress.<sup>46</sup>

Administration efforts to recalibrate their position proved futile. With neither a formal declaration of war nor explicit statutory authorization to seize the steel mills, Solicitor General Philip Perlman was unable to erase the lasting impression left by the government's highly publicized district court argument. When Perlman sought to close his argument with rhetorical flourish, insisting that "we are under war conditions," Justices Jackson and Frankfurter pointed out that Congress did not view Korea as a war.<sup>47</sup> Perlman's claim that Truman was quite willing to follow congressional directions likewise met resistance. Questioning by Justice Frankfurter disclosed that the administration treated Congress's failure to outlaw the seizure as de facto legislative approval of it;<sup>48</sup> questioning by Justice Jackson and Chief Justice Vinson underscored the administration's belief that it had independent authority to seize the mills.<sup>49</sup>

On June 2, 1952, the Court issued its decision invalidating the seizure. "Few decisions," according to reactions reported in *The New York Times* and *Harvard Law Review*, "have been so popularly received."<sup>50</sup> Earl Warren, then governor of California, hailed the decision for "remov[ing] the challenge to the basic American principle that we have three equal and coordinate

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45. Id. at 130. Accord Rehnquist, *The Supreme Court* at 191-92 (cited in note 12).

46. Brief for Petitioner Charles Sawyer, 144-172, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

47. Philip B. Kurland and Gerhard Casper eds., 48 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 959 (U. Publications of America, 1975).

48. Id. at 908.

49. Id. at 906-07.

50. The Supreme Court, 1951 Term, 66 Harv. L. Rev. 98, 99 (1952) (citing N.Y. Times news stories).



branches of government.”<sup>51</sup> Most in Congress likewise praised the Court for “declar[ing] that our Constitution is not to be employed to serve the purposes and whims of individual men.”<sup>52</sup> For their part, newspapers praised the Court for “fulfill[ing] its constitutional duty to check a headstrong president.”<sup>53</sup>

One of the law clerks on the Supreme Court in 1952 was William Rehnquist. At the time of the decision, he thought that Truman would win. After all, the Court was comprised of Roosevelt and Truman appointees and “the entire decisional trend for fifteen years [1937-52] had been in the direction of the aggrandizement of the powers of the president and Congress.”<sup>54</sup> That the Justices went so decisively against presidential power, in the middle of a war, came as a surprise to many. Years later, reflecting on what happened in district court and the Supreme Court, Rehnquist developed a keener appreciation of the impact of public opinion on the judiciary. He now concluded: “I think that this is one of those celebrated constitutional cases where what might be called the tide of public opinion suddenly began to run against the government, for a number of reasons, and that this tide of public opinion had a considerable influence on the Court.”<sup>55</sup>

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Many factors made the Steel Seizure case “one of a kind”: Truman was an unpopular, pro-labor president; he seized private property in an effort to sidestep the dictates of Taft-Hartley; and he justified the seizure by pointing to a war that increasingly seemed unwinnable. In 1952, moreover, the culture of expectations governing presidential war-making made the steel seizure case unique. At that time, presidents did not send troops into a major war without congressional approval. Likewise, the Senate did not approve the U.N. or NATO as a way of end-running Congress. And finally, presidents did not point to their inherent powers as “commander in chief” as a warrant for unilateral ex-

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51. Marcus, *Truman and the Steel Seizure Case* at 213 (cited in note 20) (quoting L.A. Times 1 (June 3, 1952)).

52. 98 Cong. Rec. 6289 (1952) (remarks of Senator Harry Cain). For additional quotes, see Marcus, *Truman and the Steel Seizure Case* at 213 (cited in note 20).

53. *Id.* at 213 (quoting The Pittsburgh Press 22 (June 3, 1952)).

54. Rehnquist, *The Supreme Court* at 171 (cited in note 12).

55. William H. Rehnquist, *The Supreme Court: How It Was, How it Is* 95 (William Morrow and Co., 1987). See also Rehnquist, *The Supreme Court* at 192 (cited in note 12) (same).

ecutive war-making.<sup>56</sup> Instead, at the time of *Youngstown*, courts saw war-making as part and parcel of our system of checks and balances—something that Congress and the courts had a say in.

More than anything else, it was this culture of expectations that explains the judiciary's repudiation of Truman's steel seizure. Consider, for example, then-existing norms governing judicial involvement in the war power. From 1789 to 1952, federal courts accepted and adjudicated disputes over war. Could Congress either declare or authorize war? Yes, it could do either one, said the Supreme Court in 1800 and 1801.<sup>57</sup> What happened when a presidential proclamation conflicted with statutory policy? Which one prevailed? An 1804 decision sided with Congress.<sup>58</sup> Could the administration seize, as enemy property, material found on U.S. land at the commencement of hostilities in 1812? Not without congressional authority, said the Court.<sup>59</sup> Could the President, as Commander in Chief, annex territory to the United States by virtue of a military conquest? No, said the Court in 1850, unless the President received authority from Congress.<sup>60</sup>

Many other war power cases came to the Court and were decided there. Federal courts have had to decide when wars begin and when they end. What power does a President have in imposing duties on goods coming from the United States to a conquered country? He has that power, but not after ratification of the treaty of peace, when the power to impose duties returns to Congress.<sup>61</sup> Federal courts have placed limits on military authorities who made arrests without a warrant.<sup>62</sup> Courts reviewed the constitutionality of war-efficiency statutes that continued in operation after the signing of an armistice.<sup>63</sup> A number of World

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56. Even during World War II, when there was little collaboration between Congress and the president, "Presidents [whenever acting unilaterally] always offered an excuse or rationale; never did they assert that they had inherent war power." Michael Ratner and David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 Loyola L.A. L. Rev. 715, 723 (1984) (discussing W. Taylor Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 Va. L. Rev. 1243 (1969)).

57. *Bas v. Tingy*, 4 U.S. (Dall.) 37 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801).

58. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

59. *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

60. *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850).

61. *Dooley v. United States*, 182 U.S. 222 (1901).

62. *Ex parte Orozco*, 201 F. 106 (W.D. Tex. 1912), dismissed, 229 U.S. 633 (1913).

63. *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919).

War II cases required judges to determine the extent to which Congress could delegate its powers to administrative officials.<sup>64</sup> Could Congress and the President place curfews on Japanese-Americans and later place them in detention camps? The Court decided both issues.<sup>65</sup> In a number of cases, the Court tackled the legitimacy of military trials and military tribunals.<sup>66</sup>

These rulings sided at times with the president and sometimes against him. Many of the decisions approved governmental claims of military necessity and/or upheld broad delegations of power to the president.<sup>67</sup> By 1952, moreover, the balance of power between Congress and the president had begun to shift. When Truman sent troops to Korea, Congress did not defend its prerogatives; instead, it stood by on the sidelines and cheered on the president.<sup>68</sup> At the same time, social and political norms did not see the president as the "sole organ" of the United States in international affairs.<sup>69</sup> Not only did courts resolve these disputes,<sup>70</sup> Korea stood as the sole exception to the general consti-

64. *Yakus v. United States*, 321 U.S. 424 (1944); *Bowles v. Willingham*, 321 U.S. 503 (1944).

65. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

66. *Ex parte Quirin*, 317 U.S. 1 (1942); *Application of Yamashita*, 327 U.S. 1 (1946); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

67. Consider, for example, *Korematsu's* approval of the internment of Japanese Americans during World War II. Here, the Court accepted at face value government claims of military necessity. See Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181 (1962) (explaining judicial reluctance to second-guess military judgments).

68. See note 6 and accompanying text.

69. We refer here, of course, to dicta in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). In *Youngstown*, the Court (both in Justice Black's majority opinion and in Justice Jackson's concurring opinion) distanced itself from *Curtiss-Wright*, concluding that *Curtiss-Wright* rested on whether or not Congress had delegated power to the president (and not on the president's inherent power). See 343 U.S. at 585 (majority opinion); id. at 635-36 n.2 (Jackson, concurring). This view is consistent with an early analysis of the case published in the *Harvard Law Review*. See Recent Cases, 50 Harv. L. Rev. 691, 692 (1937) (noting that "the theory of the decision" links Congress's power over foreign commerce to the "President's control over foreign relations" and concluding that "how far the delegation may go remains for future clarification."). See also Michael J. Glennon, *Constitutional Diplomacy* 18 (Princeton U. Press, 1990) (suggesting that the Court saw *Curtiss-Wright* as a way to respond to fears that recent non-delegation decisions "might straitjacket the United States in dealing with the Nazi threat").

70. For an overview, see notes 57-66; Major Geoffrey S. Corn, *Presidential War Powers: Do the Courts Offer Any Answers?*, 157 Mil. L. Rev. 180, 205-15 (1998). Consider, for example, *Curtiss-Wright*. Rather than suggest that courts should not review executive actions in foreign affairs, the Court did review the President's actions (upholding it as being authorized by Congress). See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 Yale L.J. 1255, 1308 n.242. (1988).

tutional principle that the power to initiate war against foreign nations lay with Congress.<sup>71</sup> Lawmaker acquiescence to Korea, for example, did not stop Congress, in 1951, from resisting Truman's efforts to send ground troops into Europe.<sup>72</sup> Even more telling, Dwight Eisenhower, unwilling to preside over a Korea-like debacle in Indochina, made clear that it "would be completely unconstitutional & indefensible" to deploy troops in "the absence of some kind of arrangement getting support of Congress."<sup>73</sup>

The "struggle for the privilege of directing American foreign policy" was, in fact, a struggle in 1952.<sup>74</sup> The norm of checks and balances still fueled the courts and, as such, Truman's unilateralism was seen as a real threat to our system of government. That is why Judge Pine's decision resonated with the nation. That too is why the Justices used the Steel Seizure case as a vehicle to speak broadly about the scope of executive power.

We do not mean to suggest here that expectations regarding our system of checks and balances, in and of themselves, explain the courts' decisions in *Youngstown*. The unpopularity of Korea and, with it, Truman's plummeting support, also fueled the decision.<sup>75</sup> Had the nation supported Truman and his war, there would have been no public outcry following the seizure and, consequently, the courts would not have been pressured to check a runaway president. For example, had Truman seized the steel mills in 1950 (when the public stood behind his Korean initiative), the Supreme Court might well have looked for a way to avoid ruling against the president.<sup>76</sup> There was, for example, no

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71. Fisher, *Abdication* at 15-33 (cited in note 4) (discussing 1789-1945 period); id. at 36-39 (discussing 1945 UN Participation Act and 1949 NATO Treaty).

72. Truman had claimed that he did not need congressional approval, prompting an outcry in both the House and Senate. Hearings were held and Truman—notwithstanding his claim that lawmaker approval was beside the point—waited to see what Congress would do. But a majority in Congress agreed with the president and the issue fizzled when the Senate passed a resolution approving of Truman's initiative (but contending that congressional approval should be obtained before future deployments of troops). See Sundquist, *The Decline and Resurgence of Congress* 110-13 (cited in note 6).

73. Foreign Relations of the United States, 1952-1954, vol. XIII, part 1, at 1242. See also Public Papers of the President, 1954, 306 (same).

74. Edward S. Corwin, *The President: Office and Powers, 1787-1957* at 171 (New York U. Press, 4th rev. ed. 1957).

75. It is also worth remembering that fears of totalitarianism—so pronounced in World War II—remained salient in 1952. For this very reason, Truman's opponents analogized his actions to those of the recently defeated European dictators. As Maeva Marcus noted: "[t]he majority of unfavorable editorials characterized the President's action as dictatorial [with] the New York *Daily News* titl[ing] its editorial 'Truman Does a Hitler'" Marcus, *Truman and the Steel Seizure Case* at 89 (cited in note 20).

76. See also Rehnquist, *The Supreme Court* at 191 (cited in note 12) (suggesting

need for a judicial “rush to judgment” (bypassing the court of appeals and issuing a sweeping decision against the administration two months after the seizure). Indeed, before the district court, counsel for the steel industry did not seek to overturn the seizure; instead, they only sought to enjoin the Truman administration from changing the terms of employment for steel workers, e.g., raising their wages.<sup>77</sup>

Ironically, the very forces that pushed the courts to check the White House in *Youngstown* later pushed the courts in the opposite direction. Over the past fifty years, the culture of expectations governing war powers has undergone a radical shift. As we will soon detail, Congress no longer sees itself as a constitutional check on presidential war-making. Likewise, the public and press increasingly see the president as the exclusive force in foreign affairs. Responding to these changing norms, courts too have limited their role in checking presidential initiatives. In the next part of this essay, we will describe this phenomenon.

## II. JUDGES STEP ASIDE

In the years since *Youngstown*, judicial pronouncements relating to the war powers have diminished to the point of being virtually nonexistent.<sup>78</sup> By making aggressive use of ripeness and standing limitations, for example, courts have refused to hear lawmaker challenges to unilateral presidential war-making. More generally, courts have concluded that numerous issues relating to war-making are political questions. And while the courts have issued some decisions on national security issues, these rulings seem quite far removed from *Youngstown* (where the Court closely scrutinized presidential war-making).

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that the government would have prevailed if the seizure had taken place during World War II).

77. Freund, 66 Harv. L. Rev. at 90 (cited in note 5). That way the courts could have heard evidence, rather than rely solely on affidavits. It should also be noted that the courts could have sidestepped the question of inherent executive power by upholding the president's action as consistent with existing federal law. See *id.* at 91-94. See also note 46 and accompanying text (describing the government's Supreme Court brief).

78. For general treatments, see Adler, *Foreign Policy and the Separation of Powers*, in McCann and Houseman, eds., *Judging the Constitution* (cited in note 4); Corn, 157 Mil. L. Rev. (cited in note 70); Jonathan L. Entin, *The Dog that Rarely Barks: Why the Courts Won't Resolve the War Powers Debate*, 47 Case W. Res. L. Rev. 1305 (1997). See also John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of the Rational Choice in the Separation of Powers*, 56 Law & Contemp. Probs. 203, 306-08 (1993) (detailing reasons courts make use of justiciability doctrines to steer clear of war making disputes).

There is a relatively simple explanation for this phenomenon. If members of Congress fail to assert their prerogatives over war and peace, federal judges are unwilling to fill the breach left open by lawmakers. At the time of *Youngstown*, Congress's failure to act was aberrational. Rather, as detailed above, the culture of expectations was one in which Congress was an active participant in war-making. Correspondingly, judges assumed their traditional role in our system of checks and balances—assessing the legality of governmental action. Today, Congress's general practice is to acquiesce, not challenge, presidential war-making. With Congress retreating in war powers, courts too have backed away. This section details how social and political forces have pushed courts away from war powers issues. Before doing so, we will briefly explain why those forces should matter to the Supreme Court.<sup>79</sup>

Just as the Supreme Court leaves its mark on American society, so are social forces part of the mix of constitutional law. True, the Justices work in a somewhat insulated atmosphere. But, as Chief Justice William Rehnquist reminded us, the “currents and tides of public opinion . . . lap at the courthouse door,”<sup>80</sup> for “judges go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events.”<sup>81</sup> As such, “[j]udges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.”<sup>82</sup>

Constitutional decisionmaking, moreover, is a dynamic process that involves all parts of government and the people as well. Lacking the power to appropriate funds or command the military, the Court understands that it must act in a way that garners public acceptance. Its power, as the Justices themselves admit, lies in its legitimacy.<sup>83</sup> An especially telling manifestation

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79. For a more detailed explanation (from which portions of the next three paragraphs are drawn), see Neal Devins and Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va. L. Rev. 83 (1998).

80. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 Suffolk U. L. Rev. 751, 768 (1986).

81. *Id.*

82. *Id.*; see also Max Lerner, *Constitution and Court as Symbols*, 46 Yale L.J. 1290, 1314 (1937) (“[J]udicial decisions are not babies brought by constitutional storks, but are born out of the travail of economic circumstance.”).

83. See Tom R. Tyler and Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 Duke L.J. 703, 715 (1994) (“[P]ublic acceptance of the Court’s role as interpreter of the Constitution . . . enhances public acceptance of controversial Court decisions.”).

of how public opinion affects Court decisionmaking is evident when the Court reverses itself to conform its decisionmaking to the social and political forces beating against it. In explaining the collapse of the *Lochner* era, for example, Justice Owen Roberts recognized the extraordinary importance of public opinion: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."<sup>84</sup> Social and political forces also played a defining role in the Court's reconsideration of decisions on sterilization and the eugenics movement, state-mandated flag salutes, the *Roe v. Wade* trimester standard, the death penalty, states' rights, and much more.<sup>85</sup> Absent popular support, these decisions proved ineffective. In the end, as Justice Robert Jackson wrote, "[t]he practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority."<sup>86</sup>

When taking social and political forces into account, moreover, the Court is apt to "exercise the rights of governance that bring it prestige and to avoid exercising the rights of governance that may bring it harm."<sup>87</sup> For example, when Congress signals the Court that it has doubts about the constitutionality of its handiwork, the Court does not risk much political capital by striking down that law.<sup>88</sup>

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Under contemporary conditions, courts have little incentive to involve themselves in war powers disputes. Unlike *Youngstown*, unilateral executive war-making is now the norm. Not only has Congress abandoned its traditional role, the public and the media also see the president as the "sole organ" of modern day war-making.

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84. Owen J. Roberts, *The Court and the Constitution* 61 (Harvard U. Press, 1951).

85. For support of these claims, see sources cited in Devins and Fisher, 84 Va. L. Rev. at 95 (cited in note 79).

86. Robert H. Jackson, *Maintaining Our Freedoms: The Role of the Judiciary*, 19 Vital Speeches of the Day, 759, 761 (1953).

87. McGinnis, 56 Law & Contemp. Probs. at 296 (cited in note 78).

88. For a general treatment of this subject, see Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Studies in American Political Development 35 (1993). See also Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 Duke L.J. 435 (2001) (discussing ways in which Congress is facilitating Rehnquist Court decisions invalidating federal statutes).

Starting with Korea, presidents have bypassed Congress. Rather than seek congressional authorization before initiating military actions, presidents now see Congress as an after-the-fact cheerleader.<sup>89</sup> Consider, for example, Congress's response to President Clinton's decision to use military force in Bosnia. For Senate majority leader Bob Dole: "[I]n my view the President has the authority and the power under the Constitution to do what he feels should be done regardless of what Congress does."<sup>90</sup> Likewise, minority leader George Mitchell opposed legislation requiring the president to first seek congressional authorization for military action in Bosnia because such "prior restraints . . . plainly violate the Constitution."<sup>91</sup> By suggesting that Congress has no role to play, lawmakers now seem more interested in protecting the executive branch than their own institution.

The constitutional position of Congress has deteriorated for a number of reasons. One is the volunteer army. As Joseph Califano has noted, an all-volunteer army "relieves affluent, vocal, voting Americans of the concern that their children will be at risk of going into combat."<sup>92</sup> Likewise, deprived of a broad-based draft, university campuses are no longer centers of anti-war activity. Without such public pressure, lawmakers would rather focus their efforts on constituent services and other matters helpful to their efforts to retain their seats.<sup>93</sup> Correspondingly, the growing cost of running for office means that legislators have less time to tend to their institutional and constitutional duties.

Presidents, in contrast, often have strong incentives to launch military initiatives. Presidents achieve status, fame if you will, by leading the nation into battle.<sup>94</sup> For example, by launch-

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89. For a detailing of Congress's ever-diminishing role, see Fisher, *Abdication* at 34-114 (cited in note 4). See also Louis Fisher and Neal Devins, *Political Dynamics of Constitutional Law* 153-71 (West Group, 3d ed. 2001).

90. 141 Cong. Rec. S17,529 (daily ed. Nov. 27, 1995).

91. 139 Cong. Rec. 25,483 (1993). After Clinton deployed troops in 1995, the Senate defeated a "congressional authorization" bill by a vote of 77 to 22. 141 Cong. Rec. S18,470 (daily ed. Dec. 13, 1995).

92. Joseph A. Califano, Jr., *When There's No Draft*, Wash. Post A23 (Apr. 6, 1999).

93. See John A. Ferejohn, *Pork Barrel Politics: Rivers and Harbors Legislation, 1947-1968* at 47-68 (Stanford U. Press, 1974); Terry M. Moe and William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. Econ. & Org. 132 (1999). It goes without saying that opportunities to reward constituents this way have increased since World War II and, as such, track Congress's diminishing interest in war powers.

94. For this very reason, the framers intended the Congress to play the dominant role in initiating military actions. See William Michael Treanor, *Fame, the Founding, and*



ing military strikes, a “rally around the president” phenomenon guarantees a surge of 10 percentage points or more in the president’s approval ratings.<sup>95</sup> And with military technology now enabling presidents to wage war with few casualties, there are strong incentives to launch such strikes. Also, with Congress playing a diminishing role in war powers, expectations have developed about the president’s constitutional powers and responsibilities. For example, when reporters claim that the president does need the approval of Congress before launching military strikes, they encourage the public to believe that the president has the constitutional authority to initiate war.<sup>96</sup> Against this backdrop, it is to be expected that the “president generally places a very high value on control of the rights of governance in foreign affairs.”<sup>97</sup> As these expectations of presidential dominance have become entrenched, lawmakers are even less likely to risk the possible fallout (with their constituents) of opposing military actions launched by the President.<sup>98</sup>

The judiciary, instead of questioning the president on national security matters and thereby protecting constitutional values, has largely stepped aside. Without the backing of Congress, the courts have left presidential decision-making alone—validating it outright or concluding that they lack the jurisdiction to review it. In particular, starting with the war in Viet Nam, courts have seen the momentous question of whether the president can commit the nation’s blood to be outside its authority.<sup>99</sup>

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*the Power to Declare War*, 82 Cornell L. Rev. 695 (1997).

95. This phenomenon has been documented by the Gallup News Service. In the wake of the September 11 terrorist attacks and the talk of military action in Afghanistan, the news service posted a study on its website comparing President George W. Bush’s surge in approval ratings to the surges experienced by other Presidents in times of war. See David W. Moore, *Bush Job Approval Reflects “Rally” Effect: Close to Highest Approval Rating Ever Measured*, Gallup News Service, (Sept. 18, 2001), available at <<http://www.gallup.com/poll/releases/pr010918.asp>>.

96. For example, in several articles in 1995, a reporter for The New York Times stated that President Clinton “does not need the approval of Congress to send troops to the Balkans.” Katharine Q. Seelye, *Legislators Get Plea by Clinton on Bosnia Force*, N.Y. Times A1 (Nov. 29, 1995). For additional discussion, see Fisher, *Abdication* at 112-14 (cited in note 4). For a recent counterexample, see David E. Sanger, *There’s a Small Matter of Checks and Balances*, N.Y. Times 4-1 (Jan. 27, 2002).

97. McGinnis, 56 Law & Contemp. Probs. at 306 (cited in note 78).

98. See Dante Fascell, *War Powers and Congress*, 50 U. Miami L. Rev. 121, 124 (1995). For a more detailed statement of how the individual interests of members of Congress and the institutional interests of Congress diverge on war powers, see Neal Devins, *Abdication by Another Name: An Ode to Lou Fisher*, 19 St. Louis U. Pub. L. Rev. 65 (2000).

99. Law professors, many of whom opposed the war, were quick to condemn the courts for abdicating their responsibilities. See Michael E. Tigar, *Judicial Power, The “Political Question Doctrine” and Foreign Relations*, 17 U.C.L.A. L. Rev. 1135 (1970).

During Viet Nam, judges dismissed—as “obviously a political question”—some lawsuits challenging the president’s authority to wage war.<sup>100</sup> In other cases, plaintiffs were denied standing to challenge the legality of the Viet Nam war.<sup>101</sup> And in a lawsuit filed by members of Congress, the court noted that it would not decide war powers cases unless the President and Congress were in “resolute conflict.”<sup>102</sup> For its part, the U.S. Supreme Court kept quiet by denying certiorari.<sup>103</sup>

This pattern from the Viet Nam years has carried forward to more recent decades.<sup>104</sup> The only noteworthy change is that members of Congress have become the principal antagonists before the courts. During the 1980s and 1990s, members of Congress filed numerous lawsuits challenging the military initiatives of Presidents Reagan, Bush, and Clinton. Typically, these members came as a small group unable to represent what Congress intended as an institution. Also, they were often opposed by another group of legislators who defended the President. Standing in the middle of this crossfire, federal judges essentially told the legislators complaining of executive aggrandizement: “Don’t come in here and expect us to do your work for you.”

Congress’s failure to stake out an institutional position prompted federal courts to toss out (on political question grounds) lawmaker challenges to Reagan-era military strikes in Nicaragua and El Salvador.<sup>105</sup> Lawsuits challenging Reagan initiatives in Grenada and the Persian Gulf were, ultimately, dis-

100. *Luftig v. McNamara*, 252 F. Supp. 819, 819 (D.D.C. 1966), aff’d, 373 F.2d 664 (D.C. Cir. 1967), cert. denied, 387 U.S. 945 (1967). See also *DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973) (ruling that courts lack competence in military matters).

101. *Campen v. Nixon*, 56 F.R.D. 404 (N.D. Cal. 1972).

102. *Drinan v. Nixon*, 364 F. Supp. 854, 860 (D. Mass. 1973).

103. For a critique of this practice, see Louis Henkin, *Viet-Nam in the Courts of the United States: “Political Questions,”* 63 Am. J. Intl. Law 284 (1969). For a general defense (not at all tied to war issues), see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 126-33 (Bobbs-Merrill Co., 1962).

104. For some judges, however, “no one” can bring a case challenging the President’s use of force because courts lack “judicially discoverable and manageable standards” for addressing and analyzing such claims. *Campbell v. Clinton*, 203 F.3d 19, 24-25 (D.C. Cir. 2000) (Silberman, concurring). By making it impossible for courts ever to have a say, this type of ruling is not simply a ducking of the issue (whereby the courts could rule against the executive in some future case). Instead, it is effectively a substantive declaration of executive supremacy on war making. See Koh, *The National Security Constitution* at 216-24 (cited in note 3) (calling attention to how a political question ruling can operate like a substantive ruling on the merits).

105. *Crockett v. Reagan*, 558 F. Supp. 893, 898-99 (D.D.C. 1982), aff’d, *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), aff’d, 770 F.2d 202, 204, 210 (D.C. Cir. 1985).

missed on mootness grounds.<sup>106</sup> Ripeness was invoked to block lawmakers challenging the constitutionality of President Bush's ordering of offensive actions against Iraq in 1990. "[U]nless the Congress as a whole, or by a majority, is heard from," wrote district court judge Harold Greene, "the controversy here cannot be deemed ripe."<sup>107</sup> And in explaining why members of Congress lacked standing to challenge President Clinton's launching of air strikes in Yugoslavia, the court noted that Congress would need to stake out an institutional position for there to be "an actual confrontation sufficient to confer standing."<sup>108</sup>

In concluding that there is no reason to protect a Congress that is unwilling to defend itself, courts have largely abdicated their role in military and national security matters. Unlike *Youngstown* (where congressional silence did not deter judicial action), today's courts seem oblivious to their constitutional duty to analyze and interpret legal boundaries. Instead, they wait for Congress to act. As then appellate judge Ruth Bader Ginsburg put it: Congress "has formidable weapons at its disposal—the power of the purse and investigative resources far beyond those available in the Third Branch . . . 'If the Congress chooses not to confront the President, it is not our task to do so.'"<sup>109</sup>

The social and political forces that help explain *Youngstown* are no longer at play today. Presidential war-making is now an entrenched part of our cultural norms. Unless Congress wakes up, courts seem unwilling to participate in this dramatic reshaping of our system of checks and balances. Lacking the powers of purse and sword, courts are reluctant to contradict cultural norms; instead, they look for ways to preserve their institutional resources. Findings of no jurisdiction, certiorari denials, and the like allow the courts to opt out of an issue until they have the backing of Congress and/or the people.

Why this passivity by the courts on the crucial decision of taking the country to war? The Court had no problem contradicting cultural norms during the *Lochner* era, and it certainly pushed the envelope with *Roe v. Wade*. The contemporary Su-

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106. *Conyers v. Reagan*, 765 F.2d 1124 (D.C. Cir. 1985); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987). For additional discussion, see Fisher, *Abdication* at 72-73 (cited in note 4).

107. *Dellums v. Bush*, 752 F. Supp. 1141, 1151 (D.D.C. 1990).

108. *Campbell v. Clinton*, 52 F. Supp. 2d 34, 43 (D.D.C. 1999), *aff'd*, 203 F.3d 19 (D.C. Cir. 2000).

109. *Sanchez-Espinoza*, 770 F.2d at 211 (quoting *Goldwater v. Carter*, 444 U.S. 996, 998 (Powell, J., concurring)).

preme Court, moreover, is not at all shy about countermanding Congress for violating its enumerated powers on federalism and other structural matters.<sup>110</sup> Against this backdrop, the Court's acquiescence to cultural norms on war-making is disappointing. The Justices should care about the structural protections of separation of powers, and how that value is threatened by unilateral presidential wars.

Were lawmakers to defend their prerogatives, courts presumably would adjudicate these disputes and might well rule for the Congress. Indeed, "[i]n two hundred years of dispute between the President and Congress over war and peace, commitment and neutrality, trade embargoes and arms sales," the Supreme Court has yet to invalidate a federal statute for impinging on the president's foreign-affairs powers.<sup>111</sup> On this point, Viet Nam era litigation is especially instructive. Before there was popular opposition to the war, courts simply concluded that they lacked jurisdiction to consider challenges to the constitutionality of the war. In the final round of litigation, "when popular and congressional opposition to the war was at its peak,"<sup>112</sup> the courts moderated their position. While affording the president wide latitude to "wind down" the war, courts now argued that the authorization issue was justiciable and that the Gulf of Tonkin Resolution could not substitute for a congressional declaration of war.<sup>113</sup>

Today, *Youngstown* seems curiously vibrant and anachronous. It remains vibrant because of its essential lesson: it appears that contemporary courts will only check presidential war making when social and political forces support such a judicial role. As a practical matter, this means that Congress cannot count on the courts to protect its prerogatives. Concurring in *Youngstown*, Justice Jackson, in words that reflect the modern (not traditional) understanding of war powers, put it this way: "The tools belong to the man who can use them." We may say that

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110. It may be that Congress has encouraged this federalism revolution. See Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 Duke L.J. 435 (2001).

111. Glennon, *Constitutional Diplomacy* at 13 (cited in note 69). Furthermore, only one appellate court has invalidated an act of Congress on these grounds. See *id.* (referring to *National Federation of Federal Employees v. United States*, 695 F. Supp. 1196 (1988)).

112. Cole, 99 Yale L.J. at 2083 (cited in note 3).

113. See, e.g., *Mitchell v. Laird*, 488 F.2d 611, 614-16 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311 (2d Cir. 1973), cert. denied 416 U.S. 936 (1974). For a fuller treatment of this evolution, see Ratner and Cole, 17 Loyola L.A. L. Rev. at 730-35 (cited in note 56).

power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”<sup>114</sup> Essentially, Jackson was admitting that the Court could not interpret the constitutional authority of the President unless Congress asserted its role. That is a distinctly modern notion. Courts in the past did not think that way.

It is for this very reason that *Youngstown* also seems a relic of the past. Congress has let power slip from its fingers. More striking, presidents now routinely claim the type of unlimited power that was anathema to the courts at the time of *Youngstown*. Federal court filings, for example, now contend that “[t]he Constitution commits to the executive branch the conduct of American diplomatic and foreign affairs,” and that whether hostilities exist or are imminent involves the President’s responsibilities as ‘Commander in Chief of the Army and Navy’ . . . and as ‘sole organ of the nation in its external relations.’”<sup>115</sup> And while federal courts have not formally embraced these claims (preferring, instead, to rule on jurisdictional grounds), the Supreme Court has adopted doctrinal formulas that put the onus on Congress to speak against presidential initiatives (rather than on the President to demonstrate that his conduct has been authorized by Congress or the Constitution).<sup>116</sup>

### III. CONCLUSION

The erosion of our system of checks and balances on war powers issues, while understandable, is unfortunate. Complex social policy issues, especially those that implicate constitutional values, are best resolved through “the sweaty intimacy of creatures locked in combat.”<sup>117</sup> More to the point, no branch of government should hold a monopoly on any of the Constitution’s key provisions; instead, “[s]ome arbiter is almost indispensable

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114. *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring).

115. Glennon, *Constitutional Diplomacy* at 108 (cited in note 69) (quoting appellate brief filed by the Justice Department in *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), a case involving President Reagan’s deployment of troops to the Persian Gulf).

116. The most important of these cases is *Dames and Moore v. Regan*, 453 U.S. 654 (1981). Here, the Court approved a Carter-era executive agreement securing the release of American hostages. Because Congress did not formally approve of this arrangement, the Court found “tacit” Congressional approval both by looking to other statutes and Congress’s silence in the face of the Carter initiative. In *Youngstown*, the Court specifically rejected a nearly identical Truman administration claim. See *supra* note 48. But in *Dames and Moore*, the Court signaled that the burden of proof should be shifted away from the president and to the Congress.

117. Bickel, *Least Dangerous Branch* at 261 (cited in note 103).

when power is . . . balanced between different branches.”<sup>118</sup> On war-making, the failure of Congress and the Court to check the President has made the Constitution less vital, less durable. By acting unilaterally, the president has effectively nullified the war-making provisions of the Constitution. For these provisions to have meaning, someone has to give them legal effect. A Congress that refuses to take a stand cannot accomplish this task. Likewise, judicial invocations of various jurisdiction-limiting doctrines eliminates the courts.<sup>119</sup>

Unlike constitutional dialogues on some issues that are better left to the political branches, war powers is an issue where judicial passivity contributes to a loss of legitimacy to constitutional government.<sup>120</sup> In particular, if it is the duty of courts to safeguard the Constitution, how can judges conscientiously look away while presidents usurp such a crucial power from the nation’s representatives? Do we have a Constitution of limits, or is it merely up for grabs? The Supreme Court reminds us that the Constitution is one of enumerated powers.<sup>121</sup> Obviously, contemporary Justices do not believe that when it comes to the war power. If that part of the Constitution can be regularly violated, why not others? Gradually we lose respect for a written Constitution.

Beyond undermining the constitutional design, we cannot expect foreign policy and national security to be formulated well in the hands of an unchecked executive.<sup>122</sup> Throughout our history, no branch has consistently demonstrated its wisdom on war powers issues. Neither Congress nor the President (nor the courts) can really assure the nation that it is truly wise on war powers issues; “[t]he only assurance,” as Alexander Bickel observed, “lies in process, in the duty to explain, justify and per-

118. Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* 9 (Knopf, 1941).

119. Without meaningful judicial review, there is reason to doubt the very legitimacy of presidential initiatives. “What a government of limited powers needs,” as Charles Black explained, “is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers. . . . [T]he Court, through its history, has acted as the legitimator of the government.” Charles L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* 52 (Macmillan Co., 1960). Judicial review is also critical to the rule of law. See Philip B. Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 Mich. L. Rev. 592, 612 (1986) (noting that the rule of law “requires that government not act except according to preestablished rule”).

120. See Devins and Fisher, 84 Va. L. Rev. at 98-106 (cited in note 79) (arguing that interbranch conflict encourages the constructive evolution of constitutional norms).

121. “Under our Constitution, the Federal Government is one of enumerated powers.” *Boerne v. Flores*, 521 U.S. 507, 516 (1997).

122. See Louis Fisher, *Unchecked Presidential Wars*, 148 U. Pa. L. Rev. 1637 (2000).

suade, to define the national interest by evoking it, and thus to act by consent.”<sup>123</sup> For example, even if one were to argue that presidents have institutional advantages over Congress in national security affairs,<sup>124</sup> presidents may launch military initiatives to deflect attention from a policy crisis at home and for other reasons having little to do with the national interest.

For reasons we have detailed, there is little reason to think that future presidents, Congresses, and Supreme Courts will reinvigorate the system of checks and balances. Indeed, with no meaningful congressional resistance, President George W. Bush has invoked the ongoing “War on Terrorism” as justification for asserting “far greater powers for the executive branch at home.”<sup>125</sup> Although Bush sought congressional authorization both for the use of force against the terrorists and to launch an attack against Iraq, his administration almost always acts unilaterally without either consulting Congress or seeking statutory authority.<sup>126</sup> And while the public may ultimately disapprove of these initiatives,<sup>127</sup> this after-the-fact check still leaves it to the

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123. Alexander M. Bickel, *The Need for a War-Powers Bill*, *The New Republic* 17, 18 (Jan. 22, 1972). See also John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 *Colum. L. Rev.* 1379, 1421 (1988) (favorably citing Bickel); Lee H. Hamilton, *The Role of Congress in U.S. Foreign Policy*, speech delivered to the Center for Strategic and International Studies, at 1 (Nov. 19, 1998) (arguing that a better foreign policy is produced by a “creative tension between the President and the Congress”).

124. In making this assumption, we do not mean to express an opinion on whether this view is correct. Arguments on this issue can be found in McGinnis, 56 *Law & Contemp. Probs.* at 305-08 (cited in note 78) (in support); Glennon, *Constitutional Diplomacy* at 314-15 (cited in note 69) (detailing but, ultimately, rejecting these arguments); Fisher, *Abdication* at 166-70 (cited in note 4) (also rejecting).

125. Sanger, *There's a Small Matter of Checks and Balances* (cited in note 96). See also David E. Sanger, *Bush, Focusing on Terrorism, Says Secure U.S. is Top Priority*, *N.Y. Times* A1 (Jan. 30, 2002) (noting President Bush's apparent willingness to launch military strikes against nations that are developing weapons that could be used against the United States).

126. Initially, Bush's White House Counsel argued that Bush could launch an attack on Iraq without any congressional authority. For further discussion, see Louis Fisher, *The Road to Iraq*, *Legal Times* 32 (Sept. 2, 2002) (contending that this claim was based on weak or nonexistent arguments).

127. In the short run, these initiatives are popular with the voters. See *supra* note 95 (discussing the “rally around the flag” effect). Over time, however, they may prove unpopular. For example, notwithstanding early public support, voters punished Truman for his handling of Korea by voting the Democrats out of office in 1952. Also, public disapproval of Viet Nam contributed to Johnson's decision not to run for reelection in 1968. Likewise, President George Bush's high approval ratings in 1991, after his successes in Iraq, had virtually disappeared a year later when he was defeated by Bill Clinton. Finally, George W. Bush's efforts to launch an attack against Iraq have been hamstrung by opinion polls showing that the public favored by 63% to 30% giving the United Nations more time to get weapon inspectors into Iraq. Adam Nagourney and Janet Elder, *Public Says Bush Needs to Pay Heed to Weak Economy*, *N.Y. Times* A1, A14 (Oct. 7, 2002).

president to set the terms and conditions governing the use of force.

All of this brings us back to *Youngstown*. The speed in which the Court acted and the firmness of its decision is a testament to how social and political forces shape judicial decision-making. And while the very forces that enabled the Court to check Truman now speak to the Court's refusal to resolve war powers disputes, the fact remains that today's Court has yet to embrace the President's claim of exclusive war-making power. Were the public (or Congress) willing to stand up to presidential unilateralism, the Court would likely restore its role in our system of checks and balances.

"The consequence of the limitations under which the Court must sometimes operate in this area," as Earl Warren put it, is that "[the people] must remain vigilant to preserve the principles of our [Constitution]." <sup>128</sup> In *Youngstown*, with public opinion against the president, the war in Korea, and the steel seizure itself, courts were willing to repudiate the Truman administration's sweeping assertions of unlimited presidential powers. The lesson here is simple: For our system of checks and balances to work, all parts of government and the public must participate. Concentrating the whole of the war power in a single branch is repugnant to our constitutional system.

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128. Warren, 37 N.Y.U. L. Rev. at 192, 203 (cited in note 67).