

FIRST USE OF NUCLEAR WEAPONS: THE CONSTITUTIONAL ROLE OF A CONGRESSIONAL LEADERSHIP COMMITTEE

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The last round of scholarship concerning the Constitution's war powers was a product of the Indochina War.¹ Out of that era sprung the War Powers Resolution of 1973,² a significant statement by Congress which sought to reclaim its eroded powers over the nation's commitment to armed conflicts. Since 1973 and the withdrawal of American troops from Vietnam, concern and debate over the war powers has shifted decidedly toward various scenarios involving nuclear weapons. Like much of the previous debate over the war powers, the question of the respective constitutional prerogatives of the elected branches to engage and manage a nuclear war is probably not resolvable.³ Even so, it is an issue with enough importance to command our attention toward sorting out the permissible constitutional roles.

Although the War Powers Act brought some constitutional order to the roles assigned to the two branches during pending or real hostilities, it is seriously flawed. First, its provisions have often been ignored.⁴ In that regard, some perhaps minor repairs are needed.⁵ More importantly, the Act's grant of discretion to the President to commit our forces in a "national

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1. See generally T. EAGLETON, *WAR AND PRESIDENTIAL POWER* (1974); T. FRANCK & E. WEISBAND, *FOREIGN POLICY BY CONGRESS* (1979); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972); J. JAVITS, *WHO MAKES WAR?* (1973); Department of State, Office of Legal Adviser, *The Legality of United States Participation in Vietnam*, 75 YALE L.J. 1085, 1088 (1966); Van Alstyne, *Congress, the President and the Power to Declare War*, 121 U. PA. L. REV. 1 (1972); and Note, *Congress, the President and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).
2. War Powers Resolution § 2, 50 U.S.C. § 1541 (1982). Originally H.J. Res. 542, the resolution was adopted over a veto by President Nixon on November 7, 1973.
3. Scholarly debate continues because the Constitution permits either branch to claim the disputed powers. Many believe that the Constitution grants the lion's share of the war powers to Congress. See L. HENKIN, *supra* note 1, at 45-50; W. REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS* (1981); A. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 3 (1976); Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1410 (1984). Others claim the same or greater share was intended for the President. See Emerson, *The War Powers Resolution Tested: the President's Independent Defense Power*, 51 NOTRE DAME LAW. 187, 209-13 (1975); Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 864-66 (1972).
4. For a good account of the role of the War Powers Act since 1973, see Note, *supra* note 3, at 1420-29.
5. *Id.* at 1436-45. See generally Symposium: *The War Powers Resolution*, 17 LOY. L.A.L. REV. 579-802 (1984).

emergency created by attack upon the United States, its territories or possessions, or its armed forces"⁶ sanctioned, or at least failed to negate, the President's potentially broad power to unilaterally launch a first strike nuclear attack.⁷ The practical and legal problems come together in the following scenario: Assume an attack on NATO forces in Western Europe. As the conventional war widens, the President orders retaliation with conventional forces without consulting Congress, within the War Powers Act emergency provision.⁸ The conflict continues to escalate and the NATO forces take heavy losses. The President decides to use theater nuclear weapons in an effort to reverse the tide and decide the matter quickly. Still acting under the War Powers Act, the President chooses not to consult Congress before firing the nuclear weapons.⁹ Several questions arise: Does such a decision-making scheme make sense? Does the President have the constitutional power to fire nuclear weapons first in such a setting?¹⁰ May Congress act to limit the presidential prerogative over the first-use decision?¹¹ If Congress has the constitutional power to so limit the president, what form may its role take? While all of the questions are interesting and important, this article will attempt a tentative answer to only the last one.¹²

One way for Congress to share the first-use decision would be to prohibit the President's first use unless both houses in full pass an expedited emergency resolution approving it. However, it may be unrealistic to involve the whole Congress in such a shared decision. While urgency and expediency may not require a decision in minutes, the nation may be irretrievably damaged if days must pass for Congress as a whole to debate and then decide the first-use question.¹³ While various ways to share the first-use decision exist,¹⁴ one potentially effective device was first proposed as a bill in Congress by the Federation of American Scientists in 1975. The FAS

6. War Powers Resolution § 2(c), 50 U.S.C. § 1541(c) (1982).

7. Whether the emergency language directly sanctioned or simply failed to negate presidential power turns on whether such a power is a part of the Article II power. See *infra* note 10. The Senate version of the War Powers Resolution would have explicitly set out the instances where the President could commit troops without statutory authorization. See Glennon, *The War Powers Resolution: Sad Record, Dismal Promise*, 17 LOY. L.A.L. REV. 657 (1984).

8. See War Powers Resolution, 50 U.S.C. § 1541(c) (1982).

9. The President would likely rely on the § 2(c) emergency language. Of course, it may also be as likely that the President would consult or even seek the approval of Congress. The point is that he would not be required to do so under the War Powers Resolution.

10. It may be that, under the Constitution, Congress must affirmatively authorize the President's first use of nuclear weapons. See W. REVELEY III, *supra* note 3, at 190-95.

11. On the question of who ultimately has the power to order the first use of nuclear weapons, the Constitution appears to permit either branch to claim the power. Good arguments have been made on both sides. See *id.* at 170-89. The weight of opinion, however, supports the notion that Congress *may* affirmatively condition or even prohibit the President's first-use decision so long as such action does not interfere with the President's generally recognized authority to "repel sudden attacks." See generally L. HENKIN, W. REVELEY III, and A. SOFAER, *supra* note 3. Such measures would be based upon the Framers' intent that the initiation of war should require the concurrence of the President and Congress and upon a recognition of the modern reality that a first use of nuclear weapons would constitute a declaration of war or at least an escalation of hostilities so grave that Congress should be allowed to participate in the decision.

12. The strategic questions are addressed in Stone, *Presidential First Use is Unlawful*, 56 FOREIGN POL'Y 94 (1984).

13. *Id.* at 108.

14. Options include requiring some form of congressional consultation instead of approval, or a requirement that the President consult with certain executive branch officials before first use.

bill would prohibit presidential first use absent a prior declaration of war unless a select joint committee of Congress authorizes such use.

The text of the FAS provision provides that:

[i]n any given conflict or crisis, whatsoever, and notwithstanding any other authority, so long as no nuclear weapons (or other weapons of mass destruction) have been used by others, the President shall not use nuclear weapons without consulting with, and securing the assent of a majority of, a committee composed of the:

President Pro Tempore of the Senate and Speaker of the House of Representatives

Majority and Minority Leader of the House of Representatives

Majority and Minority Leader of the Senate

Chairman and Ranking Minority Member of:

Senate Committee on Armed Services

House Committee on Armed Services

Senate Committee on Foreign Relations

House Committee on International Relations

Joint Committee on Atomic Energy. . .¹⁵

In addition, the proposal would not be operative if Congress suspends it by a subsequent declaration of war.¹⁶

Ironically, of the alternatives to the present uncertain constitutional calculus—an absolute bar to presidential first use or an expedited two house approval requirement, both of which are extreme and perhaps unwise or unconstitutional—the committee approval mechanism poses the most serious constitutional problems, given the 1983 Supreme Court decision in *Immigration and Naturalization Service v. Chadha*.¹⁷ In *Chadha*, the Court declared unconstitutional the legislative veto, where “legislative” action was taken with less than the full bicameral Congress.¹⁸

Chadha was an East Indian from Kenya. Having overstayed his student visa, he was subject to deportation.¹⁹ However, an Immigration and Naturalization Service (INS) officer suspended Chadha’s deportation in 1974, acting under Immigration and Naturalization Act (INA) provisions which provided that either the House or the Senate could veto such suspensions.²⁰ The House passed a resolution vetoing Chadha’s suspended deportation late in 1975.²¹ A new INS deportation order followed in 1976.²²

Chadha appealed the order, challenging the constitutionality of the statutory veto provision.²³ The case eventually reached the Supreme Court²⁴ which ruled in Chadha’s favor. The result was not surprising, given the

15. The FAS bill is reprinted in W. REVELEY III, *supra* note 3, at 356, n. 22. The Joint Committee on Atomic Energy is now defunct.

16. Stone, *supra* note 12, at 107. The proposal would also require annual reports from the President to the committee. *Id.*

17. *INS v. Chadha*, 462 U.S. 919 (1983).

18. *Id.* at 958-59. Action taken without full bicameral participation and presentment to the President was found to violate Article I of the Constitution. *Id.* at 946-59.

19. *Id.* at 923.

20. 8 U.S.C. § 1254(c)(2) (1982).

21. H.R. 726, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975).

22. *Chadha*, 462 U.S. at 928.

23. Chadha first lodged an appeal with the Board of Immigration Appeals.

unique deprivation of fairness for the individual imposed by the INA scheme,²⁵ coupled with our constitutional tradition of providing fair process before imposing important changes in an individual's legal status.²⁶ However, the *Chadha* case has created an uproar because the Chief Justice's opinion for the Court reasoned by generalizing from the facts of *Chadha* to apply the formal presentment and bicameralism requirements of Article I to all resolutions which are "exercise[s] of legislative power," defined as "action[s] that had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the legislative branch."²⁷ Thus, the sweeping language in the Burger decision has been used to free the *Chadha* opinion from its context and generalize its application to any veto which alters "legal rights." This apparently extreme reaction is supported by Justice Powell's concurring statement that the opinion "apparently will invalidate every use of the legislative veto. The breadth of this holding gives one pause."²⁸ Similarly, Justice White's dissent stated that "[t]oday the Court . . . sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto,' " on "such varied matters as war powers and agency rulemaking."²⁹ Thus, *Chadha* creates the distinct possibility, if not certainty, that all congressional assent requirements which do not clear the presentment and bicameralism hurdles are unconstitutional.

In short, the committee device would not, apparently, comply with the "single, finely wrought and exhaustively considered procedure,"³⁰ which the *Chadha* Court found to be the constitutional prescription for any exercise of legislative power. Avoiding the full bicameral deliberative process, the committee approval mechanism would allow Congress to act without the necessary "cumbersomeness and delays"³¹ which the Framers intended as both a check upon the "hydraulic" tendencies of the legislative branch vis-a-vis the other branches as well as a check upon the legislature's own propensity³² for unwise and hasty action.³³

This article seeks to determine the extent to which *Chadha* would render unconstitutional the committee approval mechanism involved in the first-use proposal. The short answer is that neither *Chadha* nor the Constitution precludes the first-use proposal. The following case will be made for the committee approval mechanism: First, the committee device is a constitutionally permissible clarification of Congress' Article I war powers, which

24. The United States Court of Appeals for the Ninth Circuit invalidated the INS veto provision in 1980. *INS v. Chadha*, 634 F.2d 408 (9th Cir. 1980).

25. The only exceptions from the Article I requirements are those mentioned in the Constitution: impeachment, the senate's advise and consent role, and matters internal to Congress.

26. Justice Powell concurred in an opinion laced with concerns about individual rights. *Chadha*, 462 U.S. at 960 (Powell, J., concurring).

27. *Id.* at 952.

28. *Id.* at 959.

29. *Id.* at 967 (White, J., dissenting).

30. *Chadha*, 462 U.S. at 951.

31. *Id.* at 959.

32. *Id.* at 948-50.

33. See *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425, 463 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983) (discussing value of President's veto in checking hasty or unwise legislative action).

serves as a political accommodation between the Executive and Congress in an area of shared powers. Second, the committee "veto" proposed by FAS is not a legislative veto and is thus not *a fortiori* unconstitutional after *Chadha*. Third, whether the committee mechanism is characterized as a legislative veto, it does not suffer the formal constitutional defects which caused the Court to invalidate the INS veto; nor would it violate separation of powers principles.

Like a few other unique exercises of the legislative power,³⁴ the first-use proposal includes the committee approval mechanism as an integral component of an overall effort to define or clarify conflicts and ambiguities in the Constitution regarding the allocation of power between the elected branches. As such, the clarification of the constitutional prescription for a first-use decision is not ordinary legislation.³⁵ It defines the Constitution's terms and "delineates structures and processes"³⁶ and, as such, it may be viewed as "quasi-constitutional in nature."³⁷ As a clarification, it reminds the President of his limited war powers.³⁸

THE COMMITTEE MECHANISM: A PERMISSIBLE EXERCISE OF CONGRESS' ARTICLE I WAR POWER

Unless Congress could not constitutionally pass the initial prohibition against presidential first use,³⁹ ample authority supports the committee approval mechanism as a "necessary and proper"⁴⁰ exercise of the Article I war power. Granting that the current attitude of the Court is that all "legislative" acts must strictly adhere to the literal, formal requirements of presentment and bicameralism in Article I,⁴¹ a constitutional basis still exists for a more flexible, less formal approach to the analysis of congressional power in the context of foreign affairs.

The war power is unique in our Constitution in part because it is split among the elected branches.⁴² As one manifestation of the separation of powers, the intentional division of the war powers may require more sharing and tolerance of mechanisms for sharing than is required for authority

34. See War Powers Resolution, 50 U.S.C. § 1541 (1982); The Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, titles I-IX, 88 Stat. 297-332 (codified in scattered sections of 1, 2, and 31 U.S.C.); International Emergency Economic Powers Act, 50 U.S.C.A. § 1706(b) (1951 & West Supp. 1985).

35. Early authority for the distinction may be found in the Supreme Court's 1798 decision in *Hollingsworth v. Virginia*, 3 U.S. 378 (1798), which held that the proposed eleventh amendment need not be presented to the President, because presentment "applies only to the ordinary cases of legislation. . . ." *Id.* at 381 n.* Because Article I requires presentment of "Every Order, Resolution or Vote" of the Congress, *Hollingsworth* supports the notion that some legislation is not of that species. I do not wish to rely on *Hollingsworth* for too much, although Professor Carter has argued convincingly from *Hollingsworth* for the existence of a category of "extraordinary legislative power" in his attempt to save the legislative vetoes in the War Powers Resolution from *Chadha*. See Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 129-32 (1984).

36. G. GUNTHER, CONSTITUTIONAL LAW 361 (1985).

37. *Id.*

38. See generally Stone, *supra* note 12.

39. *Id.*

40. U.S. CONST., art. I, § 8, cl. 18.

41. *Chadha*, 462 U.S. at 951. A "legislative" act is one "that had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." *Id.* at 952.

42. U.S. CONST., art. I, § 8, cl. 11.

that is more clearly allocated to one branch.⁴³ The proposition that the exercise of foreign affairs power may earn more deference from a reviewing court than the exercise of domestic power is not novel and not without strong support.⁴⁴ "That there are differences between them, and that these differences are fundamental, may not be doubted. The two classes of powers are different, both in respect of their origin and their nature."⁴⁵ Justice Sutherland's expansive, but still authoritative declaration from his opinion in *United States v. Curtiss-Wright Export Corp.*⁴⁶ that sovereignty provides an extra-constitutional source of foreign affairs power⁴⁷ has laid the groundwork for a double standard: Certain governmental arrangements of power which might be invalid in the context of domestic affairs might be tolerated in the foreign affairs context.⁴⁸ In *Lichter v. United States*,⁴⁹ the Court restated the double standard in upholding the Renegotiation Act as authority for recovery by the government of "excessive profits" taken by private war goods contractors during World War II. The Court explained that "while the constitutional structure and controls of our Government are our guides equally in war and peace, they must be read with the realistic purposes of the entire instrument fully in mind."⁵⁰ The Court in *Lichter* was acutely aware of the dangers of formalism in the foreign affairs context and recognized that preoccupation with the "letter" of the Constitution could undermine its purposes:

[I]t is of the highest importance that the fundamental purposes of the Constitution be kept in mind and given effect in order that, through the Constitution, the people of the United States may in time of war as in peace bring to the support of these purposes the full force of their united action. *In time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety.*⁵¹

Without pushing this doctrine too far, it may at least be maintained that the Constitution should be interpreted more flexibly in the foreign affairs context.⁵²

Of course, the first-use proposal concerns the special case of the war powers, a unique and specific foreign affairs context. Even if it is true, as Chief Justice Burger wrote in *Chadha*, that it is "crystal clear from the

43. As the United States Court of Appeals for the District of Columbia noted in striking down a legislative veto in a regulatory program, "[T]he foreign affairs veto presents unique problems since in that context there is the additional question whether Congress or the President or both have the inherent power to act." *Consumer Energy Council of Am. v. Federal Energy Regulatory Commission*, 673 F.2d 425, 459 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumers Energy Council of America*, 463 U.S. 1216 (1983).

44. See L. HENKIN, *supra* note 1, at 15-16.

45. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315 (1936).

46. *Id.*

47. See L. HENKIN, *supra* note 1, at 19-26; *Curtiss-Wright*, 299 U.S. at 315-18.

48. *Curtiss-Wright*, 299 U.S. at 315; L. HENKIN, *supra* note 1, at 18.

49. *Lichter v. United States*, 334 U.S. 742 (1948).

50. *Id.* at 782.

51. *Id.* at 779-80 (emphasis added).

52. L. HENKIN, *supra* note 1, at 23 (foreign affairs powers "are not subject to doctrines of interpretation and limitation applicable to powers granted by the Constitution . . . [such as] 'separation of powers'").

records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency,"⁵³ it is also true that those values do not rank higher than the concern for expedience in executing our national defense manifested in Congress' war powers. Efficiency and expediency in time of foreign crisis may be necessary for achieving the Constitution's ultimate purposes.⁵⁴ The committee approval mechanism is a realistic expedient for fulfilling the important constitutional purpose of national security while satisfying the Constitution's concern with tyranny by insuring that the nation not be involved in war by one person's decision.⁵⁵

In the parlance of Article I, the committee approval mechanism may be justified as a delegation of Congress' power to declare war when the full, two-house procedure simply is not possible. As the Court in *Curtiss-Wright*⁵⁶ recognized, "not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited."⁵⁷ This limitation is especially true of the decision concerning first-use of nuclear weapons, which "may not be so immediate an issue that one decision maker [i.e. the President alone] need be given authority to decide it" but which "is a time-urgent matter and does not permit the usual congressional procedures."⁵⁸ Thus, as the Court in *Lichter* concluded, "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes."⁵⁹ Without the power to delegate its approval decision to a congressional committee, Congress may not be able to exercise its power to participate in the first-use decision at all.⁶⁰

While it is true that Justice Sutherland's essay on the foreign affairs powers in *Curtiss-Wright* was far broader than what was necessary to decide the case, his endorsement of Congress' broad delegation to the President has special importance in the context of the first-use proposal because his opinion was signed by six other Justices during an era when most of them would have objected to the delegation in a domestic affairs case.⁶¹ Furthermore, recent Supreme Court decisions have affirmed *Curtiss-Wright* as an authority for the continuing judicial deference provided exercises of the foreign affairs power.⁶²

Indeed, recent delegation and foreign affairs cases indicate that at a time when broad delegations in domestic affairs cases are again being questioned

53. *Chadha*, 462 U.S. at 958-59.

54. See *Lichter*, 334 U.S. at 779.

55. The relationship of the first-use proposal to the prevention of tyranny is discussed *infra* at notes 113 to 140 and accompanying text.

56. 299 U.S. 304 (1936).

57. *Id.* at 319.

58. Stone, *supra* note 12, at 108.

59. *Lichter*, 334 U.S. at 778.

60. This is true, granting the impossibility of participation by the entire body. It has been suggested but never held that the war power may not be delegable at all. See *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974).

61. See L. HENKIN, *supra* note 3, at 25.

62. See, e.g., *Haig v. Agee*, 453 U.S. 280 (1981); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Regan v. Wald*, 468 U.S. 222 (1984), *reh'g denied*, 105 S. Ct. 285 (1984).

by some of the Justices, the Court has continued to find creative ways to save extraordinarily vague delegations when the challenged delegation involves foreign affairs. In the Court's 1980 *Benzene* decision,⁶³ which threw out an OSHA regulation of occupational exposure to benzene,⁶⁴ a plurality narrowly construed the OSHA grant of authority and argued that the construction of the statute urged by the government would have represented an unconstitutional delegation of legislative power.⁶⁵ Justice Rehnquist concurred on the theory that the congressional directive that OSHA regulate toxic substances in the workplace "to the extent feasible"⁶⁶ was too vague and thus violative of the nondelegation doctrine.⁶⁷ In the same opinion, Justice Rehnquist cited *Curtiss-Wright*⁶⁸ as authority for the proposition that broader delegations should be tolerated in foreign affairs cases.⁶⁹

Then, in two decisions in 1981, Justice Rehnquist voted with the Court to sustain executive actions concerning foreign affairs only after some especially creative analysis to find delegated authority from Congress. In *Haig v. Agee*,⁷⁰ the Court sustained the Secretary of State's authority to revoke a passport when the holder's activities in foreign countries posed a perceived threat to the nation's national security or foreign interests.⁷¹ All parties agreed that Congress had not expressly granted the Executive the authority to revoke Agee's passport. Instead, the delegation was found by evidence of congressional silence and thus constructive acquiescence in a longstanding executive policy or construction regarding passport revocations expressed in regulations.⁷² In short, the delegation was implied where it could not be expressly found.⁷³

A few weeks later the Court relied on a similar theory to uphold the President's power to suspend the claims of American nationals against Iran pending in American courts in the wake of settling the Iranian hostage crisis. In *Dames & Moore v. Regan*,⁷⁴ Justice Rehnquist's opinion for the Court again conceded the absence of any express authority delegated from Congress to authorize the President's suspension of claims.⁷⁵ Again, the court found authority for the President's actions in congressional acquiescence and "the general tenor of Congress' legislation in this area."⁷⁶

Thus, special efforts are being made to find ways to endorse the exercise of foreign affairs powers where a close reading of the Constitution would

63. See *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) [hereinafter cited as *Benzene Case*].

64. *Id.* at 662.

65. *Id.* at 646.

66. Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5)(1982).

67. *Benzene Case*, 448 U.S. at 671.

68. 299 U.S. 304 (1936).

69. *Benzene Case*, 448 U.S. at 684 (Rehnquist, J., concurring).

70. 453 U.S. 280 (1981).

71. *Id.*

72. *Id.* at 291, 306.

73. In *Regan v. Wald*, 104 S. Ct. 3026 (1984), the Court followed the trend of the 1981 cases in sustaining a treasury regulation aimed at restricting travel by Americans to Cuba by finding implicit authority to so regulate from Congress. Once again, Justice Rehnquist's opinion for the Court relied on *Curtiss-Wright* and the greater judicial deference due in foreign affairs cases. *Id.* at 3039.

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

75. *Id.* at 677.

76. *Id.* at 678.

cast doubt on the legitimacy of the challenged action. It is true that the foreign affairs delegations discussed above are distinguishable from the first-use proposal for lack of a record of the equivalent "acquiescence" from the President in the first-use context and the absence of any real dispute over which branch holds the underlying substantive power in those cases. The Court has nonetheless demonstrated, however, a consistent record of bending over backwards to sustain the exercise of foreign affairs powers and delegations of those powers.⁷⁷

If there is a delegation problem with the release mechanism, it is not the usual one of too much delegation or delegation without standards.⁷⁸ Quite to the contrary, the committee approval device may be viewed as a remedy or prescription for the rigidity of an absolute prohibition upon the executive. The delegation problem presented here is the transfer of power to a single committee.

In *AFGE v. Pierce*,⁷⁹ the D.C. Circuit spoke of an appropriations committee approval device as being, if not a legislative veto,⁸⁰ "nothing more or less than a grant of legislative power to two congressional committees."⁸¹ The court found this delegation to be "plainly violative" of the formal process requirements of Article I, "the only method through which legislation may be enacted."⁸² The *AFGE* opinion has been effectively criticized⁸³ for failing, like *Chadha*, to distinguish between measures which check the Chief Executive and those that check an agency to which power has been delegated.⁸⁴ In any event, to the extent that its holding constrains delegations

77. The Court's record is not made inconsistent by its decision in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that President Truman acted without statutory authority in his take-over of a steel mill to avert a strike during the Korean War. *Youngstown* does not undercut the record of special deference in foreign affairs cases because in that case Congress expressly considered and rejected granting the President the authority he sought to exercise. The Court relied on Congress' intent in rejecting the President's claim. See *infra* text accompanying notes 177-80. Thus, the distinctions referred to in the text may be unimportant if Congress takes affirmative action.

78. See generally R. PIERCE, S. SHAPIRO, & P. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 51-63 (1985).

79. *AFGE v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982).

80. *Id.* at 306.

81. *Id.*

82. *Id.*

83. See Strauss, *Was there a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L. J. 789, 812-15.

84. *Id.* Professor Strauss' argument to preserve what he calls "the political veto" has not been followed by the post-*Chadha* opinions of the lower courts. See, e.g., *The Reorganization Act cases*: *EEOC v. CBS*, 743 F.2d 969 (2d Cir. 1984); *EEOC v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984); *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984). In the *AFGE* decision, however, Judges Wald and Mikva wrote separately to argue for an *en banc* hearing of the case. In their argument they cautioned against the one-dimensional approach to the analysis of veto provisions taken by the panel in *AFGE*:

The statutory provision invalidated in this case—requiring that both the Senate and House Appropriations Committees approve any expenditure of funds "used prior to January 1, 1983, to plan, design, implement, or administer any reorganization of [HUD]"—is easily distinguishable from the legislative vetoes previously found to be unconstitutional by this court. . . . [T]he present case requires a different analysis of the constitutional interplay between the two branches.

We write separately to underscore our concern that language in the panel's opinion not be read to foreclose careful consideration in subsequent cases of historical experience, practical working relationships, and the deference due Congress when it established its own procedures under the Constitution. For example, we note that both the Reorganization Act

of legislative power to committees,⁸⁵ *AFGE* is easily distinguishable from the first-use committee mechanism on the basis of the first-use mechanism's foreign affairs context,⁸⁶ the absence of any real presentment problem,⁸⁷ and its separation of powers implications.⁸⁸ Further, it is more likely that the appropriations committees' authority was voided on presentment and perhaps bicameralism grounds, not on delegation principles.⁸⁹ Nothing in *AFGE* or any other case suggests that a grant of legislative power to a committee violates any rule against delegations. With old and rare and inapplicable exceptions,⁹⁰ the courts have upheld all congressional delegations.⁹¹

If delegation has any meaning today, it is in the context of regulation and administration.⁹² As Professor Strauss has said, albeit in the context of the budget process: "That a congressional committee . . . determines whether [the President may act] . . . seems . . . unexceptionable in the world of continuing executive-legislative interaction In such a continuing relationship, limiting one participant to episodic, formal, even clumsy acts is likely to produce rigidity and a covetousness about power that will hamper the effective conduct of government and may weaken the presidency far more than the alternative."⁹³ The committee mechanism in the nuclear weapons area may be as likely to forestall the "rigidity and covetousness" as in the budget process. This collaborative arrangement, if enacted, should not be confused with those arrangements for which Congress may be properly criticized for delegating too much power and passing the buck on difficult decisions. Instead, the delegation is to a committee which may, for the first time, be able to provide Congress with an effective voice in deciding whether to grant power to an already powerful President who may require more power under certain exigent circumstances. The committee approval condition preserves the constitutional balance while accomplishing the essential delegation necessary for wartime decisionmaking.

of 1977, . . . and the Congressional Budget and Impoundment Act of 1974, . . . include provisions permitting either house of Congress to disapprove of proposed executive actions. We are convinced that these and similar statutes cannot simply be invalidated under the reasoning of our prior opinions without detailed examination of how such arrangements operate and what they are designed to accomplish. . . . Various factors—whether related to the subject area covered by the statute or the particular procedures mandated—remain to be considered in the specific context of future cases. Courts should examine closely the constitutional issues raised by each legislative review provision before invalidating on a pro forma basis all statutes that provide for after-the-fact congressional oversight.

AFGE, 697 F.2d at 308-09 (Citations omitted).

85. *AFGE*, 697 F.2d at 307.

86. See Stone, *supra* note 12, at 108; E. CORWIN, *THE PRESIDENT, OFFICE AND POWERS, 1787-1984* 271-77 (1984).

87. See *infra* notes 110 to 113 and accompanying text.

88. See *infra* notes 157 to 180 and accompanying text.

89. *AFGE*, 697 F.2d at 307.

90. See generally R. PIERCE, S. SHAPIRO, & P. VERKUIL, *supra* note 78, at 51-63.

91. See, e.g., *Benzene Case*, 448 U.S. 607 (1980); *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974); *Arizona v. California*, 373 U.S. 546 (1963).

92. Strauss, *supra* note 83, at 816 n.102.

93. *Id.* at 816.

THE FIRST-USE COMMITTEE APPROVAL MECHANISM: NOT A LEGISLATIVE VETO

The legislative veto has many forms and has been variously characterized. Generally, a legislative veto may be defined as "an effort by Congress, by one house of Congress, or even by a single committee or chairman to retain control over the execution or interpretation of laws *after* enactment."⁹⁴ More specifically, the veto is a "clause in a statute which says that a particular executive action . . . will take effect only if Congress does not nullify it by resolution within a specific period of time."⁹⁵ The legislative veto has three essential elements:

- 1) A statutory delegation of power to the Executive;
- 2) An exercise of that power by the Executive;
- 3) A power reserved by the Congress to nullify that exercise of authority.⁹⁶

Judge Breyer has characterized "the veto's function as a legislative compromise of a fight for delegated power."⁹⁷ "[S]ometimes," he says, the veto compromises "important substantive conflicts embedded deeply in the Constitution."⁹⁸ Although Judge Breyer's functional characterization would likely include the first-use committee approval mechanism as a legislative veto, it does not fit his own definition.

First, the committee mechanism does not involve any initial statutory delegation to the Executive. Instead, the proposal contains an initial *prohibition*: "so long as no nuclear weapons have been used by others, the President shall not use nuclear weapons"⁹⁹ In a pre-*Chadha* decision, *AFGE v. Pierce*,¹⁰⁰ the D.C. Circuit recognized a distinction between a statutory delegation followed by a committee veto and an initial prohibition followed by a committee authorization.¹⁰¹ *AFGE v. Pierce* involved a HUD appropriations measure which provided that none of the appropriated funds "may be used prior to January 1, 1983, to plan, design, implement, or administer any reorganization of the Department without the prior approval of the Committees on Appropriations."¹⁰² The court recognized that the spending condition is not "naturally" characterizable as a "legislative veto in the usual sense," but rather that the directive is simply a grant of legislative power to a committee.¹⁰³ In other words, the D.C. Circuit recognized that the provision contained an initial prohibition rather than a delegation, followed by a resolution of approval rather than disapproval. As already discussed, a grant of legislative power to a committee poses a discrete constitutional issue.¹⁰⁴ But such a provision is not a legislative veto. Function-

94. B. CRAIG, *THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION* 1 (1983).

95. Breyer, *The Legislative Veto After Chadha*, 72 GEO. L. J. 785, 785 (1984).

96. *Id.* at 786.

97. *Id.* at 787.

98. *Id.*

99. See FAS proposal, *supra* note 15 and accompanying text.

100. 697 F.2d 303 (D.C. Cir. 1982).

101. *Id.* at 306.

102. *Id.* at 304.

103. *Id.* at 306.

104. See *supra* notes 78 to 94 and accompanying text.

ally, the committee approval proposal is like a statute that prohibits the President from using nuclear weapons where they have not been used first by others, while providing that the statute may be amended by committee to allow the President first-use authority.¹⁰⁵

Second, the FAS proposal does not provide for a subsequent resolution of disapproval or a nullification of previously delegated authority. Unlike the legislative veto, the committee action here would be a subsequent resolution of *approval*, not disapproval. Further, the approval would be initiated by the President. Aside from the problems associated with the exercise of approval power by a committee instead of the full Congress,¹⁰⁶ joint resolutions of approval are generally accepted as a constitutional alternative to the legislative veto.¹⁰⁷ This committee approval procedure, therefore, does not involve any withdrawal of authorization but rather a new authorization, a lifting of a congressionally-imposed restriction.¹⁰⁸

Since the committee approval mechanism involves neither an initial delegation of power to the President, nor a subsequent withdrawal of delegated power without presentment, this proposal for congressional participation in the first-use decision should not be characterized as a legislative veto and is not unconstitutional *per se* after *Chadha*. It remains to be proved, however, that the committee approval mechanism does not share any of the same constitutional infirmities as the legislative veto and that it is consistent with the commands of separation of powers.

THE FIRST-USE COMMITTEE APPROVAL MECHANISM: NOT VIOLATIVE OF ARTICLE I OR THE SEPARATION OF POWERS

It is necessary to examine the issues in *Chadha* and separation of powers independently because the *Chadha* holding is based on form and form alone—the literal requirements of Article I. *Chadha* is not based on the function of the veto and its impact on the purposes of separation of powers, as it perhaps could and should have been.¹⁰⁹ In any case, there are no Article I nor separation of powers flaws in the FAS proposal.

Presentment

The first of two “formal” concerns which guided the *Chadha* Court’s decision is the Article I, section 7, clause 3 requirement that every act of

105. See Carter, *supra* note 35, at 133. In effect, new law would be created by the President seeking and obtaining Committee approval.

106. See *supra* notes 78 to 94 and accompanying text.

107. See Breyer, *supra* note 95, at 789; Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1084-87 (1985). For examples of proposed substitutions of approval resolutions for legislative vetoes, see Levitas & Brand, *Congressional Review of Executive and Agency Actions after Chadha: ‘The Son of Legislative Veto’ Lives*, 72 GEO. L. J. 801, 806 (1984); see also L. FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 178-83 (1985). Unlike simple and concurrent resolutions, joint resolutions are presented to the President. The first use committee mechanism likewise satisfies presentment because the statutory restriction could be lifted only at the President’s initiative.

108. AFGE, 697 F.2d at 306.

109. See generally Strauss, *supra* note 83.

legislation be presented to the President for his approval.¹¹⁰ The legislative veto did not fulfill this requirement because the veto had the effect of altering statutorily created authority without presenting the proposed alteration to the President.¹¹¹ The committee approval mechanism in the FAS proposal, however, does not violate this formal requirement of presentation to the President. Unlike the legislative veto, the committee approval procedure, when actually exercised, would not produce legislation without the President's participation.¹¹² By definition, any exercise of the approval mechanism would be an affirmative act, initiated by the President. Without the affirmative authorization from the committee, the original statutory prohibition on first use would remain in effect. The committee approval device is merely the procedure by which the President might obtain a release from the prohibition. The President could "veto" the first-use authorization simply by not acting upon it; that is, by not employing nuclear weapons despite the authorization. Thus, the committee approval procedure is consistent with *Chadha's* formal concern about presentment.

Bicameralism

The second component of the *Chadha* holding is the bicameralism requirement of Article I, sections one and seven.¹¹³ Acknowledging that the one-house veto was a convenient and efficient device,¹¹⁴ the Court found that it nonetheless was inconsistent with the Framers' conscious decision to "impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable" in order to check "arbitrary governmental acts."¹¹⁵ It is clear that a committee approval procedure, while involving members of both houses, nevertheless lacks bicameralism in the sense that neither house is fully involved in the legislative act.¹¹⁶ Such a procedure, to be sure, would not assure "that the legislative power would be exercised only after opportunity for full study and debate in separate settings."¹¹⁷

At first view these objections would seem fatal to the committee release device. However, there are two bases for excepting the FAS proposal from formal bicameralism requirements. One basis is the Court's own record in separation of powers cases.¹¹⁸ While in a few recent cases the Court has

110. *Chadha*, 462 U.S. at 946-48.

111. *Id.* at 952.

112. The fact that the committee authorization would run directly to the President rather than to an agency, is significant. In *AFGE*, the D.C. Circuit found that a committee approval mechanism did implicate the presentment requirement. However, there the committee authorization ran directly to an agency (HUD), not to the President himself. 697 F.2d at 306-07. A committee was empowered to release a congressionally imposed restriction on funds for reorganization of the agency without any presidential involvement—thus the violation of presentment. By contrast, in the proposed first-use context the President would of course have the final say on whether the release of the congressionally imposed prohibition would actually be realized, i.e. in a nuclear strike ordered by the President.

113. *Chadha*, 462 U.S. at 948-51.

114. *Id.* at 958.

115. *Id.* at 958-59.

116. *AFGE*, 697 F.2d at 306.

117. *Chadha*, 462 U.S. at 951.

118. See generally cases discussed in L. HENKIN, *supra* note 1, at 89-123; see also W. REVELEY III, *supra* note 3, at 206-12; L. FISHER, *PRESIDENT AND CONGRESS* 200-04 (1972); see also *supra* notes 62 to 77 and accompanying text.

exhibited a well-documented tendency to opt for the simple if often unrealistic approach to separation of powers that precludes one branch from sharing tasks that resemble the obligations of another branch,¹¹⁹ it has generally applied a more flexible approach in its infrequent decisions of separation issues. Especially in areas of shared powers, such as the war powers, where the potential for conflict is greatest, Justice Jackson's famous formula for resolving such conflicts,¹²⁰ stated in the 1952 *Youngstown* case,¹²¹ has guided the Court.¹²² In essence, in situations involving shared powers, if Congress acts, it wins.¹²³ This functional approach to the analysis of the power allocation question was applied in 1981 in *Dames & Moore v. Reagan*.¹²⁴ There, the Court declared that the Congress had acted through an implicit delegation by acquiescence which legitimated the President's curtailment of American claims against Iran in the wake of resolving the hostage crisis.¹²⁵ Then, just this past term, the Court departed from its formal approach to separation of powers in a domestic affairs case. In *Thomas v. Union Carbide*,¹²⁶ the Court abandoned its rigid approach to analyzing the relationship of Articles I and III which it had endorsed only three years earlier in the *Northern Pipeline* decision.¹²⁷ Proclaiming "practical attention to substance rather than doctrinaire reliance on formal categories,"¹²⁸ the Court held that Article III does not bar Congress from requiring bind-

119. See, e.g., Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 625-40 (1984).

120. 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. [footnote omitted] In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. [footnote omitted] Presidential claim to power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

121. *Id.* Only Justices Black and Douglas rejected the "twilight zone" premise in *Youngstown*.

122. See, e.g., *Dames & Moore*, 453 U.S. at 654, 674.

123. That is, in "the twilight zone" of shared power, legislation, or perhaps something less than legislation, is effective to resolve the power allocation question. See generally Watson, *supra* note 107, at 1084-86.

124. 453 U.S. 654 (1981).

125. *Id.* at 678-88.

126. 105 S. Ct. 3325 (1985).

127. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

128. *Union Carbide*, 105 S. Ct. at 3336.

ing arbitration with limited judicial review of compensation disputes among registrants in a pesticide registration scheme.¹²⁹

Thus, the popularity of formalism in deciding separation cases may be waning. In any event, the formalism of *Chadha* is unlikely to apply in the war powers context.¹³⁰ Moreover, the courts have steadfastly refused to become involved in defining the limits of the congressional war power¹³¹ and have only rarely invalidated a statute which arguably invaded executive powers, except where the Article II power is stated clearly in the text.¹³²

A second basis for excepting the FAS proposal from formal bicameralism requirements is that such requirements have considerably less relevance in the foreign affairs context than in the domestic context. Thus there is even less reason for a bicameralism constraint in the context of the war powers and a first-use decision. Two important concerns which led the Framers to adopt the bicameral requirement of Article I are relevant to the committee mechanism.¹³³ The first, and perhaps the most important, was the fear of legislative hegemony. The Court in *Chadha* relied upon the comments of James Wilson during the convention debates¹³⁴ and the observations of Hamilton in the *Federalist*¹³⁵ to the effect that legislative tyranny was greatly to be feared and only to be averted by dividing the legislative power so as to make its exercise more difficult and cumbersome.¹³⁶

While the Court's emphasis upon this concern may fit the INS veto provision at issue in *Chadha*, it exemplifies the pitfalls of stating broad constitutional principles based on an extreme case. Although it is *generally* true that the Framers believed "that the powers conferred on Congress were the powers to be most carefully circumscribed,"¹³⁷ it is also true that in the area of war powers the legislature was not the branch whose potential for tyranny was most feared. It was the Executive, not Congress, whose potential

129. *Id.* at 3336-37.

130. See *supra* text accompanying notes 36-74.

131. See Note, *supra* note 3, at 1415-16.

132. Carter, *supra* note 35, at 124-25, n.111 (recognizing *Myers v. United States*, 272 U.S. 52 (1926) as a possible exception). In any event, I claim that the committee would be given an Article I, not an Article II power.

133. The remaining two purposes for the bicameralism requirement are related and are inapplicable to the first-use context for the same reasons. First, the Framers feared that "special interests could be favored at the expense of public needs." *Chadha*, 462 U.S. at 950. The problem with exercising legislative power by a committee, therefore, is that it would invite the elevation of parochial interests and the undermining of the constitutional functions of a national and two-house legislative system. Second, the Framers were also concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared that a commonality of interest among the larger states would work to their disadvantage; representatives of the larger States, on the other hand, were skeptical of a legislature that could pass laws favoring a minority of the people. These concerns are irrelevant to the FAS proposal because the decision to approve or not to approve a first-use of nuclear weapons can hardly be characterized as one which invites special or parochial interests to predominate over national interest. Second, even if there might be certain groups or states which have unique interests—such as states which could be likely candidates for enemy retaliation because they host nuclear weapons sites—the process for selection of committee members would not allow the kind of special interest domination that could occur in other contexts. The FAS proposal specifies who the committee members must be according to offices in the House and Senate. The committee, therefore could not be targeted for infiltration by senators and congressmen whose sole concern is the representation of a local or special interest.

134. *Chadha*, 462 U.S. at 949.

135. *Id.* at 949-50.

136. *Id.*

137. *Id.* at 947.

for abuse of war power was the subject of lively discussion at the convention¹³⁸ and was examined in the *Federalist*.¹³⁹ The careful attention paid to the "declare war" language by the Framers¹⁴⁰ demonstrates their concern that the President's powers be checked so that he would only be able to commit troops without a declaration of war in response to "sudden attacks."¹⁴¹

In the usual case, then, bicameralism serves to check the President in the exercise of the war powers. Indeed, the "sudden attacks" exception would release the President from the bicameralism check in exigent circumstances not unlike those from which Congress would seek an exception in the first-use proposal.¹⁴² Furthermore, since the ratification of the Constitution, history has demonstrated that the legislative branch has evidenced no inherent "hydraulic pressure . . . to exceed the outer limits of its power"¹⁴³ in the area of foreign affairs and war. Indeed, quite the opposite has been true.¹⁴⁴ Thus the concern about curbing the legislative powers, which in part motivated the Framers' decision to require bicameral action, is of limited relevance in the foreign affairs and war powers context.

A second purpose for which the Framers adopted the bicameralism requirement was to assure "that the legislative power would be exercised only after opportunity for full study and debate in separate settings."¹⁴⁵ The *Chadha* opinion quotes Justice Story's characterization of the Framers' fears concerning the propensity of the legislative branch for hasty and ill-considered action: "If [a legislature] feels no check but its own will, it rarely has the firmness to insist upon holding a question long enough under its own view, to see and mark it in all its bearings and relations to society."¹⁴⁶ Thus, the Framers opted for a time-consuming, "step-by-step, deliberate and deliberative process."¹⁴⁷

Again, however, the exercise of legislative power in the area of war powers, and more particularly a first-use decision, is distinguishable. It is true that the Framers saw the requirement of approval by both houses¹⁴⁸ as part of a "system [which] will not hurry us into war."¹⁴⁹ Nevertheless, the reality of modern warfare demands that certain decisions to commit or not to commit America into hostilities be made with greater dispatch than other legislative decisions. Consequently, in modern times, even when Congress does adhere to strict bicameralism in making emergency national security

138. Witness the clamor following delegate Butler's suggestion that the President be given power to declare war. A. SOFAER, *supra* note 3, at 31. See *id.*, at 27 and 31 on the fears of convention delegates such as Pinckney, Gerry and Mason concerning presidential abuse of war power.

139. THE FEDERALIST Nos. 26 and 69 (A. Hamilton); A. SOFAER, *supra* note 3, at 42-44.

140. See A. SOFAER, *supra* note 3, at 27-31.

141. *Id.* at 31.

142. War Powers Resolution, 50 U.S.C. § 1541 (1982).

143. *Chadha*, 462 U.S. at 951.

144. See S. REP. NO. 797, 90th Cong., 1st Sess. (1967).

145. *Chadha*, 462 U.S. at 951.

146. *Id.* at 949-50 (quoting Justice Joseph Story in 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 383-84 (3d ed. 1858)).

147. *Id.* at 959.

148. The suggestion that the Senate alone should have the power to declare war was rejected at the Convention. A. SOFAER, *supra* note 3, at 31.

149. *Id.* at 52 (quoting Wilson, 2 Elliot *Debates* (Iredell) 528).

decisions, it often does not, and *cannot*, "insist upon holding a question long under its own view."¹⁵⁰

As the Supreme Court has recognized, an appreciation that one important purpose of the Constitution is to "provide for the common defense"¹⁵¹ should foster an attitude of realism concerning matters of national safety.¹⁵² More importantly, the concern that the allocation of powers between Congress and the President "not hurry us into war," while often served by the requirement of bicameral approval, may be better served by excepting the first-use context from the formal requirement. In the present uncertain political and constitutional climate, the absence of explicit legislation on the first-use context makes it possible that the President may unilaterally choose to initiate a nuclear attack. Because such a decision would most assuredly be an "act of war,"¹⁵³ the elasticity retained by the "emergency" clause in the War Powers Act is inadequate to assure a congressional role in the first-use decision. Assuming that Congress would not impose the first-use prohibition without the release mechanism, the release mechanism furthers the bicameralism purpose by providing at least some debate, and perhaps restraint, that would not otherwise exist.

It is important to remember that a procedure such as the committee approval mechanism in the first-use proposal does not give the power to one "man, or a single body of men, to involve us in such distress,"¹⁵⁴ which was the Framers' greatest fear. Rather, the FAS proposal insures, in a realistic way, that at least representatives of two different branches—the President and a committee composed of members from *both* houses—concur before the nation can be involved in the distress entailed by a nuclear first strike. The Framers' concern that "nothing but our national interest can draw us into a war"¹⁵⁵ is realistically honored and the *Chadha* majority's interest in dividing power and insuring fuller deliberation¹⁵⁶ is met, even though bicameralism, in the strictest formal sense, is not followed and probably cannot be followed.

Separation of Powers

Many commentators on *Chadha* have lamented its broad sweep as seemingly negating 200-plus existing legislative veto provisions.¹⁵⁷ While many of what have been characterized as veto provisions suffer from formal

150. *Chadha*, 462 U.S. at 950 (quoting Justice Story, *supra* note 146). For example, World War II was authorized by Congress on the same day as the Pearl Harbor attack; and the Formosa Resolution was passed under expedited procedures which did not admit "full study and debate." W. REVELEY III, *supra* note 3, at 126.

151. U.S. CONST., preamble.

152. *Lichter*, 334 U.S. at 742, 782 n.34.

153. See Stone, *supra* note 12, at 103-04.

154. Wilson, 2 Elliot, *Debates* 528 (Iredell), quoted in A. SOFAER, *supra* note 3, at 52, n.198.

155. *Id.*

156. *Chadha*, 462 U.S. at 951.

157. There is evidence, however, that Congress is both finding ways around *Chadha* and, in some instances, apparently simply ignoring the holding. See generally Horan, *Of Train Wrecks, Time Bombs, and Skinned Cats: The Congressional Response to the Fall of the Legislative Veto*, 13 J. LEGIS. 22 (1986). The Congressional Research Service has reported that the legislative veto "is alive and well," sometimes in new informal and nonstatutory forms, sometimes in forms indistinguishable from the veto thrown out in *Chadha*. See L. FISHER, ONE YEAR AFTER INS V.

Article 1 defects, some, such as the first-use proposal, do not offend and may actually facilitate the purposes which are sought to be achieved by the separation of powers.¹⁵⁸ Generally, separation of powers has been interpreted to prohibit arrogations of power by one branch of government which disrupts the proper balance between the coordinate branches¹⁵⁹ or prevents one of the branches from accomplishing its constitutionally assigned functions.¹⁶⁰ Unlike the legislative veto, the committee approval procedure is not an attempt to perform the executive function of the "execution or interpretation of laws *after* enactment."¹⁶¹ It is true that the joint committee would exercise discretion in arriving at its decision concerning whether to lift the congressionally-imposed prohibition on first use. However, this discretion is properly characterized as congressional deliberation of the kind that would accompany any exercise of Congress' war powers. Furthermore, lifting a congressionally imposed prohibition on first use could not be considered an executive prerogative.

There is, of course, the additional separation of powers question as to whether the proposed first-use legislation would intrude upon any of the President's Article II war powers. But any objection that the first-use legislation intrudes upon the executive's war powers would be relevant not to the subsequent release mechanism but to the initial prohibition.¹⁶² The committee release mechanism, when actually exercised, would not be an attempted derogation of presidential power but, on the contrary, an expression of congressional approval of presidential first use. As such, the release mechanism actually empowers the President and is not an intrusion upon executive power.

One way to decide whether the usurpation threat central to our separation of powers is present in the first-use proposal is to ask whether Congress would want to grant the power without the opportunity to check it.¹⁶³ If the answer is "no," the proposal grants power to the President that he would otherwise not have. Such an analysis focuses on the trade off between the efficiency gained by the shared power arrangement and the chance that formal constitutional prescriptions for preventing tyranny are being violated. Moreover, the committee approval mechanism is constructed so as to remove any threat to executive power. If Congress has the power to impose the initial prohibition, the committee mechanism does empower the President. As Justice White said, dissenting in *Chadha*, the use of a veto device in the war powers area allows Congress to "transfer greater authority to the President . . . while preserving its own constitutional role."¹⁶⁴

CHADHA: CONGRESSIONAL AND JUDICIAL DEVELOPMENTS, (Cong. Research Serv. 1984); see also L. FISHER, *supra* note 107, at 181-83.

158. See generally Strauss, *supra* note 83.

159. Nixon v. General Services Administration, 433 U.S. 425, 443 (1977).

160. *Id.*, citing United States v. Nixon, 418 U.S. 683, 711-12 (1974).

161. CRAIG, *supra* note 94, at 8 (emphasis added).

162. This issue is beyond the scope of the discussion of the constitutionality of the committee mechanism.

163. See Strauss, *supra* note 83, at 791-92.

164. *Chadha*, 462 U.S. at 969 (White, J., dissenting).

It bears mentioning here that separation of powers is far from a unitary concept. At least three discrete reasons for separation were considered by our Framers, and there is evidence that all three—forestalling tyranny, insuring the government's legitimacy, and promoting efficiency—resulted in the separation which found its way into the Constitution.¹⁶⁵ Furthermore, because the Constitution does not explicitly refer to a rule for separation of powers,¹⁶⁶ the search for the rule's requirements in a given instance is often elusive, particularly when the potentially competing dictates of the tyranny and efficiency reasons for separation point toward opposite outcomes in a separation controversy.¹⁶⁷ Unfortunately, the Supreme Court has at times obfuscated the meaning of separation of powers by downplaying the importance of one reason for separation to better support an outcome which relies upon another reason for separation.¹⁶⁸ *Chadha* is a good example: The Framers' concern with efficiency was distorted to a low profile in order to stress the protections from tyranny which would come from literal adherence to presentment and bicameralism.

Even if the committee approval mechanism is characterized as a legislative veto, it may, unlike the *Chadha* veto and perhaps other vetos of administration, actually enhance the goals of separation of powers. This may be seen in four ways. First, little, if any, danger of aggrandizement of legislative power exists because the mechanism is a grant of power to the President. The initial prohibition and the release may best be viewed as a congressional decision to provide a check on an historically unchecked unilateral executive power.¹⁶⁹ Moreover, because the war powers language is vague and because either elected branch may credibly make a claim in the area, such a structuring of responsibilities clarifies the Constitution. Further, tyranny may be more likely without the prohibition and release because the President may elect to bypass Congress on a first-use matter.

Second, it is unlikely that the imposition of these new responsibilities upon selected members of Congress would interfere with their ability to perform their constitutionally-required duties.¹⁷⁰ Although the committee's deliberations would be necessarily secret and sensitive, and perhaps quite taxing, the episodic nature of the committee's function assures that the members' legislative work would be accomplished. Thus, even if the committee is given the unlikely characterization as performing an "executive" function, the separation of powers interest in getting the business of government done is not offended.¹⁷¹

Third, the release mechanism may substantially further the efficiency

165. See generally GWYNN, THE MEANING OF THE SEPARATION OF POWERS (1962).

166. The closest thing to an explicit statement of separation of powers in the Constitution is the allocation of powers among the three branches in the three articles. See U.S. CONST. art. I, § 1, cl. 1; art. II, § 1, cl. 1; art. III, § 1, cl. 1.

167. See Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 723-30 (1984).

168. *Id.* See *Myers v. United States*, 272 U.S. 52 (1926); *United States v. Brown*, 381 U.S. 437 (1965).

169. See *supra* note 144.

170. See *In re Application of the PRESIDENT'S COMMISSION ON ORGANIZED CRIME. Subpoena of Lorenza SCADUTO*, no. 85-5232, slip op. (11th Cir. May 29, 1985).

171. See *id.*

values which loomed large at the Constitutional Convention.¹⁷² History reveals that efficiency, getting the important work of government accomplished effectively, was as important to the Framers as either of the other reasons for separation of powers.¹⁷³ While the Court has been remembered more for those instances where it denied or downplayed this efficiency value in separation disputes,¹⁷⁴ the relatively few separation disputes which have been decided serve as a reminder that the efficiency value encourages accommodation and cooperation among the branches. In the context of the shared war powers, the committee release mechanism may be the most effective way to make a first-use decision, as compared to a unilateral decision by the President or full bicameral action by Congress. So viewed, the whole government gains in its effectiveness and loses nothing.¹⁷⁵

Finally, the avoidance-of-tyranny rationale—which is often manifested in what is called “our system of checks and balances”—would be enhanced by this check on the President, especially where otherwise none might exist.¹⁷⁶ Indeed, support for the committee approval mechanism may be found in one of the most important separation disputes—*Youngstown Sheet and Tube Co. v. Sawyer*.¹⁷⁷ In holding that President Truman’s seizure of the steel mills without statutory authority exceeded the President’s constitutional power, the Court relied on evidence that Congress had recently considered, but then rejected, the idea of granting him the authority he had exercised.¹⁷⁸ Thus, where the powers in question are concurrent, in the “zone of twilight,”¹⁷⁹ congressional intent may be effectively expressed to curtail presidential action by measures short of legislation. So long as Congress has power to control the President in such an area by statute, allowing a less formal expression of congressional intent helps insure that some check on presidential power exists. If the power which the President has in “the twilight zone” may be controlled only by statute, a mere one-third of either chamber can thwart the legislative will.¹⁸⁰ While it is true that *Youngstown* did not look to a committee for its evidence of congressional intent, it is not much different in principle to do so by recognizing the legitimacy of a streamlined device for congressional participation in the first-use decision than to look to legislative history to examine the reasons why Congress did not enact legislation.

CONCLUSION

Given the risks of human fallibility in a one person decision and the risks to the nation’s survival of a nuclear war, good sense suggests that a momentous decision such as first use of nuclear weapons be shared. The urgency which compels quick action, such as deciding whether to fire nu-

172. See generally Banks, *supra* note 167.

173. *Id.* at 720-23.

174. *Id.* at 723-30.

175. See Strauss, *supra* note 83, at 812, 815.

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

177. *Id.* at 637 (Jackson, J., concurring).

178. *Id.* at 586.

179. *Id.* at 637 (Jackson, J., concurring).

180. See Watson, *supra* note 107, at 1084-86.

clear weapons in retaliation for a nuclear attack, is not present in a first-use scenario. Further, since the conflict into which nuclear weapons would be introduced would have so far been one fought with conventional weapons, any lost time would not threaten the nation's continued survival in the way a nuclear attack could. The Committee mechanism for first-use decisions would involve Congress in a most important national decision, yet it would preserve the need for speed and secrecy required by the situation. In some sense, it is a compromise. Even so, it may be more effective than either of the polar alternatives of unilateral executive power or full bicameral involvement. The committee could engender the tough and independent criticism of the technical reports and factual or political assumptions which would be leading the President to favor the nuclear attack. Furthermore, no single President, too deeply involved, could drag the nation into a nuclear holocaust. For the first time, Congress would necessarily be a part of the decision-making process of nuclear weapons use issues.