

2003

National Security Law: More Questions Than Answers

David B. Sentelle
dbs@dbs.com

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Law Commons](#)

Recommended Citation

David B. Sentelle, *National Security Law: More Questions Than Answers*, 31 Fla. St. U. L. Rev. (2003) .
<http://ir.law.fsu.edu/lr/vol31/iss1/1>

This Essay is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized administrator of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

FLORIDA STATE UNIVERSITY LAW REVIEW



NATIONAL SECURITY LAW: MORE QUESTIONS THAN ANSWERS

David B. Sentelle

VOLUME 31

FALL 2003

NUMBER 1

Recommended citation: David B. Sentelle, *National Security Law: More Questions Than Answers*, 31 FLA. ST. U. L. REV. 1 (2003).

NATIONAL SECURITY LAW: MORE QUESTIONS THAN ANSWERS

HON. DAVID B. SENTELLE*

The terrorist attacks on the United States on September 11, 2001, the reactions to those attacks, and more recently the armed conflict in Iraq have raised, or more accurately raised anew, a host of questions concerning the law of national security. Because I think the bar and especially the bench and the legal academy should be thinking about those questions, I am going to raise many of them for your thoughts and discussion, but I will not attempt to answer very many of them, both because the answers may not be fixed, and because I want to retain the openness necessary to deal with them should I confront them in an Article III context. Nonetheless, I want to offer them up for your consideration. The first question: Is national security law really law?¹ Many cynical students and observers of law and politics would say *no*. That is, they would assert that what we call national security law is simply a fig leaf, or a collection of fig leaves to cover whatever the political branches decide to do in the name of national security or national defense, hiding the fact that national security law is really not law at all. Moreover, cynics would contend that it is just a collection of ad hoc policy decisions with essentially post hoc declarations of discretion and vague references to inherent authority, rubberstamping—either through the courts or policy announcements of one sort or another—providing titular legitimization for whatever the President or the congressional majority (or sometimes minority) intended to do from the very beginning. The cynical view undermines—at least in the field of national security—the American fundamental concept that ours is a government of laws and not men—a government of principles and not whim, arbitrariness, or caprice. I disagree.

* Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. Prior to his appointment to the D.C. Circuit in 1987, Judge Sentelle served on the United States District Court, Western District of North Carolina, in Ashville. He is a 1968 graduate of the University of North Carolina Law School.

Judge Sentelle delivered these remarks in a speech to the faculty of the Florida State University College of Law on March 28, 2003. The Judge thanks Joseph R. Coker for adding footnotes to his Manuscript.

1. Here I will give credit to a group of writers in the field of national security law, to whom I owe a great debt for much of the organization of my remarks today, Stephen Dycus, Arthur L. Berney, William C. Banks, and Peter Raven-Hansen, editors of a national security law textbook published by Aspen Law and Business. See NATIONAL SECURITY LAW (Stephen Dycus et al. eds., 3d ed. 2002). I also want to credit Retired Colonel Scott Silliman, United States Air Force, who is the Director of the Center for Law, Ethics, and National Security at Duke University Law School, with whom I have had the good fortune to have frequent consultation over the last year and a half about the subject of national security.

I am not either naive enough or idealistic enough to assert that there is not some element of truth in the cynical view. Nonetheless, I think it is significant, indeed crucially important, that the bench, the bar, and perhaps especially the legal academy continue to debate the legal underpinnings of our nation's foreign policy, its national security policy, and its national defense. Granted, there is a prevalent, indeed a respected and perhaps respectable, tradition for the proposition *my country right or wrong*. There is, of course, a counter-tradition of more recent origin, but of disturbing prevalence, especially in the academy, that *my country right or wrong is wrong*. The proponents, whether self-recognized or not, of each of these views, have already made up their minds, without regard to the actual legality of any decision or act of the foreign relations or national security, that the acts of the nation are to be defended, applauded, and upheld on the one hand, or condemned, denigrated, protested, and set aside on the other. Neither of these approaches, however, explains why, after well over 200 years of national constitutional history, the American bar, bench, and legal academy continue to explore, expound, and debate the legitimacy of the acts taken by government in the furtherance of foreign policy and the defense of national security. That healthier tradition can only be explained and understood insofar as it is part of, and obedient to, the tradition of the rule of law—even in the confused, constantly changing, and frankly dangerous world of national security.

With that said, assuming that I am correct that national security law is indeed law, What are the subsidiary questions that we should be considering within that realm? Is there a legal basis for the use of military force in foreign conflict without a declaration of war? This is a question that is currently under litigation in the First Circuit, arising from a lawsuit brought by a number of members of Congress in the District Court for Massachusetts, to which the circuit has recently returned the litigation for further proceedings.² It is a question likely to give rise to further litigation in other federal courts.³

At the risk of being accused of too much levity in the choice of analogy, I would say that this question is in a limited way parallel to the subject of romance: Each generation thinks it has discovered it

2. See *Doe I v. Bush*, No. CIV. A. 03-10284-JLT, 2003 WL 21142782 (D. Mass. Feb. 27, 2003), *aff'd*, 323 F.3d 133 (1st Cir. 2003).

3. Now let me say here at the outset that I do not intend to comment on that or any other pending litigation. There are ethical strictures against comment by federal judges on pending litigation, whether in our own courts or others, and although I think I am well within the exception to that stricture for comment within academic settings, I am not going to push the envelope by litigation-specific commentary. I simply wish to put forward for academic thought and review, in very sketchy fashion, the history of the controversy. In doing so, I recognize that it raises a great many subsidiary questions, at least some of which I will raise following some discussion of the general topic.

anew, but it has always been with us. We need not look back very far to see the political opposition first to President Johnson and then to President Nixon on the subject of the Vietnam War. Understand that I do not mean the word political in a negative sense, but only in a descriptive or generic one. Before that, a different set of political opponents questioned with similar seriousness the legitimacy of President Truman's use of force and concomitant domestic powers in the pursuit of the Korean conflict.⁴ But the controversy did not first arise in the twentieth century. There have been uses of military force in international conflict without declaration of war virtually since the beginning of the Republic.⁵ To put the question into the framework of law, as opposed to political controversy, I would call your attention to the case of *Bas v. Tingy*.⁶ That decision has the unusual distinction of being one of the few decisions of the Supreme Court that still has any apparent importance issued before the appointment of Chief Justice John Marshall.⁷

In the late eighteenth century, relations between the new nation of the United States and the older nation of France had deteriorated far more than they have in the last few months. We had reached a state of armed conflict, albeit generally limited to conflict on the seas, but a conflict which resulted in vessels operating under French colors attacking and seizing United States-owned vessels.⁸ But there was no declaration of war. Indeed, the conflict is and was generally referred to as the Quasi-War.⁹ Congress passed two acts providing for salvage rights of the former owners of the seized United States vessels upon their recapture.¹⁰ Captain Tingy was the commander of the *public armed* ship *Ganges* which had recaptured the *Eliza*, a ship belonging to John Bas, after its capture by a French privateer.¹¹ Tingy

4. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 178 (1996).

5. See, e.g., Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 590 (S.D.N.Y. 2002) ("When one considers the sheer number of military campaigns undertaken during this country's history, declarations of war are the exception rather than the rule, beginning with the undeclared but Congressionally authorized naval war against France in the 1790's . . ."); see also Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 38-51 (1995) (discussing the early practices of presidential use of force without legislative approval).

6. 4 U.S. (4 Dall.) 37 (1800).

7. To digress for a moment, some time for your own entertainment, go back and pull the first four volumes of the United States Reports, now generally published as one and a half volumes, and look over the cases. You will not find very much that could be cited as precedent for anything that is heard by the Supreme Court or any other federal court today. But that is a digression.

8. STANLEY M. ELKINS & ERIC L. MCKITRICK, *THE AGE OF FEDERALISM* 643-45 (Oxford University Press 1993).

9. See, e.g., Sofaer, *supra* note 5, at 41.

10. *Bas*, 4 U.S. at 37.

11. *Id.*

brought an action in libel for salvage.¹² If the action was governed by the 1798 act of Congress, then he was entitled to one-eighth the value of the *Eliza*.¹³ Under the 1799 act, he was entitled to one-half the value.¹⁴ The 1798 act referred expressly to recapture from “the French.”¹⁵ The 1799 act referred to recapture from “the enemy.”¹⁶ Although not phrased in precisely the same language we might have used in the twentieth or twenty-first century, the issue underlying the controversy was: Could there be an *enemy* in the absence of a congressional declaration of war?¹⁷ As was the custom in those pre-Marshall days, there was not an opinion that was literally the opinion of the Court, each justice wrote for himself and the Court entered a judgment. Both Justices Bushrod Washington and Samuel Chase handed down interesting opinions addressing the undeclared war question. In so doing, they laid the foundation for the proposition that war may be conducted without a formal declaration of war.

Justice Washington stated, “that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war.”¹⁸ He came rather directly to grips with the declaration of war question, stating, “[i]f it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation.”¹⁹ But he went on to insist that, “hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn . . . Still, however, it is *public war*.”²⁰ Were they enemies? Well, Justice Washington went on to point out that armed vessels of the two nations were combating on the high seas in order to subdue each other and make prizes of the property of the other. “They certainly were not friends . . . [i]f they were not our enemies, I know not what constitutes an enemy.”²¹

Justice Chase phrased his analysis differently. He spoke in terms of the difference between Congress declaring a general war and waging a limited war.²² He set out four acts authorized by the American government “demonstrative [of a] state of war.”²³ As he observed, by

12. *Id.*

13. *Id.* at 37, 40.

14. *Id.*

15. *Id.* at 40.

16. *Id.*

17. *See id.* at 39.

18. *Id.* at 40.

19. *Id.*

20. *Id.*

21. *Id.* at 41.

22. *Id.* at 43.

23. *Id.*

acts of Congress an American vessel was authorized: (1) to resist search by a French public vessel; (2) to capture any vessel that should attempt by force to compel submission to a search; (3) to recapture any American vessel seized by a French vessel; and (4) to capture any French armed vessel found on the high seas.²⁴ Even in the absence of a declaration of war, he had “no hesitation in pronouncing, [sic] that a partial war exists between *America* and *France*.”²⁵ The Court was unanimous.

I do not suggest that this single decision of the Supreme Court answers for all time or all circumstances the question of legitimacy of undeclared war, but I do suggest that it offers eloquent testimony to the antiquity of the question. And so it has gone through our history. Five times the United States has fought declared wars: (1) the War of 1812 against Great Britain; (2) the 1846 war with Mexico; (3) the 1898 Spanish-American War; (4) World War I beginning in 1917; and (5) World War II beginning in 1941.²⁶ Technically, there have been eleven declarations of war, because both the world wars involved multiple declarations against multiple enemies, but there have been only five declared wars.²⁷ But at least ten more times the Commander-in-Chief has committed American troops in extended military engagements based upon some authorization by Congress stopping short of a formal declaration of war. That would include the undeclared naval war with France, the two wars against the Barbary pirates beginning in 1801 and 1815, the raids on the slave traffic in 1820 to 1823, the operation against Paraguay to seek redress for attack on a naval vessel in 1859, the Lebanese incursion to protect an in-place government against insurrection in 1958, the Vietnam War from 1964 to 1973, the restoration of the Lebanese government in 1982, the Gulf War in 1991,²⁸ and the Afghanistan incursion against Al Qaeda terrorists following the events of September 11, 2001.²⁹ Add to this the current conflict in Iraq,³⁰ the extended undeclared war in Korea during the Truman administration, and Clinton’s Bosnian operation—each use arguably authorized under United Nations, authority theretofore legitimated by congressional action³¹—and we

24. *Id.* at 44.

25. *Id.* at 45.

26. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-1999 (1999) [hereinafter USE OF ARMED FORCES].

27. *Id.*

28. *Id.*

29. *U.S. Strikes Afghanistan*, WASHINGTON POST, Oct. 8, 2001, at C14; see also Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (congressional resolution authorizing the use of force “against those responsible for the recent attacks launched against the United States [on September 11, 2001]”).

30. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE (2003) [hereinafter PRESIDENTIAL COMPLIANCE].

31. See USE OF ARMED FORCES, *supra* note 26.

have at least twelve uses of force conducted by the Executive and approved to a greater or lesser degree by congressional action without formal declaration of war. Again, I do not suggest that this answers the question of the existence, and certainly not the extent, of the constitutional authority of the United States government, whether in its executive or legislative branches, to conduct undeclared war, but I do offer it as historic evidence for consideration in any analysis of that question.

Subsidiary to the question of the constitutionality *vel non* of undeclared war is the question of the relative authority of the executive and legislative branches in the conduct of foreign affairs, and specifically in the management of national security and the conduct of military conflict. In what order should we consider them? There are two ways of ordering the questions. We might first look to the national security powers of Congress since the powers of the legislative branch are first addressed in the Constitution.³² Conversely, we might consider the Executive first since, historically and currently, legitimacy has been questioned more often, indeed far more often, with respect to the Commander-in-Chief's use of armed forces than in the area of Congress's authority to, on the one hand, authorize or, on the other, interfere with the President's claimed authority to authorize military action.³³ Let us start with the Congress, perhaps because it is at least facially an easier realm. I might even suggest answers to some questions here. For example, What are the sources in the Constitution for Congress's authority to deal with national security? The plainest source is Section 8 of Article I. That section affords to Congress the general power to "provide for the common Defense . . . of the United States."³⁴ Granted, it may be argued that the very generality of that introductory language deems it a reliable source for determining a specific grant of power. But specific clauses of that section speak with eloquent specificity to the power of Congress to:

[D]eclare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies . . .; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions; To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States . . .³⁵

32. See U.S. CONST. art. I.

33. See Yoo, *supra* note 4, at 170-71.

34. U.S. CONST. art. I, § 8.

35. *Id.*

All of these grants of power are amplified by the last paragraph of Section 8, the famous Necessary and Proper Clause empowering the Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³⁶

Additionally, might not Sections 9 and 10 of Article I, although phrased in terms of limitation, be cited as additional sources of congressional authority? That is, Section 9 provides that “the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it.”³⁷ Could that not be taken as a grant to Congress the power to suspend the privilege of a writ of habeas corpus in the case of rebellion or invasion? Granted, that suspension, when it has occurred or been attempted, has generally been at the hands of the executive and not the legislature.³⁸ However, does not the placement of Section 9 in article I, the legislative article, rather than Article II, the executive article, suggest an implicit grant to the Congress rather than the President?³⁹

As for Section 10, the Constitution provides that “[n]o state shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal.”⁴⁰ Again, might not the limitation of Section 10 on the states, especially coupled with the specific grant of the letters of marque and reprisal authority in Section 8, strengthen the implication of congressional primacy in foreign relations and in national defense in particular?

Even more specifically, in the third paragraph of Section 10, the Constitution provides that “No state shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact . . . with a foreign Power, or engage

36. *Id.*

37. *Id.* § 9.

38. On April 27, 1861, President Lincoln suspended the writ of habeas corpus in response to rioting in Baltimore and the burning of several railroad bridges north of Baltimore, ordered by the Governor of Maryland, to prevent federal troops from entering the city. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 20-25 (1998).

39. In *Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487), Chief Justice Taney stated that “[t]he clause of the [C]onstitution, which authorizes the suspension of the privilege of the writ of habeas corpus is in the 9th section of the first article. This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department.” The Chief Justice went on to state that if the power to suspend the writ of habeas corpus was intended to be bestowed upon the President, “it would undoubtedly be found in [the] plain words in [Article II of the Constitution]; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.” *Id.* at 149. For a discussion of the historical underpinnings of *Ex parte Merryman*, see REHNQUIST, *supra* note 38, at 26-39.

40. U.S. CONST. art. I, § 10.

in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”⁴¹ The states cannot do that alone. But can they not do it with the consent of Congress? And, are these not parallel to powers expressly granted to Congress in Section 8? Might one then argue that the grants of power to Congress in the field of national defense and national security are broad, numerous, and explicit?

Is it a surprise, then, that currently and historically it is almost without exception the President who has taken the lead in the commitment of national resources and, specifically, the armed forces in the pursuit of national defense and national security? I referred earlier to the five times that the United States has fought wars upon congressional declaration of war. I believe it is safe to say that in each of those instances Congress acted upon the request of the President, whether it was Monroe, Polk, McKinley, or Franklin D. Roosevelt. The twelve times in which Presidents have committed troops under color of some congressional authorization stopping short of a declaration of war have rather obviously begun at presidential insistence, not congressional. This lays aside the fact that there have been numerous instances of presidential use of armed forces without congressional action. In recent years, including by way of example and not exhaustion, President Ford’s use of the armed forces in the rescue of the Mayaguez, President Carter’s attempted rescue of the hostages in Iran, and President Reagan’s Grenada incursion.⁴² If Congress has all the constitutional grants of power to which I earlier alluded, what are the sources of the President’s power to conduct national defense or national security operations? Again, let us look first to the Constitution.

First, is it relevant that the Constitution expressly provides that the President will take an oath to, *inter alia*, “preserve, protect and defend the Constitution of the United States”?⁴³ Does the wording of that oath implicitly suggest that he will use all powers otherwise his in that defense? Does that include the power to use the armed forces?

More explicitly, Article II, Section 2, provides: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”⁴⁴ Does that simply mean that the President is the chief general or admiral, or does it further empower him in the use of armed forces for the national defense?

41. *Id.*

42. See USE OF ARMED FORCES, *supra* note 26; see also Yoo, *supra* note 4, at 181 (discussing the Mayaguez incident, the attempted hostage rescue in Iran, and the Grenada incursion in calling into question the success of the War Powers Resolution).

43. U.S. CONST. art. II, § 2.

44. *Id.*

The second paragraph of that same section provides that the President “shall have Power . . . to make Treaties.”⁴⁵ Is it significant that the President makes the treaties, while Congress (and only one house at that) has only the power to reject or accept what the President has done?⁴⁶ Even conceding that, over the years, the Senate has forced the modification of treaties by conditional ratifications,⁴⁷ does it suggest that the President has primacy in the field of foreign relations? Is such an assertion of primacy amplified by his power under Article II, Section 2, to appoint ambassadors and other public ministers and consuls, and especially by his power under Article II, Section 3, to “receive Ambassadors and other public Ministers [from other countries]” to “take Care that the Laws be faithfully executed [without reservation for any congressional primacy in defense or international relations] and . . . [to] Commission all the Officers of the United States”?⁴⁸

Aside from those explicit grants of power to the President, are there other sources for an executive claim to national security powers? Note that Presidential Counsel Lloyd Cutler, on behalf of President Carter,⁴⁹ Central Intelligence Associate Counsel Mitchell Rogovin, on behalf of President Reagan,⁵⁰ and various other presidential counsel, attorneys general, secretaries of relevant departments, and other executive officials including the presidents themselves, have asserted such claims throughout history. What other sources of public power might there be for presidential assertion of authority in the field of national security? Do the explicit powers in Article II of the Constitution carry with them the implication of more power? We might refer generally to the powers in Article II as the President’s commander-in-chief powers, foreign relations powers, and executive powers. Do those fragmented powers create a whole that is greater than the sum of their parts? Are there other powers, perhaps what we might call emergency powers, that are inherent in that branch of government, which has to see to the execution of law, while Congress is generally charged with the making of laws, and was, at least in the

45. *Id.*

46. *Id.*

47. See generally Kevin C. Kennedy, *Conditional Approval of Treaties by the U.S. Senate*, 19 LOY. L.A. INT’L & COMP. L. REV. 89, 95-122 (1997) (discussing the frequency of conditional ratification of treaties by the Senate and the general types of conditions that are placed on ratification).

48. U.S. CONST. art. II, § 2, cl. 2; *id.* § 3.

49. See Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 811 n.132 (1984).

50. See Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 904 (1994) (citing the statement of Mitchell Rogovin before the House Select Committee on Intelligence for the proposition that Presidents have claimed authority, under their powers over foreign affairs, to conduct some military operations without congressional approval).

eighteenth century, expected to be in session only a rather small part of the time? If there are inherent and emergency powers, how broad are these powers?

I would be remiss at this point if I did not note, at least as a significant aside, that the Supreme Court has discussed these questions in various forms and at various times. I think it would be generally conceded that the most comprehensive and, at the same time, the most fundamental analysis by the Supreme Court can be found in the fragmented opinion of the Court in *Youngstown Sheet & Tube Co. v. Sawyer*⁵¹ (commonly known as the *Steel Seizure Case*). I will not attempt to cover that case to exhaustion in this aside.⁵²

In the *Steel Seizure Case*, as you may recall, President Truman, acting under rather general grants of authority related to the deployment of U.S. forces to Korea, actually seized steel mills.⁵³ The whole litigation is about his authority to do so. The acting Attorney General, arguing at the court of appeals level, took the inherent authority concept to its extreme—arguing that the President by virtue of the vesting of the Executive power in him under Article II, inherited all the Executive authority of the crown at the time of the Declaration of Independence.⁵⁴ Is there an inherent authority extending that far? Hint: The United States did not make that argument in the Supreme Court. Was it a silly argument? Perhaps, but just fifteen years earlier, in *United States v. Curtiss-Wright Export Corp.*, the Supreme Court had joined seven-to-one in an opinion by Justice Sutherland that described the federal government as having all powers of external sovereignty and declaring that “the President alone has the power to speak or listen as a representative of the nation,” based in part on a similar theory.⁵⁵ Does that argument have validity today? Note: Justice Sutherland quoted John Marshall as stating “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”⁵⁶ That was John Marshall. Does that strengthen the argument any today? Well, perhaps the President is the nation’s sole representative with the foreign nations, but is he the sole agent when we look to national defense and the conduct of national security operations, specifically

51. 343 U.S. 579 (1952).

52. It takes me two hours in a seminar course to come anywhere close to an exhaustive treatment, and it is a principle theme to the National Security Law text to which I earlier alluded, see Dycus, et al., *supra* note 1, as well as most other writing on the question of presidential authority, even that which is not limited to national security law. But back to the questions about the President’s authority.

53. *Youngstown*, 343 U.S. at 582-83.

54. See William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 759-60 (1986).

55. 299 U.S. 304, 319 (1936).

56. *Id.* at 319 (internal quotes omitted).

war? Hint: Justice Sutherland was cheating when he quoted Marshall. Marshall was not on the Supreme Court at the time he made the statement; he was a member of Congress arguing (successfully) that President Adams had not committed an impeachable offense by turning over to the British for trial a British subject charged with murder in his own country.⁵⁷ Note: Adams was acting pursuant to the Jay Treaty that Congressman Marshall had helped to negotiate.

Back to the more fundamental questions: What is the power of the President to use troops without a declaration of war, or to commit troops to undeclared operations without specific congressional authorization? Can it be seriously contended that he does not have the emergency power to commit troops if we are actually invaded, or if there is an actual insurrection, for example, if the State of South Carolina fires on Fort Sumter? Aside from those emergencies, or perhaps even including them, what is the effect and what is the legitimacy of the War Powers Resolution?

In 1973, Congress passed the War Powers Resolution for the express purpose of “fulfill[ing] the intent of the framers of the Constitution and insur[ing] that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”⁵⁸ It requires, *inter alia*, that the President shall “in every possible instance . . . consult with Congress before” sending armed forces into hostilities or situations of imminent hostility, and regularly until the armed forces are no longer so engaged.⁵⁹ Section 4 of the Resolution⁶⁰ deals expressly with the use of armed forces without a declaration of war and requires the President within 48 hours after the introduction of forces into hostilities to submit a report to the Speaker of the House and the President Pro Tem of the Senate setting forth the circumstances necessitating the introduction of armed forces, the constitutional or legislative authority under which such introduction took place, and the estimated scope and duration of the hostilities involved.⁶¹ It further requires that at least once every six months thereafter he report periodically

57. H. Jefferson Powell, *The Founders and the President's Authority Over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1511-12 (1999); see also LEONARD BAKER, JOHN MARSHALL, A LIFE IN LAW 318-23 (1974). Note that President Adams was acting pursuant to the Jay Treaty, of which John Marshall was a key public supporter in 1895. For an overview of the negotiation, ratification, and subsequent public discourse over the John Jay Treaty, see *id.* at 201-12.

58. 50 U.S.C. § 1541(a) (2003).

59. *Id.* § 1542.

60. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §1543 (2000)).

61. *Id.*

to the Congress on the status of the hostilities as well as the scope and duration.⁶²

Section 5 of the Resolution⁶³ requires, *inter alia*, that within 60 days after the submission of a report or after the date upon which such report is required, the President is to

[T]erminate any use of United States Armed Forces with respect to which such report was submitted . . . unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.⁶⁴

I believe it is correct to state that every President since the enactment of the Resolution has expressed misgivings about the Resolution, conspicuously including Gerald Ford, the most legislative man to serve as the Chief Executive during the twentieth century. However, Presidents have generally complied with it.⁶⁵ But they have done so, as Ford declared in the John Sherman Cooper Lectures after his presidency, without conceding that it is constitutional or binding.⁶⁶ Ford said he consulted with the Congress simply because he thought it was common sense and it would strengthen the trust between the executive and legislative branches.⁶⁷ With that said, I think we are left with two broad questions, perhaps covering many subsidiary ones. These two broad questions are among those that I do not purport to answer. The first is based on the assertion of some presidentialists that this Resolution is an unconstitutional congressional usurpation of the President's Executive, Commander-in-Chief, or inherent power. Are they correct? Some legislative proponents have argued that the Resolution is not only constitutional, but that it is enacting constitutional requirements, that is, that even in the absence of the Resolution the President would be required to seek congressional authorization (perhaps not on precisely these strict schedules set out in the Resolution) and to cease operations if not congressionally authorized. Is that a valid argument? I did not say I would ask only easy questions, I did say that I would not be expressing opinions on many of them. The War Powers Resolution is one of those areas in which I will not be expressing an opinion.

62. *Id.*

63. *Id.* § 5.

64. *Id.*

65. See PRESIDENTIAL COMPLIANCE, *supra* note 30, at 11-13.

66. See President Gerald R. Ford, The War Powers Resolution, Alfred M. Landon Lectures on Public Issues given at Kansas State University (Feb. 20, 1978), available at <http://www.ford.utexas.edu/library/speeches/780220.htm> (last visited Aug. 14, 2003).

67. *Id.*

The next question I would raise, and the last one on this level of generality is, do the courts have a role in national security law? After all, the Constitution does provide that “the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States, and Treaties made . . . under their Authority.”⁶⁸ If I am correct that national security law is indeed law, does that not presuppose that we have a role? Are we not, after all, the branch charged with the duty of saying what the law is?

Certainly we have some role in such specific areas as the limitations on Executive and perhaps Legislative authority to, for example, conduct surveillance together prior to requiring intelligence information. In the Foreign Intelligence Surveillance Act (FISA) of 1978, Congress has created a whole special court staffed by district judges selected by the Chief Justice to pass upon applications for and issue orders permitting the use of electronic surveillance (including wiretaps) to obtain foreign intelligence information.⁶⁹ That court has exercised its power ever since. Under the original act, the wording of the statute was such that the court understood it to be its duty to determine that the wiretaps were not used in the furtherance of criminal investigations, otherwise put, that the gathering of foreign intelligence was “the purpose” of the electronic surveillance.⁷⁰ In the Patriot Act Amendment to the statute after the tragedies of September 11, the statute recited that the gathering of foreign intelligence must be “a significant purpose.”⁷¹ The FISA Court held that it was constitutionally required to insure that the foreign intelligence gathering remained the primary purpose⁷² and that the wiretaps did not become a shortcut to criminal investigation in cases in which a Title III wiretap order might not be available.⁷³ For the first time in the history of the court, its judgment was appealed.⁷⁴ FISA had created a foreign intelligence surveillance court of review.⁷⁵ My colleague Senior Judge Laurence Silberman sits on that court. Until the Patriot Act Amendment case,⁷⁶ the review court had never sat. In its first and, to date, only opinion, it reversed the FISA court and held that the foreign intelligence wiretap could indeed be used in furtherance

68. U.S. CONST. art. III, § 2, cl. 1.

69. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801, et seq. (2002)).

70. See *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 619-20 (Foreign Int. Surv. Ct. 2002).

71. U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 291 (2001) (codified at 50 U.S.C. § 1804(a)(7)(B) (2003)).

72. See *In re All Matters Submitted to the Foreign Surveillance Court*, 218 F. Supp. 2d at 622.

73. See *id.* at 623.

74. See *In re Sealed Case*, 310 F.3d 717, 719 (Foreign Int. Surv. Ct. Rev. 2002).

75. 50 U.S.C.A. § 1803(b) (2003).

76. *In re Sealed Case*, 310 F.3d at 719-20.

of criminal investigations so long as the gathering of foreign intelligence was a purpose of the tap.⁷⁷

Whether you agree with the FISA court or the review court, that case illustrates the principal role which courts must be conceded to play in national security. We must function like courts. We must, in cases properly brought before us and properly within our jurisdiction, enter appropriate orders and judgments for relief when the political branches, acting under the color of national security powers, have unconstitutionally or otherwise unlawfully invaded the civil rights of citizens or persons within our jurisdiction. Have we always performed that role well? Ask that question of Korematsu and the other Japanese Americans who were driven from their homes and interned during World War II. I am not passing on the policy question behind what Roosevelt or the others did in those acts, but if you have never read the *Korematsu* case,⁷⁸ read it and reflect sometime on whether the courts functioned very well in our conceded role in national security of adjudicating the question raised by the invasions of civil rights by the political branches in the national security context. I hasten to say that I am not suggesting that the Executive and the Legislative branches cannot do things in emergencies which would be unconstitutional without the emergency. I am simply raising this question, and this is one upon which I am venturing an answer: Do the courts not still have a duty to pass on the constitutionality of what the other branches have done? What sort of questions does that duty raise today? Is the concept of a military tribunal constitutional as a method of adjudicating crimes? If so, who can those tribunals try? Can they try American citizens? Can they try American citizens for acts abroad but not domestic? I can answer none of these today, but I assume that I and other judges will have to answer these and a great many more questions in days to come. The bar and the legal academy must be prepared to defend on the one hand the civil rights of the citizens of our country, and, on the other hand, the legitimate prerogatives of the government of this country. When the line between those two is not clear, does not constitutional duty impose a role upon the judiciary in national security affairs?

More controversially, back to the first question of whether and to what extent the President may commit troops without congressional declaration of war, and even without congressional authorization, Is that a political question which the courts ought not address? The Supreme Court has not had occasion to provide a definitive answer to that question, nor will I attempt to do so. I will say briefly that the lower courts which have addressed the question cannot be accused of

77. *Id.* at 735-36.

78. *Korematsu v. United States*, 323 U.S. 214 (1944).

unanimity. In *Ange v. Bush*,⁷⁹ a district judge passed on a challenge to the President's deployment of U.S. military forces in the Persian Gulf. The government defended in part on the political question theory.⁸⁰ Judge Lamberth reviewed the six factors enumerated by the Supreme Court in *Baker v. Carr*, for determining whether a question is a political one:

[A] textually demonstrable constitutional commitment . . . to a coordinate political department or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches . . . or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁸¹

Judge Lamberth found the question of the commitment of armed forces to be a political question under the textually demonstrable commitment of war powers to the political branches, the due respect theory, and the lack of judicial equipment to enter the field.⁸² In doing so, he took precedent from *Harisiades v. Shaughnessy*.⁸³ It cannot be said, however, that the *Harisiades* case, while certainly a legitimate precedent for Judge Lamberth's reasoning, was in any way controlling. It dealt with a much more narrow question outside the area of the use of forces, specifically the constitutionality of deporting a legal resident alien because of his membership in the Communist Party.⁸⁴ Not only could Judge Lamberth not find a controlling precedent, but on the same date that he issued his decision in *Ange v. Bush*, another judge of the District of Columbia District Court, Judge Harold Greene, issued *Dellums v. Bush*,⁸⁵ passing on a challenge to the constitutionality of the same deployment brought by members of Congress in which he determined that the question was not a political question outside judicial competence.⁸⁶ He did not, however, rule in favor of the plaintiffs, rejecting the suit on standing grounds.⁸⁷ No higher court has conclusively resolved the conflict.

Is the question a political one on which we cannot act? I already telegraphed my stance. I am not going to answer it unless and until I

79. 752 F. Supp. 509 (D.D.C. 1990).

80. *See id.* at 511-15.

81. *Id.* at 512 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

82. *Id.*

83. 342 U.S. 580 (1952).

84. *Id.* at 581.

85. 752 F. Supp. 1141 (D.D.C. 1990).

86. *Id.* at 1146.

87. *Id.* at 1149-51.

meet it in an Article III context. These are but a few of the questions that face the bench, the bar, and the legal academy in the field of national security law today, and while I have not attempted to answer many of them, I will come out where I came in. The very fact that we are asking these questions is strong evidence that national security law is law: that the United States conducts its foreign affairs under the rule of law. Has the United States done so perfectly for its entire history? Of course not. Humans have not done anything perfectly, nor may we expect perfection in this century. But we keep asking these questions. And when it becomes appropriate, when it becomes necessary, we answer them.