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Judicial Review Under a British War Powers Act

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Judicial Review Under a British War Powers Act

David Jenkins*

ABSTRACT

This Article considers how U.K. courts might exercise review under a hypothetical British "war powers act," in the event that the current Labour Government or an incoming Tory one responds to calls to reform the Royal War Prerogative and Parliament passes such a statute. The Article undertakes a comparative study, analyzing how U.S. courts apply the political question doctrine in war powers cases. It suggests that they apply the doctrine in a way that assesses the justiciability of the particular subject matter of a case, thereby supporting deference to the political branches in most war powers cases without foreclosing review altogether. Explaining how and why U.S. courts show such deference despite the Constitution's "declare war" clause and a strong form of judicial review, the Article concludes that a future British "war powers act" would likely not invite the kind of inappropriate judicial activism that some inside and outside of government have feared in avoiding statutory prerogative reform.

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I. INTRODUCTION

Contrary to earlier indications that it would reform the Crown's war prerogative through primary legislation, the British Government now takes the position that a non-binding House of Commons resolution is the best means of increasing Parliament's involvement in the decision to go to war.¹ This resolution would require the Prime Minister to seek approval from Parliament before authorizing the British military to use force, subject to certain exceptions for emergencies or other national security reasons.² If implemented, the resolution would not have the binding legal effect of a statute and, therefore, would be unreviewable by the courts, thus preserving the Crown's war prerogative.³ The Government's about-face partly addresses worries that any legal division of the war powers between the Crown and Parliament might result in undesirable judicial interference in delicate policy matters concerning war.⁴ Intervening judges would not only risk undermining operational efficiency but also lack the democratic accountability of elected officials. Despite the current preference for a resolution, however, there remains the possibility of statutory reform at a later date—either by a continuing Labour Government or, more likely, by a new government under the

1. U.K. MINISTRY OF JUSTICE, THE GOVERNANCE OF BRITAIN—CONSTITUTIONAL RENEWAL, 2008, Cm. 7342-1, at 50, available at <http://www.justice.gov.uk/docs/constitutional-renewal-white-paper.pdf> [hereinafter COMMAND PAPER 7342-1].

2. *Id.* at 50, 52; *see id.* at 53–56 (describing the process of obtaining approval). The question of what to do with the prerogative power to deploy armed forces overseas was expressly excluded from a recent report. *See* U.K. MINISTRY OF JUSTICE, THE GOVERNANCE OF BRITAIN—REVIEW OF THE EXECUTIVE ROYAL PREROGATIVE POWERS: FINAL REPORT 13(2009), available at <http://www.justice.gov.uk/about/docs/royal-prerogative.pdf> (recommending against further statutory regulation or abolition of certain prerogative powers, such as the organization and regulation of the armed forces, the granting of pardons, and the granting of Royal Charters). For a critical commentary of the Labour Government's current proposal for use-of-force resolutions, *see* generally David Jenkins, *Efficiency and Accountability in War Powers Reform*, 14 J. CONFLICT & SECURITY L. 145 (2009).

3. Jenkins, *supra* note 2, at 157.

4. *See* COMMAND PAPER 7342-1, *supra* note 1, at 50 (“A resolution will define a clear role for Parliament in this most important of decisions, while ensuring our national security is not compromised by the introduction of a less flexible mechanism.”).

Conservative Party, whose leader, David Cameron, has advocated changes to the war prerogative as part of a broader package of political reforms.⁵ In any case, now that the subject of a British “war powers act” (as this Article generally labels a hypothetical statutory reform) has been seriously broached by all major parties, it seems appropriate to study some of the important constitutional issues potentially raised by such a statute. While prominent legal scholars have provided Parliament with thoughtful evidence about the desirability and expected impact of various options for war prerogative reform,⁶ little academic commentary on this speculative but constitutionally significant subject has emerged.

This Article hopes to fill this gap in academic literature by addressing concerns that judicial enforcement of a war powers act (the content of which this Article does not speculate upon) might lead to excessive and inappropriate judicial activism in delicate policy matters concerning war.⁷ It suggests that such concerns are likely exaggerated and that the main effects of a war powers act (contingent, of course, upon its actual terms) would probably be more political than legal. As the attitude of British judges toward a war powers act is wholly conjectural (as is future passage of such an act itself), this Article draws conclusions from American law, where courts, Congress, and the President have long faced entrenched constitutional provisions that govern the exercise of government war powers and that, to some degree, remain subject to judicial review.⁸ This very different constitutional system actually makes for an apt comparison because its outer appearance of legalism masks the fact that U.S. courts are prone to defer to the other branches in matters of war despite the existence of legally binding constitutional or statutory provisions.⁹ Such judicial behavior occurs because courts are usually institutionally ill-suited to interject themselves into non-

5. Rosemary Bennett, *Tories to Give MPs Vote on War*, TIMES (London), Feb. 6, 2006, <http://www.timesonline.co.uk/tol/news/politics/article727442.ece>; David Cameron, *A New Politics: Democratic Accountability*, GUARDIAN (London), May 25, 2009, available at <http://www.guardian.co.uk/commentisfree/2009/may/25/david-cameron-a-new-politics2>; Andrew Porter, *Labour Closing the Gap on Tories, New Poll Shows*, TELEGRAPH (London), Jan. 30, 2010, available at <http://www.telegraph.co.uk/news/election-2010/7104772/Labour-closing-the-gap-on-Tories-new-poll-shows.html>.

6. See, e.g., JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL, DRAFT CONSTITUTIONAL RENEWAL BILL—VOLUME II: EVIDENCE, 2007–8, H.L. 166-II, H.C. 551-II (presenting a draft bill and analysis in an effort to rebalance the power between the executive and parliament).

7. See, e.g., COMMAND PAPER 7342-1, *supra* note 1, at 50 (expressing concern that a “less flexible mechanism” than a non-binding House resolution would compromise national security).

8. Jenkins, *supra* note 2, at 148–49; see U.S. CONST. art. I, § 8 (describing the war powers of Congress); *id.* art. II, § 2 (describing war powers of the President).

9. See *infra* note 36 for numerous examples in which U.S. courts have deferred to the other branches in matters of war.

justiciable matters such as war powers disputes unless the threatened injury to individual rights or an extreme executive-legislative conflict necessitates review.¹⁰ A closer comparative look at the constitutional division of war powers and the political question doctrine in the United States is therefore a helpful starting point for predicting what the reaction of British courts might be to any future war powers act. Further speculation from an internal perspective of British public law is necessary for a fuller picture, but that step goes beyond the work herein. Accordingly, this Article is also an invitation for British legal scholars to more closely examine separation of powers and judicial deference within the specific context of war powers, which is a specialized field of public law somewhat underdeveloped in the United Kingdom but increasingly relevant and important in light of ongoing constitutional change.

II. WAR POWERS, SEPARATION OF POWERS, AND INSTITUTIONAL PROCESSES

The Labour Government's decision to consider a resolution addressed two concerns that might arise from any legally binding, statutory requirement that the Government first get parliamentary approval before committing military forces to an armed conflict.¹¹ First, such a statute might undermine operational efficiency, flexibility, and spontaneity by subjecting military decisions to a slow, public, and adversarial political process in Parliament.¹² Second, such a statute might drag unelected judges into the highly sensitive and politically-contested area of war-making.¹³ Any reform that would set legal restrictions on the Government's war powers, therefore, could have unintended consequences and might be too radical a departure from the British constitutional tradition of pure

10. See Robert J. Pushaw, Jr., *The 'Enemy Combatant' Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1079-80 (2007) (discussing how the Constitution's design has created different standards for reviewing the exercise of military powers).

11. COMMAND PAPER 7342-1, *supra* note 1, at 47.

12. *Id.*

13. See SELECT COMMITTEE ON THE CONSTITUTION, WAGING WAR: PARLIAMENT'S ROLE AND RESPONSIBILITY, 2005-2006, at 104; COMMAND PAPER 7342-1, *supra* note 1, at 47 (asserting that individuals who take unapproved deployment action should not be subject to civil or criminal liabilities); JOINT COMMITTEE ON THE DRAFT CONSTITUTIONAL RENEWAL BILL, DRAFT CONSTITUTIONAL RENEWAL BILL—VOLUME I: REPORT, 2007-8, H.L. 166-I, H.C. 551-I, at 355-57 (discussing potential concerns over making prerogative powers justiciable). Such concerns about judicial activism are not new and even delayed the incorporation of the European Convention on Human Rights into British domestic law for decades. Lord Irvine, *The Impact of the Human Rights Act: Parliament, the Courts and the Executive*, PUB. L. 308, 309 (2003).

Governmental and Parliamentary—not judicial—involvement in decisions of high policy.

The United States provides one of the best and most obvious examples of a departure from the British tradition.¹⁴ The U.S. Constitution of 1787, enforceable in the courts by judicial review, formally divides the war powers between the legislative and executive branches.¹⁵ This situation is distinct from the parliamentary system in Britain, where Crown ministers are accountable (in theory) to a sovereign Parliament (and the politically ascendant House of Commons) while simultaneously wielding a traditionally powerful, monarchical prerogative power over war.¹⁶ While the separation of powers doctrine exists in the United Kingdom as a matter of abstract constitutional principle,¹⁷ the convention of ministerial responsibility arguably tends to reduce the risk of serious, open confrontations between the Government and Parliament.¹⁸ By contrast, the U.S. Constitution's sharp separation of the legislative and executive branches and the distribution of war powers between them intentionally sets conditions for potentially profound institutional conflict.¹⁹ Such conflict has implications for judicial review and the

14. See, e.g., U.K. MINISTRY OF JUSTICE, *THE GOVERNANCE OF BRITAIN—WAR POWERS AND TREATIES: LIMITING EXECUTIVE POWERS*, 2007, Cm. 7239, at 68 (discussing the United States as a point of comparison for methods of securing Parliament involvement).

15. Congress has power “[t]o declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water,” “[t]o raise and support armies” with a two-year time period for appropriations, “to provide and maintain a navy,” as well as to regulate the armed forces and make rules for calling up the state militias. U.S. CONST. art. I, § 8. Just as importantly, all revenue bills must arise in the House of Representatives, *id.* art. I, § 7, giving Congress the power of the purse over the military and its operations. However, “[e]xecutive power shall be vested in a President,” *id.* art. II, § 1, who “shall be commander in chief of the Army and Navy of the United States” and, at times, federally mobilized state militias, *id.* art. II, § 2. There is one notable exception to the division between the executive and legislative branches in the United States: “The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.” *Id.* art. I, § 3.

16. Overview of the UK System of Government, http://www.direct.gov.uk/en/Governmentcitizensandrights/UKgovernment/Centralgovernmentandthemonarchy/DG_073438 (last visited Mar. 30, 2010).

17. For an extended discussion of the doctrine's role in British governance, see COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT AND MATERIALS* 103–32 (6th ed. 2007); N.W. Barber, *Prelude to the Separation of Powers*, 60 CAMBRIDGE L.J. 59 (2001); Eric Barendt, *Separation of Powers and Constitutional Government*, 1995 PUB. L. 599 (U.K.); Diana Woodhouse, *The English Judges, Politics and the Balance of Power*, 66 MOD. L. REV. 920, 920–24 (2003).

18. Although, of course, in recent years there have been several significant back-bench rebellions in the Commons and much opposition in the Lords to Government bills, especially on controversial civil liberties matters. See, e.g., *Blair Defeated Over Terror Laws*, BBC NEWS, Nov. 9, 2005, http://news.bbc.co.uk/2/hi/uk_news/politics/4422086.stm; *Ministers Shelve 42-day Detention*, BBC NEWS, Oct. 13, 2008, http://news.bbc.co.uk/2/hi/uk_news/politics/7668477.stm.

19. See *supra* text accompanying note 15.

role of the courts in war-making.²⁰ Regardless of whether one finds the prospect of substantial checks and balances desirable as a means of controlling government decision making,²¹ primary legislation abolishing the war prerogative and requiring the Government to seek advance parliamentary approval for military action might replicate this internally adversarial American system. And if such a conflict does occur, the worry then becomes that unelected judges might intrude and inappropriately impose judicial solutions to controversial political disputes over war.

Were Parliament ever to pass a war powers act, however, the potential for judicial meddling in matters of war might be more theoretical than real. The American experience is thus worthy of closer study and comparison because it suggests—even under constitutionally entrenched war power provisions—that this is the case. U.S. courts are loathe to interfere in war powers disputes, despite (or maybe because of) a written Constitution that places far more restrictions on government and gives far more power to the judiciary than a war powers act could do in the United Kingdom.²² In the United States, Congress has the power to declare war, raise and spend revenue, and otherwise authorize and provide for the armed forces.²³ These congressional powers often collide with the war powers of the President, who, as Commander-in-Chief, deploys and commands the military.²⁴ The result is legal ambiguity in the scope

20. See Jenkins, *supra* note 2, at 150–53 (discussing different interpretative approaches to the Constitution's distribution of war powers and the role of judicial review).

21. The separation of powers doctrine, in whatever way, thus to some degree ensures “fragmentation” of government power that, normatively, prevents dangerous concentrations of authority in a liberal democracy. While resisting theoretical cohesion, sometimes braking democratic majoritarianism, and occasionally resulting in less government efficiency, the doctrine's fragmentation of power is, for these same reasons, advantageous in that “it offers many points of entry into the policymaking process and many types of decision makers with varied incentives resulting from their distinct constituencies, institutional location, and ways of doing business.” Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PENN. L. REV. 603, 652 (2001). As others have pointed out even in the U.K., for instance, “[a] degree of friction between the courts and the executive is healthy. However, when it manifests itself in open conflict . . . , it can undermine public confidence.” Woodhouse, *supra* note 17, at 923; see David Feldman, *Human Rights, Terrorism and Risk: The Roles of Politicians and Judges*, PUB. L. 364, 383 (2006) (U.K.) (“Tension between institutions is not pathological; as long as it does not tear the state apart, it is a precondition for a healthy constitution under the rule of law.”); Lord Irvine, *supra* note 13, at 323 (“[T]he government can accept adverse court decisions, not as defeats, but as steps on the road to better governance.”); Lord Steyn, *Deference: A Tangled Story*, PUB. L. 346, 347–48 (2005) (U.K.) (asserting that tension between different branches of government is “natural and healthy”).

22. See *infra* note 36 for numerous examples in which U.S. courts have declined to intervene in war powers disputes.

23. U.S. CONST. art. I, § 8.

24. *Id.* art. II, §§ 1, 2.

of the President's discretion to engage in and conduct hostilities, given that it is Congress that has the authority to commit the nation to war and limit military resources. The only certainty in this system is that by assigning to the executive and legislative branches different but complementary war powers, the Constitution recognizes that *both* the executive and the legislature have important roles in military decision making.²⁵ Overlap and friction between congressional and presidential war powers thus allow for considerable political maneuvering, compromise, and sometimes conflict between the legislative and executive branches. Nevertheless, some form and degree of legislative approval for executive military actions is required.²⁶ Executive-legislative cooperation, no matter how legally tenuous or politically fragile, is thereby assured.²⁷

In this pragmatic way, the Constitution attempts to balance the efficiency of centralized, executive military command with heightened democratic accountability through legislative debate, scrutiny, and approval.²⁸ Therefore, despite the Constitution's formal division of war powers between the executive and the legislature, disputes over these powers in the U.S. are usually resolved politically rather than judicially.²⁹ This constitutional arrangement implicitly acknowledges that both political branches possess certain institutional qualities suited to war-making.³⁰ These include the dispatch, decisiveness, and discretion of the executive with the open deliberation of the legislature and localized political accountability of its members, which are virtues that the slow, case specific, and electorally isolated courts do not possess.³¹ The open, politically contestable allocation of

25. See *supra* text accompanying note 15 (explaining that the U.S. constitution divides the war powers between the legislative and executive branches).

26. See *supra* text accompanying note 15 (explaining that the U.S. constitution divides the war powers between the legislative and executive branches).

27. MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* 1 (2007) ("Modern conventional wisdom holds that the Constitution's text does not go very far toward resolving these and other debates over the control of U.S. actions on the international stage."); see EDWARD CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 201 (1984) ("The verdict of history, in short, is that the power to determine the substantive content of American foreign policy is a *divided* power, with the lion's share falling usually, though by no means always, to the President."); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 14-15, 29, 84-85, 92-97 (2d ed. 1996) (discussing power struggles over matters considered "lacunae" in the Constitution).

28. For further discussion about structurally managing efficiency and accountability values when legally distributing war powers between government institutions, see Jenkins, *supra* note 2.

29. The War Powers Act of 1973 presents one example of a political resolution. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541-48 (2000)); Jenkins, *supra* note 2, at 152.

30. Pushaw, *supra* note 10, at 1079-80.

31. Subjecting such delicate policy judgments to exacting scrutiny by unelected judges with no expertise in military affairs seems

war powers under the Constitution not only permits differing and perhaps conflicting interpretations of the legal demarcations of branch authority but also accommodates differing normative preferences for determining which values and which branches are best-suited for war-making.³² Furthermore, this system adapts over time in response to inter-branch dynamics and shifting value judgments that are themselves politically contingent. Thus, the American war powers model is an intrinsically political—not legal—process for adjusting and managing the different institutional capabilities of the legislative and executive branches to substantiate and reconcile accountability and efficiency concerns. A deeper understanding of why this might be so, despite the judiciary’s power to invalidate even primary legislation, can inform further discussions in the United Kingdom about the desirability and advisability of putting the Crown’s ancient war prerogative on a statutory footing.

One of the significant explanatory factors for American judicial deference to political decisions about war is the regard that American judges have for the relative democratic credentials of the executive, legislative, and judicial branches.³³ As discussed earlier, this concern also resonates in British debates over the extent or form of changes to the war prerogative.³⁴ Because war is a matter of such national importance, commitment, and cost, democratic principles demand that the final word on the subject be left in the hands of government officials accountable to the electorate and better able to respond to

inappropriate in a constitutional democracy. Furthermore, the political departments, especially the executive, have overwhelming institutional advantages in this area. Congress’s [*sic*] powers to declare war, fund the armed forces, and oversee executive actions are designed to ensure broad-based support for military efforts. The President alone can respond to emergencies and can implement war strategy with the requisite swiftness, decisiveness, and access to information (which is often secret). By contrast, the judiciary inherently proceeds far more slowly and deliberatively than either Congress or the President.

Id.

32. See Jenkins, *supra* note 2, at 150–53 (discussing different interpretative approaches to the Constitution’s distribution of war powers); see e.g., CORWIN, *supra* note 27, at 201 (describing authority under the constitution as a struggle between the President and Congress); David Barron & Martin Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine and Original Understanding*, 121 HARV. L. REV. 689 (2008) (discussing the congressionalist approach); Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006) (discussing the presidentialist approach).

33. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring in judgment) (“The judiciary may . . . have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But in doing so we should be wary and humble.”)

34. See *supra* p. 614.

military exigencies.³⁵ For such reasons, American courts have been very reluctant to involve themselves in matters of war, generally deferring to the political branches.³⁶ Similar democratic arguments, of course, have been the impetus for constitutional reforms that would increase Parliament's role in war-making while ensuring that British courts did not have too much say in the matter.³⁷ However, in both the U.S. and U.K. systems, distinctions need to be made between arguments about democratic *legitimacy* and democratic *accountability* to the electorate. Congressional and presidential war powers are granted by a Constitution premised upon popular sovereignty.³⁸ While the historical origins of the Royal prerogative are undemocratic, its modern exercise by senior ministers sitting in the House of Commons is democratically accountable to some degree. Because public authority in both countries is exercised on behalf of the people, popular sovereignty in some conceptual form ultimately legitimizes all government war powers in the United States and the United Kingdom.³⁹ Thus, questions about how to divide the war powers between different branches and whether or not to abolish the prerogative are not ones over democratic legitimacy writ large. Instead, these questions are process-oriented and concern how any political branch alone or in conjunction with the others can make decisions efficiently, while remaining accountable to the electorate, through ongoing public debates and periodically at the polls. Once

35. See *supra* text accompanying note 31.

36. For examples of reluctance of American courts to be involved in matters of war, see *Doe v. Bush*, 322 F.3d 109 (1st Cir. 2003); *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Da Costa v. Laird*, 448 F.2d 1368 (2nd Cir. 1971), *cert. denied*, 405 U.S. 979 (1972); *Orlando v. Laird*, 443 F.2d 1039 (2nd Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Berk v. Laird*, 429 F.2d 302 (2nd Cir. 1970); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967); *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1967); *Dellums v. Bush*, 752 F. Supp. 1141 (D. D.C. 1990); *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972); *Mottola v. Nixon*, 318 F. Supp. 538 (N.D. Cal. 1970). These cases should be contrasted with *Youngstown Sheet and Tube Co.*, 343 U.S. 579 (1952), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in which the President unconstitutionally tread upon fundamental individual rights and core functions of the other branches.

37. See U.K. MINISTRY OF JUSTICE, *THE GOVERNANCE OF BRITAIN*, 2007, Cm. 7170, at 17–18 (asserting that the prerogative powers of the executive should generally be brought under greater Parliamentary control); *COMMAND PAPER 7342-1*, *supra* note 1, at 47 (asserting that individuals who take unapproved deployment action should not be subject to civil or criminal liabilities).

38. See U.S. CONST. pmb. (“We the People”); DANIEL LESSARD LEVIN, *THE CONSTITUTION IN AMERICAN POLITICAL CULTURE* 19 (1999) (explaining that “We the People” identifies popular sovereignty).

39. See ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 285–87 (8th ed. 1920); Rivka Weill, *We the British People*, PUB. L. 380, 380–84 (2004) (U.K.) (discussing popular sovereignty in the British and American systems of government).

democratic accountability is placed in this narrower light of political responsiveness, rather than at the normative level of relationships to constituent power, one can then better analyze how the prerogative should be reformed. One can also better assess what role unelected judges should play in resolving inevitable war powers disputes of whatever quality, scale, or frequency between the elected political branches.⁴⁰

40. See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 4–12, 57–59 (1980) (discussing arguments for the democratic legitimacy of the American form of judicial review, in light of its clear anti-majoritarian role and the electoral isolation of federal judges). Of course, U.S. courts have an awesome power to invalidate primary legislation made by the elected Congress and signed by the elected President. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This is unlike their British counterparts, which must ultimately bow to majority wishes as expressed through the will of Parliament. DICEY, *supra* note 39, at 60 (explaining that parliament can override the court through legislation). This remains the case, even now that British judges have the power to issue non-binding declarations of incompatibility against Parliament under section 4 of the Human Rights Act 1998. Human Rights Act, 1998, c. 42, § 4 (Eng.), available at http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1#pb2-11g4. Furthermore, the judicial review of executive statutory powers, at least under the *ultra vires* doctrine, has the clear purpose of subjecting the Crown to the control of the supreme Parliament and, in the case of the prerogative, bringing it under legal control through the common law. Douglas E. Edlin, *From Ambiguity to Legality: The Future of English Judicial Review*, 52 AM. J. COMP. L. 383, 383 (2004) (“[T]he courts’ function in these cases is limited to effectuating the intentions of Parliament Judicial review, on this account, poses no threat to the orthodoxy of parliamentary sovereignty, because the courts are simply enforcing Parliament’s intentions when they restrain *ultra vires* administrative actions.”). The constitutional, but anti-majoritarian, role of the courts arguably becomes a bit clearer in Canada, for example, where courts can invalidate primary legislation for violating the Canadian Charter of Rights and Freedoms, Richard A. Edwards, *Judicial Deference Under the Human Rights Act*, 65 MOD. L. REV. 859, 867–68, 876–77 (2002), while section 33 of that Charter permits the federal Parliament and provincial assemblies to provide that a law shall operate “notwithstanding” certain guaranteed rights, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), available at <http://laws.justice.gc.ca/en/charter/>. Thus, whatever the respective remedial powers of American, British, or Canadian courts—and the scope and theoretical bases for their differing brands of judicial review—the anti-majoritarian nature of review can be seen as contributing to a broader, politically (as well as legally) sophisticated form of democratic dialogue between government institutions and officials, as well as between them and the public at large. See T.R.S. Allan, *Human Rights and Judicial Review: A Critique of ‘Due Deference’*, 65 CAMBRIDGE L.J. 671, 684 (2006) (U.K.) (“[T]he legitimacy of majority rule depends on the extent to which the rules enacted can be acknowledged as a fair expression of the public interest.”); Edwards, *supra*, at 867 (characterizing the relationship between branches of government under the U.K. Human Rights Act as one of continuing action and dialogue); Jeff A. King, *Institutional Approaches to Judicial Restraint*, 28 OXFORD J. LEGAL STUD. 409, 420, 428 (2008) (discussing collaborations between the branches of government to promote public welfare); Francesca Klug, *Judicial Deference Under the Human Rights Act 1998*, 2 EUR. HUM. RTS. L. REV. 125, 132 (2003) (discussing a dialogue approach to the Human Rights Act); see generally Richard Clayton, *Judicial Deference and ‘Democratic Dialogue’: The Legitimacy of Judicial Intervention Under the Human Rights Act 1998*, PUB. L. 33 (2004) (U.K.) (arguing for an intensive standard of

Debate over reform must therefore be attuned not only to the electoral responsiveness of the branches, but also more broadly to the respective processes by which the Government, Parliament, and the courts would make decisions bearing on military matters.⁴¹ As skeptics of statutory reform might rightly point out, some possibility of judicial review would naturally arise from any statutory regulation of war powers.⁴² However, judicial interpretation and enforcement of a war powers act would carry out the will of the elected Parliament and thus would be just as democratically legitimate as any other statutorily based judicial review.⁴³ Indeed, it would arguably be even more legitimate than the judicial review of prerogative actions, as it would be premised upon an act of Parliament.⁴⁴ Arguments for or

review under the Human Rights Act). Thus, as Chopper provocatively comments of the U.S. Supreme Court, even from a skeptical point of view:

It is widely assumed that the moral and intellectual force of the Court's opinions – its appeal to conscience as well as political ideals and its invocation of fundamental tenets – has led the people to transcend their immediate interests in favor of allegiance to traditional values and to reconsider the merit and virtue of previously formulated popular decisions. It may be that, despite the strong majoritarian underpinning of our society, many citizens (at least at certain times) welcome the judgments of an authoritarian and elitist government organ in the belief that it will aid in the preservation of stability as well as liberty.

CHOPER, *supra*, at 138–39. This statement expresses in stark terms the distinction between the democratic legitimacy and accountability of government institutions.

41. See *R v. British Broad. Corp.*, [2004] 1 A.C. 185, ¶ 76 (H.L.) (appeal taken from Eng. and Wales) (U.K.) (“Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others.”); *R v. Dir. of Pub. Prosecutions*, [2000] 2 A.C. 326, ¶ 381 (H.L.) (appeal taken from Eng. and Wales) (U.K.).

In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.

Int'l Transp. Roth GmbH v. Sec'y of State for the Home Dep't, (2003) Q.B. 728, para. 77 (U.K.).

[T]he executive's special responsibility is the security of the state's borders . . . the judiciary's special responsibility is . . . criminal justice . . . between the special territory of each there lies . . . a spectrum. The degree of deference owed . . . must depend upon where the impugned measure lies within this scheme.

Id.

42. For a discussion of how a statute might invite judicial review of war powers disputes, see A. McHarg, *Reforming the United Kingdom Constitution: Law, Convention, Soft Law*, 71 MOD. L. REV. 853, 870–73 (2008).

43. See DICEY, *supra* note 39, at 39–85 (discussing the principal of parliamentary sovereignty).

44. *Council of Civil Serv. Unions v. Minister for the Civil Serv.*, [1985] A.C. 374 (H.L.) (U.K.).

against statutory reform, then, instead need to focus upon: (1) whether judges' lack of democratic accountability to the electorate and the inherent limitations of the judicial process render courts ill-suited to review war powers cases; and (2) whether a war powers act would increase the risk of excessive or inappropriate review from that process-oriented standpoint.⁴⁵ This process analysis must drive not only consideration of just what kind of legal reforms should be undertaken in the first place but also subsequent assessment of what judicial approaches should be applied to review political actions pursuant to any future war powers act.

In the event of any future statutory reform of the war prerogative, British judges might find themselves in a similar situation to that of their American colleagues. British judges would have to be self-aware and carefully reflect on the institutional capability and propriety of courts to weigh in on delicate matters of war. Admittedly, this can be an awkward position for a judge. However, in enforcing constitutional or statutory provisions in a liberal democracy premised upon some baseline substantive values, both the American and British judge uphold another critical value to be taken into account in government war-making that is done in the public interest—the rule of law.⁴⁶ No political decision, however

45. Similar considerations have driven debates about the propriety and extent of judicial deference under the *Human Rights Act*. Edwards, *supra* note 40, at 859; Jeffrey Jowell, *Judicial Deference: Servility, Civility or Institutional Capacity*, PUB. L. 592, 592, 595 (2003); Steyn, *supra* note 21, at 354–55; Woodhouse, *supra* note 17, at 932.

46. As Jowell writes of the legitimacy of judicial power in a *post* Human Rights Act era: “No longer can we equate ‘democratic principle’ with ‘majority approval.’ Nor can we any longer arrogate the monopoly of legitimacy to those decisions endorsed by the electorate. The new expectations have at their heart the protection of a limited but significant catalogue of rights even against overwhelming popular will.” Jowell, *supra* note 45, at 597. He continues that “a realistic sense of [judges’] own limitations should not lead them to disparage their own legitimacy, or to deny their own authority, on account alone of their lack of accountability to the electorate.” *Id.* at 601; *see also id.* at 599 ([C]ourts have . . . held that a body which owes allegiance to the popular will is disqualified for that reason from making certain kinds of decision). Along the same lines, Feldman writes “democratic accountability is not the only or predominant basis for legitimacy of policy-related decision-making,” arguing that even courts can have a role in national security matters. Feldman, *supra* note 21, 375–78. As Clayton puts it with regard to judicial review in Canada: “There is also another aspect of judicial review that promotes democratic values. Although a court’s invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be.” Clayton, *supra* note 40, at 44. Accordingly, in an extra-curial statement of Lord Steyn, “[t]here is nothing antidemocratic about the role of the courts. The so-called counter majoritarian difficulty is a little unreal.” Steyn, *supra* note 21, at 348. His words in *A v. Sec’y of State for the Home Dep’t* are notably apt:

I do not in particular accept the distinction which [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It

sensitive or urgent, can be a pretext for the executive to exercise power outside of all legal limitations, to violate the most fundamental of individual rights without legal authority to do so, or to usurp core legislative or judicial functions so as to undermine basic separation of powers principles. Such an approach would go beyond even the widest war-making discretion and move toward something resembling a Schmittian state of exception that is antithetical to a liberal, democratic system that legitimizes those very political processes relied upon by officials and the public alike.⁴⁷ The judiciary therefore has not only an institutional competency but also a constitutional duty to interpret and enforce legal restrictions on war powers when political disputes over their meaning would escalate so as to risk destabilizing other constitutional norms.⁴⁸ This judicial role, therefore, is both democratically legitimate in the fundamental sense and, from the perspective of institutional processes, in line with the adjudicative competency and thus proper constitutional role of the courts.⁴⁹

Nevertheless, as American experience suggests and despite understandable concerns over the role of judicial process, a statutory reform of the war prerogative in the United Kingdom would not

is also of course true . . . that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.

[2005] 2 A.C. 68, para 42 (H.L.). The construction and understanding of some structural mechanisms for checking government action therefore becomes necessary in promoting what K. D. Ewing has called a “culture of liberty.” Keith D. Ewing, *The Futility of the Human Rights Act*, PUB. L. 829, 831 (2004) (U.K.).

47. See D.A. Jeremy Telman, *Should We Read Carl Schmitt Today?*, 19 BERKELEY J. INT’L L. 127, 137 (2001) (book review) (“Although Schmitt would allow the state to act outside the law only in exceptional circumstances where such actions were necessary in order to ensure political stability, his theory is incompatible with liberalism because, for Schmitt, the sovereign state’s power to engage in exceptional, extra-legal acts is its very essence.”).

48. For Choper, the main justification for judicial review is the preservation of individual rights against government action, thereby supporting judicial deference to political processes when rights are not clearly in issue. CHOPER, *supra* note 40, at 64, 66, 296, 330, 414. However, even he recognizes the hypothetical necessity of the courts to settle extreme, intransigent conflicts between the branches, going to the line in defending their own and contesting the other’s constitutional powers: “[A]t least here the Court should intercede to preserve our constitutional equilibrium and to avoid the unseemly conversion of a grave constitutional crisis into a street corner brawl of naked self-help that would heap scorn on both [executive and legislative] departments.” *Id.* at 298. He also recognizes a role for the courts in defending its own institutional position from encroachment by and interference from the political branches. *Id.* at 384, 413.

49. See CHOPER, *supra* note 40, at 298 (“[T]he court should intercede to preserve our constitutional equilibrium . . .”).

necessarily lead to undue judicial involvement in matters of war. In applying statutory requirements (at least openly worded ones subject to varying interpretations, in contrast perhaps to procedurally detailed ones leaving less room for political maneuvering), British courts would have to assess whether a war powers dispute indeed infringed discernible fundamental rights or led to a constitutional impasse—and so threatened the rule of law—in which political means of resolution had reached deadlock, were inadequate, or for some other reasons ought to give way to legal processes.⁵⁰ The latter occasion would likely be very rare in practice, thus ameliorating the risks of judicial interference in matters of war. Despite their power of judicial review, American courts have shown remarkable self-restraint in war powers cases.⁵¹ They have taken the expansive language of the Constitution and the possibilities of branch conflict not as an invitation or opportunity for judicial intervention but as a warning that the political arena is the best place for resolution of such disputes.⁵² Even the War Powers Act of 1973, setting out specific guidelines for presidential use of force without congressional pre-authorization, has not provoked a judicial change in habits of review.⁵³ U.S. courts clearly favor political solutions and defer to the political branches, which can better balance efficiency and accountability concerns, especially where the initiation and conduct of armed conflict is at issue.⁵⁴ The courts will assert themselves only in those extraordinary war powers cases when the rule of law is at

50. See, e.g., *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 815 (2000) (finding that individual Congressmen lacked standing to bring a case under the War Powers Act in the absence of clear congressional opposition to presidential military action against Yugoslavia); *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973) (political branches must be clearly and resolutely in opposition for a case to be ripe for review).

51. See *supra* note 36 for examples of cases exhibiting such restraint.

52. See *infra* Part III (the Political Question doctrine).

53. See, e.g., *Campbell*, 203 F.3d at 19 (Congressional judicial action against the president under the War Powers Act failing on combination of standing and political question issues); see War Powers Act, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§1541-1548) (2000)). More fully:

This Act requires the President to submit a report to Congress, within 48 hours, whenever armed forces are introduced into hostilities or are in a situation where involvement in hostilities is imminent. Unless Congress has declared war or otherwise authorized such action within 60 days, the President must withdraw American forces. In attempting to control judicial interpretation, the Act also declares that congressional authorization shall not be inferred from any law, including appropriations.

David Jenkins, *Constitutional Reform Goes to War: Some Lessons from the United States*, PUB. L. 258, 271(2007) (U.K.) (internal citations omitted). Indeed, this Article gives no more attention to the U.S. War Powers Act, for the reason that no court has ever construed it to limit either Congress or the President, due to the institutional deference discussed. Jenkins, *supra*, at 13.

54. See *infra* Part III (addressing the political question doctrine).

stake, and adjudication of a war powers dispute becomes both desirable and necessary for defining and maintaining outer constitutional boundaries for political action.⁵⁵

American courts have consistently based this deferential posture on the “political question doctrine,” discussed in the next Part of this Article, which sets out criteria of justiciability for determining whether a particular constitutional question is indeed an issue more suitable for political or judicial resolution.⁵⁶ In war powers cases, the doctrine has most usually compelled the former conclusion.⁵⁷ This doctrine requires that a judge consider how a war powers dispute implicates operational efficiency, democratic accountability, and rule of law values.⁵⁸ He or she must then assess the institutional competency of a court to adjudicate a solution in light of those values’ relative weight and the competencies of the political branches. The doctrine gives preference to the political processes in military matters, excepting again cases in which a political branch attempts to invoke war powers to infringe fundamental rights (seen in President Bush’s unilateral attempt to designate, try, and imprison so-called “enemy combatants” without due process of law⁵⁹) or when there arises a potentially dangerous constitutional conflict between the other two branches (as with Congress’ opposition to President Nixon’s military actions in Cambodia⁶⁰). At times, these individual liberty interests and separation of powers concerns will closely coincide and

55. See HENKIN, *supra* note 27, at 134–36. This structural dynamic is in keeping with the Constitution’s framework for the separation of powers. “[T]he text, as historically understood, distributes foreign affairs power [which includes that of war-making] across multiple independent power centers: the President, the Senate, Congress, the states, and the courts. Each has independent authority that prevents the others from always having their own way.” RAMSEY, *supra* note 27, at 379.

56. See *infra* Part III.

57. See, e.g., *Holtzman v. Schlesinger*, 414 U.S. 1304, 1315 (1973) (holding that the “highly controversial constitutional question involving the other two branches of this Government must follow the regular appellate procedures . . .”); *Orlando v. Laird*, 443 F.2d 1039 (2nd Cir. 1971), *cert. denied*, 404 U.S. 869 (1971) (challenging constitutional sufficiency of authority of the executive branch to wage war in Vietnam); *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1967) (challenging an order that petitioners be sent to a West Coast replacement station for shipment to Vietnam and the U.S. military activity in Vietnam).

58. See *Baker v. Carr*, 369 U.S. 186, 217 (1962) (explaining factors the Court must consider when deciding a political question doctrine issue); see also CHOPER, *supra* note 40, at 4–12 (discussing the role of the judicial review within the context of the American representative democracy).

59. *Hamdi v. Rumsfeld*, 542 U.S. 507, 538–40 (2004); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 623–24 (2006) (explaining that the President did not provide a reason why the court martial rules were impracticable); *Rasul v. Bush*, 542 U.S. 466, 488 (2004) (holding that federal court jurisdiction is permitted because of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees).

60. See *Holtzman v. Schlesinger*, 414 U.S. 1304, 1315 (1973) (overruling a lower court decision which enjoined the Secretary of Defense, among others, from continuing air operations over Cambodia).

heighten justiciability, as they did when President Truman attempted the unilateral executive nationalization of the steel industry during the Korean War without any statutory authority to do so.⁶¹ In “run-of-the-mill” executive–legislative disputes over the authority to commit the nation to war or manage military operations, however, courts will accordingly abstain from review.⁶² The end result, at first glance, is that the American political question doctrine appears not so different in substance from the British doctrine of justiciability, which already applies not only to review of the executive’s statutory powers but also to its prerogative decisions.⁶³ There is no reason why these justiciability concerns would not continue to apply to cases arising under any future British war powers act. A closer look at just how and why American courts shy away from involving themselves in war powers cases is thus a good starting point for re-thinking how British courts might, would, or should one day apply a war powers act.

III. WAR POWERS, POLITICAL QUESTIONS, AND JUDICIAL REVIEW

Despite the important constitutional issues raised by the prospect of statutory war powers reform, there has been surprisingly little commentary or speculation by British legal scholars about just what the effects of such primary hypothetical legislation might be on judicial review. In contrast, American writing on the subject of war powers is rich and voluminous, understandably so in light of the long national experience with war powers under the Constitution.⁶⁴ That scholarship offers a starting point for further political debate and academic commentary within the British context, by suggesting just how and why courts might generally prefer to leave war powers disputes to political resolution, despite the existence of written legal provisions.

Accordingly, this part of the Article turns to American work on the war powers and the political question doctrine to understand better the phenomenon of judicial self-restraint in such cases. The first subpart compares prevailing views of the Constitution’s war

61. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952); see generally CHOPER, *supra* note 40, at 388–93 (discussing the increased justiciability of claims which are based on individual constitutional rights).

62. CHOPER, *supra* note 40, at 388–93.

63. See Jenkins, *supra* note 53, at 265–73 (comparing American and British non-justiciable political question doctrines).

64. See generally Harold Hongju Koh, *Judicial Constraints: The Courts and War Powers*, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES 121 (Gary M. Stern & Morton H. Halperin eds., 1994) (discussing the courts and war powers).

powers represented by Edward Corwin and H. Jefferson Powell.⁶⁵ While they differ in their interpretations of those powers, they nevertheless both suggest the aforementioned importance of assessing the branches' institutional capabilities to realize the values of efficiency, accountability, and the rule of law.⁶⁶ The second subpart examines how the political question doctrine guides American courts in assessing their own ability to adjudicate war powers disputes and the propriety of doing so in any particular case. The work of Herbert Wechsler, Alexander Bickel, and Fritz Scharpf represent the three main schools of thought on the deeper constitutional meaning of the doctrine.⁶⁷ However, all of them support another general conclusion relevant for any future British discussions on war powers reform—that is, despite different theoretical accounts of the judicial role, courts will seldom interject themselves into politically sensitive areas of war-making, even where constitutional or statutory provisions exist.⁶⁸

A. *Executive, Legislative, and Judicial Roles in War-Making*

Edward Corwin describes the U.S. Constitution's allocation of authority over American foreign relations, which encompasses the initiation and conduct of war, in terms reflecting executive–legislative branch dualism.⁶⁹ Corwin's position is that the Constitution entrusts both war and foreign affairs to concurrent congressional and presidential authority.⁷⁰ He argues that the Constitution only extends to Congress and the President, in light of their respective powers, “an invitation to struggle for the privilege of directing foreign policy.”⁷¹ He writes:

What the Constitution does, *and all that it does*, is to confer on the President certain powers capable of affecting our foreign relations, and certain other powers of the same general kind on the Senate, and still other such powers on Congress; but which of these organs shall have the decisive and final voice in determining the course of the American nation is left for events to resolve.⁷²

65. For a comparison of Powell and Corwin's views, see discussion *infra* Part III.A.

66. For a comparison of Powell and Corwin's views, see discussion *infra* Part III.A.

67. For analysis of Wechsler, Bickel, and Scharpf's views, see discussion *infra* Part III.B.

68. For analysis of Wechsler, Bickel, and Scharpf's views, see discussion *infra* Part III.B.

69. CORWIN, *supra* note 27, at 201.

70. *Id.*

71. *Id.* at 201; see also HENKIN, *supra* note 27, at 92–108 (discussing the distribution of Constitutional power between the President and Congress).

72. CORWIN, *supra* note 27, at 201.

Although the executive branch possesses the attributes of institutional unity, secrecy, dispatch, and information access that give it advantages in conducting foreign affairs and commanding the armed forces, Congress nevertheless undertakes debate and increases public scrutiny of war policy choices by exercising its powers of the purse, to declare war, and to raise and maintain armies.⁷³ The Constitution accordingly divides power over foreign affairs, and thus war, between the executive and legislative branches in a manner that is politically volatile, contingent upon factual circumstances, and functionally dependent upon which branch is institutionally better able to decide upon a certain matter.⁷⁴

H. Jefferson Powell has taken issue, to an extent, with Corwin's assessment, agreeing that history has demonstrated continuing struggle between Congress and the President over the conduct of foreign affairs and war but disagreeing with Corwin that the Constitution has nothing further to say about the matter.⁷⁵ Powell admits that neither Congress nor the President seems to have exclusive or plenary authority over these areas and that formalistic textual arguments cannot conclusively refute Corwin's suggestion that the Constitution invites political struggle.⁷⁶ Nevertheless, Powell argues that the "best reading" of the Constitution recognizes that the President holds the power to formulate and execute foreign and military policy, thus leaving such disputes to political rather than judicial resolution.⁷⁷ Powell's position does not mean that Congress does not possess considerable power to contest and influence such matters but only that it is "institutionally incapable of taking the leading role in formulating foreign policy."⁷⁸ Powell's argument also applies to war-making, where the President, as Commander-in-Chief, possesses some concurrent authority with Congress to commit the nation to hostilities. He therefore differs from Corwin in that he believes the Constitution tips the balance of initiative in favor of the President, relegating Congress to a more limited, reactive role in foreign and military affairs.⁷⁹

73. *Id.*

74. See HENKIN, *supra* note 27, at 96–118 (discussing the division of war powers between the President and Congress).

75. H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* 4–5 (2002).

76. *Id.*

77. *Id.* at 17, 25, 95–97, 147–49. For criticism of Powell's historical conclusions, see David Gray Adler, *Constitution, Foreign Affairs and Presidential War-Making: A Response*, 19 GEO. ST. U. L. REV. 947 (2003).

78. POWELL, *supra* note 75, at 102–04; see RAMSEY, *supra* note 27, at 112–13 ("Although Congress can restrict the President's conduct of foreign affairs, it cannot accomplish much affirmatively without the President's cooperation.")

79. POWELL, *supra* note 75, at 95–98; see also, Jenkins, *supra* note 53, at 4 ("[T]he unilateral discretion of the President to initiate hostilities is actually much

Presidential initiative notwithstanding, Powell admits that the “declare war” clause sets some “outer boundary” on executive action and requires congressional authorization once hostilities reach “some point of severity” at which time they become a full war, as opposed to limited military action, in the constitutional sense.⁸⁰ Powell thus recognizes that war is an exception to presidential power to formulate and execute foreign and military policy, unilaterally using limited force in some circumstances:

If the anticipated or actual severity, scope or duration of hostilities rises to the level of ‘war’ in a constitutional sense, congressional authorization is constitutionally necessary. Furthermore, to the extent that Congress has acted to prohibit the use of the armed forces in a given conflict, area or set of circumstances, that prohibition is binding.⁸¹

In this way, the Constitution “provides for autonomous foreign-policy initiative in the executive as well as ensuring that Congress has the means of addressing wayward or antidemocratic behavior by the executive,” thereby establishing checks and balances through branch interdependence.⁸²

While Powell disagrees with Corwin by finding a “best reading” that favors presidential initiative, their positions are nonetheless reconcilable insofar as they both characterize foreign and military affairs as matters for political resolution between the executive and legislative branches.⁸³ Notwithstanding any presidential initiative in war-making, a necessary corollary of both Corwin’s and Powell’s arguments is that there must be occasional circumstances when judicial involvement becomes necessary. Courts must protect individual fundamental rights against government action, police the outer boundaries of the political process itself, and resolve those disputes resulting in political deadlock. Thus, without the possibility of judicial review in extreme cases, the President and Congress could trample on individual rights using the war powers, and serious political disputes could potentially lead to constitutional crises when the executive and legislative branches are at loggerheads.⁸⁴ Therefore, even regular judicial deference to the political process does not foreclose occasional judicial review. As Corwin writes:

greater than the Constitution’s “declare war” clause would suggest on its face, due to congressional and judicial deference to executive war-making.”)

80. POWELL, *supra* note 75, at 113–22.

81. *Id.* at 139.

82. *Id.* at 139–42.

83. *Id.* at 139–40; *see* CORWIN, *supra* note 27, at 201 (describing the relationship between the President and Congress as a struggle for divided power).

84. *See* CHOPER, *supra* note 40, at 329–30 (discussing the court’s role in adjudicating individual rights claims in the context of Executive and Legislative war powers).

War does not of itself render constitutional limitations liable to outright suspension by either Congress or President, but does frequently make them considerably less stiff—the war emergency infiltrates them and renders them pliable. Earlier constitutional absolutism is replaced by constitutional relativity; it all depends—a result that has been definitely aided in the case of substantive rights by the modern conception of due process of law as “reasonable law” – that is to say, what the Supreme Court finds to be reasonable in the circumstances.⁸⁵

He suggests that such “constitutional relativity” in times of war, while not leading to the irrelevance of legal boundaries to branch powers, nevertheless sometimes appears to reduce them to a near “vanishing point.”⁸⁶ The judiciary will refrain from reversing political compromises reached by Congress and the President or interfering in their political haggling over high policy matters of war.⁸⁷

Corwin’s “vanishing point” for existing legal limitations signals a near complete absence of justiciability factors, exacerbated by the nature of war and national security matters.⁸⁸ It might be more accurate to say, then, that these limitations do not actually vanish, but the nature of the dispute is such that the courts’ adjudicatory processes simply have no traction in grappling with the contested issues until rule of law concerns escalate so as to present a clear case and controversy for adjudication. Accordingly, in *Doe v. Bush*,⁸⁹ the First Circuit Court of Appeals refused to enjoin the President from initiating military action against Iraq because of constitutionally insufficient congressional involvement with and pre-authorization for the presidential decision to invade. As Judge Lynch wrote for the three judge panel:

85. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* 80 (1947); see CORWIN, *supra* note 27, at 271 (explaining that in the “crucible of war” the delegation of power becomes “highly malleable.”).

86. CORWIN *supra* note 85, at 127–31; CORWIN *supra* note 27, at 297 (describing how questions of constitutional interpretation are set aside at war time in order to focus on the task at hand). But see CORWIN, *supra* note 85, at 117–22, and CORWIN *supra* note 27 at 292–93, discussing *Ex parte Quirin*, 317 U.S. 1 (1942), and arguing that the President possesses plenary authority as Commander-in-Chief to deal with unlawful combatants, including those who are United States citizens. His position in this instance conflicts with his idea of “constitutional relativity.” Corwin’s analysis of *Ex parte Quirin* would erect an absolute barrier to judicial review over an executive claim of authority to designate and detain a citizen as an unlawful combatant. He would do so by advancing a formalistically defined, inherent executive war power possibly immune from any congressional limitation or judicial scrutiny, without reference to the circumstances of the particular case. This view is incompatible with his otherwise flexible, contextual notion of “constitutional relativity,” in favor of bright-line and conclusive determinations of what types of war powers are or are not amenable to judicial review. In any case, such a position is now untenable in light of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

87. CORWIN, *supra* note 85, at 131.

88. *Id.*

89. 323 F.3d 133 (1st Cir. 2003).

The case before us is a somber and weighty one. We have considered these important concerns carefully, and we have concluded that the circumstances call for judicial restraint. The theory of collision between the executive and legislative branches is not suitable for judicial review, because there is not a ripe dispute concerning the President's acts and the requirements of the October Resolution [for use of military force against Iraq] passed by Congress. By contrast, the theory of collusion, by its nature, assumes no conflict between the political branches, but rather a willing abdication of congressional power to an emboldened and enlarged presidency. That theory is not fit for judicial review for a different, but related, reason: Plaintiffs' claim that Congress and the President have transgressed the boundaries of their shared war powers, as demarcated by the Constitution, is presently insufficient to present a justiciable issue. Common to both is our assessment that, before courts adjudicate a case involving the war powers allocated to the two political branches, they must be presented with a case or controversy that clearly raises the specter of undermining the constitutional structure [footnote omitted].⁹⁰

On the other hand, Corwin's and Powell's arguments imply that the usual institutional primacy of the political branches in foreign and military affairs become increasingly difficult to justify when (1) the executive and legislature are deadlocked; (2) they potentially violate express rather than generalized legal requirements for war-making decisions; or (3) they use war powers beyond the initiation of armed conflict or strategic command of the armed forces to take actions intruding upon fundamental rights.⁹¹ The consequent increases in justiciability of the issue and the risks to the rule of law, in turn, harden apparently vanished legal boundaries, making them clearer and more amenable to adjudication. Nevertheless, the focus on justiciability means that courts will almost always defer to the political branches when they contest taking the nation to war. As politically irreconcilable conflicts between the executive and legislative branches will thankfully be quite rare, courts will then typically review only those periodic actions by branches that run up against clear legal limitations to their authority or infringe upon fundamental individual rights.⁹² This was the case in *Hamdi v. Rumsfeld*, when President Bush ordered the detention of an American citizen as an unlawful combatant, thereby functionally adjudicating individual liberty interests under the guise of the war powers.⁹³ The Supreme Court decided that, while such a detention power had been implicitly granted by Congress (based upon a broad

90. *Id.* at 135.

91. See POWELL, *supra* note 75, at 141–46 (discussing objections to his proposed answer).

92. See CHOPER, *supra* note 40, at 329–30 (discussing judicial review of individual rights claims); see also Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1468–69, 1497 (2005) (offering a set of criteria for the Court to consider when deciding political questions).

93. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004).

and deferential reading of congressional authorization for the use of force against terrorists), the President was nevertheless constitutionally required to exercise it in accordance with some basic due process.⁹⁴ The Court's willingness to exercise review in *Hamdi* was a palpable contrast to the deference the First Circuit showed in *Doe v. Bush*, for instance.⁹⁵

This American approach to reviewing war powers is to an extent similar to the situation that exists in the United Kingdom, where courts will review both statutory and prerogative executive decisions under standards of legality, procedural propriety, and reasonableness alongside the rights guarantees of the European Convention on Human Rights—but only as long as the subject matter is justiciable.⁹⁶ Thus, British courts have refused to review strategic military decisions as non-justiciable issues, as in the *C.N.D.* case,⁹⁷ while imposing a reasonableness standard on the prerogative decision to exclude homosexuals from military service, as seen in the Court of Appeal's decision in *ex parte Smith*.⁹⁸ However, even in that case, the court found that the ban was not unreasonable given the sensitive political nature of military discipline and national security (although the European Court of Human Rights later disagreed with this result and application of a broad *Wednesbury* standard of reasonableness where Convention rights were concerned).⁹⁹ Even if a court

94. See, e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing "use of United States Armed Forces against those responsible for the [September 11, 2001] attacks launched against the United States."); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 614 (1952) (holding the President did not act within his constitutional powers); *Brown v. United States*, 12 U.S. 110, 129 (1814) (holding the power to confiscate property during times of war lies with the legislature). But see *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (holding that an order by the President for removal of an alien enemy is not subject to judicial review); *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) (holding that it was within the war power of the executive to exclude those of Japanese ancestry from the West Coast war area); *Ex parte Quirin*, 317 U.S. 1, 48 (1942) (holding that the President was authorized to order that a charge of violation of the law of war be tried by the military commission).

95. Compare *Hamdi v. Rumsfeld*, 542 U.S. at 535–39 (exercising judicial review of the Executive branch's actions) with *Doe v. Bush*, 323 F.3d at 139 (deferring to Presidential power to invade Iraq).

96. See *Jenkins*, *supra* note 53, at 267–68 (discussing the British judiciary's practice of determining if an issue is justiciable).

97. Campaign for Nuclear Disarmament v. Prime Minister of the U.K., [2002] EWHC 2777 (Admin) (U.K.).

98. *R v. Ministry of Defence*, (1996) Q.B. 517, 547 (U.K.).

99. *Smith v. U.K.*, 29 Eur. Ct. H.R. 493, 543 (2000); see also *R v. Sec'y of State for the Home Dep't*, (2001) 2 A.C. 532, 548–49 (H.L.) (U.K.) (describing difference between *Wednesbury* standard of review and the standard of review under the European Convention); *Associated Provincial Picture Houses v. Wednesbury Corp.*, (1948) 1 K.B. 223, 229–30 (C.A.) (U.K.) (describing the standard of reasonableness); *Lustig-Prean v. U.K.*, 29 Eur. Ct. H.R. 548, 558 (2000) ("[C]onventional *Wednesbury* principles, adapted to the human rights context, should be applied.").

ultimately determines that a case is justiciable and therefore reviewable as a threshold matter, it might still show deference to the political judgment of Parliament or the Government when national security is in issue, as the House of Lords did in *Secretary of State for the Home Department v. Rehman*.¹⁰⁰

The European Convention on Human Rights, per the Human Rights Act, now requires a stricter, rights-based scrutiny of such decisions.¹⁰¹ The European Court of Human Rights made this clear in disagreeing with the Court of Appeals' deference in *ex parte Smith*, and the House of Lords itself has found provisions of Parliament's anti-terrorism legislation to be incompatible with the Convention in *A and Others*.¹⁰² Nevertheless, judicial deference to political decisions about war-making would continue despite the Convention, especially when high policy matters such as the initiation or conduct of war would be at issue, as they would be in any hypothetical dispute under a British war powers act.¹⁰³ American and British cases thus similarly reflect Corwin's "constitutional relativity" insofar as they demonstrate that courts will only review war powers decisions in those rare justiciable instances where the need for political judgment must give way to the adjudication of clear rights claims or judicial settlement of an impasse between the branches.¹⁰⁴ Otherwise, courts will often defer to political processes for resolving war powers disputes, even where written legal standards might be applicable, due to an institutional inadequacy in addressing such subject matter.¹⁰⁵ Just how firm legal standards are in any particular war powers case will vary depending on the circumstances and a judge's assessment of the relative branch capabilities to effectuate often competing efficiency, accountability, and rule of law concerns. Constitutional relativity therefore permits considerable and regular judicial deference to executive and legislative decisions about the initiation and conduct of war, but it stops short of a true vanishing point where the political branches might act outside of any legal controls

100. (2003) 1 A.C. 153, 184 (H.L.).

101. Human Rights Act, 1998, c. 42, § 1 (Eng.), available at http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1#pb2-11g4.

102. A v. Sec'y of State for the Home Dep't, (2005) 2 A.C. 221 (H.L.) (U.K.); see also Sec'y of State for the Home Dep't v. JJ and Others, (2008) 1 A.C. 385, 415–16 (H.L.) (U.K.); MB v. Sec'y of State for the Home Dep't, (2008) 1 A.C. 440, 490 (H.L.).

103. See Jenkins, *supra* note 53, at 277 ("[I]t is difficult to hypothesize a situation in which a challenged prerogative decision to go to war or command the armed forces in the field would present judicially identifiable standards not best left to political resolution.").

104. See CORWIN, *supra* note 85, at 127–31 (explaining the term "constitutional relativity").

105. See Choper, *supra* note 92, at 1486–87 (discussing the institutional competencies of each branch).

whatsoever.¹⁰⁶ The same process-based argument for judicial deference in most war powers disputes—especially in the initiation and conduct of military operations—conversely justifies review in exceptional cases where rights are at stake or, even more rarely, where the executive and legislative branches stubbornly collide.

Even under the existing war prerogative, British judges already assess justiciability, thus approaching war powers cases in a manner somewhat similar to their American colleagues.¹⁰⁷ The upshot is that while the U.S. Constitution requires some institutional cooperation between Congress and the President in taking the nation to war—a prerogative residing solely with the British Crown, by contrast—American judges are just as reluctant to interfere in matters of war due to the general deficiencies of the courts and the adjudicative process in war-making.¹⁰⁸ Courts in both the United States and United Kingdom therefore already apply conceptually similar notions of a “political question” to those military and national security matters they have found to be non-justiciable—even where applicable legal requirements might exist. In turn, these common principles of justiciability allow American and British courts gradually to shift from deference to more intense levels of review, as it becomes appropriate.¹⁰⁹ In matters of war, however, such intense review will seldom occur.¹¹⁰ To better understand the institutional limitations of courts and how judges might decide to review war powers cases in the face of statutory legal requirements, a closer look at the American political question doctrine is instructive.

106. CORWIN, *supra* note 85, at 127–31; *see* CORWIN, *supra* note 27, at 297 (describing the relaxation of constitutional interpretation during times of war).

107. *But see* Allan, *supra* note 40, at 680–81, 683, 688–89, 692, 694–95 (expressing reservations about a justiciability doctrine and the undue judicial deference that it might cause); King, *supra* note 40, at 412–13, 421–24 (same).

108. *See generally* Jenkins, *supra* note 53 (comparing the American and British war practices and judicial responses).

109. Pushaw, *supra* note 10, at 1016.

110. *Id.* at 1016; Koh, *supra* note 64, at 124; Pushaw, *supra* note 10 (“In short, the rigor of judicial review waxes and wanes depending upon the context of each case.”). This contextual and varying approach to judicial review is already recognized in the U.K. in regard to the review of European Convention rights per the Human Rights Act. “The extent and degree of concession of course depends upon context and the right and interest involved A concession on the basis of institutional capacity need not, however, lead the courts effectively to delegate the entire decision to another branch of government.” Jowell, *supra* note 45, at 598. Thus, while there is every reason to believe that this idea of deference would continue under a future war powers act (most certainly so when Convention rights would be at issue), this would not necessarily entail a regular or insensitive judicial intrusion into high policy matters of war. “Concluding that there cannot be ‘no-go’ areas for judges under the HRA does not, however, necessarily require them to intrude on the rightful role of elected judges and politicians.” Klug, *supra* note 40, at 130; *see generally* Paul Daly, *Justiciability and the ‘Political Question’ Doctrine*, PUB. L. 160 (2010) (U.K.) (discussing whether the political question doctrine allows courts to avoid ruling in certain categories of cases).

B. *The Political Question Doctrine and Judicial Deference*

American federal courts have consistently made clear that decisions over the initiation and conduct of hostilities are political questions unsuitable for judicial resolution and, therefore, are constitutionally relegated to the political branches.¹¹¹ This reticence reflects a judicial self-assessment that courts are usually institutionally ill-equipped and adjudicative processes are usually ill-suited to promote values of accountability and efficiency in war-making. Only in rare cases, when a case becomes justiciable and rule-of-law concerns run high, will courts review war powers disputes to ensure constitutional stability.¹¹² The political question doctrine, as articulated most clearly in *Baker v. Carr*,¹¹³ reflects this process-oriented approach to branch war powers. The decision in *Baker* set out the main criteria of justiciability for analyzing when courts should defer to political processes¹¹⁴—criteria that war powers cases usually satisfy, even under a written constitution.

In *Baker*, the Supreme Court addressed a claim that the State of Tennessee misapportioned state legislators among the population in a way that debased the votes of the plaintiffs and denied them equal protection under the Fourteenth Amendment.¹¹⁵ The Court rejected the argument that legislative apportionment was a non-justiciable political question not subject to judicial review.¹¹⁶ Writing for the majority, Justice Brennan explained that an evaluation of whether a constitutional dispute was one to be resolved by the political branches, rather than by the courts, was necessary under the separation of powers.¹¹⁷ The political question doctrine, and the criteria used in determining whether it applied in any particular case, thus also arose from the need to evaluate the relative

111. "Although the modern Supreme Court has not often invoked that doctrine, dismissals on this basis are legion among lower courts." RAMSEY, *supra* note 27, at 322.

112. For prominent examples of courts reviewing war powers disputes, see *supra* note 59.

113. 369 U.S. 186 (1962). However, the origins of the political question doctrine, intrinsic as it is to the exercise of judicial power, go back to that seminal American decision on judicial review, *Marbury v. Madison*. 5 U.S. (1 Cranch) 137, 170 (1803).

The province of the Court is solely to decide the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Id.

114. *Baker*, 369 U.S. at 217.

115. *Id.* at 187.

116. *Id.* at 198–99.

117. *Id.* at 210–11.

institutional capabilities of the branches to make certain decisions.¹¹⁸ As Justice Brennan explained:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue 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 nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; 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.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.¹¹⁹

Brennan's analysis of the political question doctrine inextricably links it with a contextual assessment of justiciability under the facts of each case. As such, it rejects advanced, formalistic characterizations of the constitutional issues that a court would or would not review. This case-by-case determination means that courts reserve authority to enforce constitutional limitations on congressional and executive actions without necessarily pre-committing themselves to abstaining from review over broad categories of government powers. However, their institutional ability to exercise review and the propriety of doing so in a case at bar will vary considerably. To put it in language familiar to British lawyers, it is the justiciability of the particular subject matter in question, rather than the classification or source of the power involved (such as "presidential war powers"), that is dispositive of judicial competence to exercise review. The existence of written constitutional requirements, like the declare war clause, thus does not foreclose inclusion of many other factors in this process-oriented analysis in order to determine which branches alone or together are institutionally best suited to decide an issue. However, some subject matter, such as the initiation or conduct of war, might

118. *Id.* at 210.

119. *Id.* at 217.

be non-justiciable by their nature in all but the most unusual case despite being regulated by constitutional or statutory provisions.

The *Baker* criteria, however, have sparked numerous questions about the true nature of judicial deference and review under the Constitution's separation of powers. Academic debates about the political question doctrine lead to two main conclusions. First, as to the requirements of the doctrine, "no lawyer has ever understood exactly what it means;"¹²⁰ second, American commentators "assume that there is a close and necessary relationship between the legitimacy of judicial review and the theories that might explain the political question cases."¹²¹ Although the *Baker* criteria attempt to shed light on the nature of a political question by explaining under what circumstances the courts should or should not decide an issue, the meaning and application of the criteria themselves remain open to different interpretations. Two prevailing and overarching theories attempt to discern the deeper constitutional meaning of the political question doctrine and explain its intimate relationship to judicial review and the separation of powers more generally.¹²² These theories might be termed the "classical" view, articulated best by Herbert Wechsler,¹²³ and its "prudential" alternative, seen in Alexander Bickel's analysis of his so-called "passive virtues" of

120. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 29 (1960). Although Black made this comment two years before the *Baker* decision, subsequent confusion about the doctrine proves the pertinence of his observation: "That there is a 'political question' doctrine is not disputed, but there is little agreement as to anything else about it . . ." HENKIN, *supra* note 27, at 144 (citation omitted).

121. Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 *YALE L.J.* 517, 519 (1966).

122. Difficulties in theoretically explaining the political question doctrine might be, in turn, related to on-going disagreements about the nature of the separation of powers doctrine itself. "Still, we cannot seem to solve the problem of separation of powers. We are not even close. We do not agree on what the principle requires, what its objectives are, or how it does or could accomplish its objectives. Lack of progress is not for lack of attention." M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 *VA. L. REV.* 1127, 1128–29 (2000). However, before going on to criticize the academic quandaries over the doctrine, Magill points out that there is fundamental consensus on its most basic premise, in that it

is a way to prevent a single institution of government from accumulating excessive political power; the way to achieve that objective is to disperse the three governmental powers — legislative, executive, and judicial — among different institutions and to equip each department with select powers to protect itself and to police the other departments.

Id. at 1129–30. The meaning or structural requirements of the separation of powers doctrine is even more problematic within the context of the United Kingdom's unwritten and rather idiosyncratic constitution. See Woodhouse, *supra* note 17, at 920–22.

123. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 1 (1959).

judicial review.¹²⁴ Both explanations of the American political question doctrine, however, point to the judiciary's self-assessment of its institutional ability to decide certain cases in relation to the political branches—a functional analysis that becomes clearer in the work of Fritz Scharpf.¹²⁵ Even when there are legal standards under a written constitution or statute, necessary judicial attention to the values of efficiency and accountability will become more evident through the application of justiciability criteria.¹²⁶ Accordingly, political resolution will take precedence when these values are ascendant. On the other hand, an increase in justiciability under applied criteria signal rising rule-of-law concerns, gradually hardening apparently “vanished” legal boundaries and supporting progressively more intense judicial review.¹²⁷

The classical view of the American political question doctrine builds upon Chief Justice Marshall's pronouncement in *Marbury* that it is “emphatically the province and duty of the judicial department to say what the law is.”¹²⁸ The Chief Justice was, of course, speaking in reference to a potential conflict between an act of Congress and the Constitution. Nevertheless, this attribution of responsibility to the judiciary just as well conveys the power of courts in both Britain and America to interpret and apply primary legislation in relation to executive claims of legal authority. The judiciaries in the United States and United Kingdom therefore fulfill comparable institutional roles in upholding the rule of law, despite many important differences in their respective constitutional systems and legal cultures. Although speaking specifically in regard to constitutional review in the United States, Wechsler therefore suggests that courts cannot abdicate this institutional responsibility by refusing to decide a constitutional issue whenever it satisfies procedural and jurisdictional requirements.¹²⁹ This means that whenever American courts invoke the political question doctrine, they “judge whether the Constitution has committed to another agency of government the

124. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 125 (2d ed. 1986).

125. Scharpf, *supra* note 121, at 566–97.

126. *Id.* at 560.

127. BICKEL, *supra* note 124, at 16–17.

128. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); *see also* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.).

We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

Cohens, 19 U.S. (6 Wheat.) at 404.

129. Wechsler, *supra* note 123, at 6.

autonomous determination of the issue raised, a finding that itself requires an interpretation.”¹³⁰ The criteria used to support the application of the political question doctrine, such as those that *Baker* proposed a few years after the appearance of Wechsler’s influential article, are themselves “standards that should govern the interpretive process generally.”¹³¹ A judicial determination that an issue is a political question is, according to Wechsler, a decision about the relative constitutional powers of the branches, which “is *toto caelo* different from a broad discretion to abstain or intervene.”¹³² This judicial duty rests upon the character of the judicial function and the responsibility of the courts to dispense with all cases and controversies upon “neutral principles.”¹³³ These principles apply equally to any parties to a constitutional dispute and rest upon “analysis and reasons quite transcending the immediate result that is achieved,” rather than a court’s desire to reach a certain decision in the case before it.¹³⁴

Bickel, however, disagrees with Wechsler’s characterization of the political question doctrine as leading to a conclusive decision as to which branch has constitutional authority over certain matters.¹³⁵ Bickel suggests that the practice of the Supreme Court has shown that it will invoke the political question doctrine as a unique way to avoid deciding constitutional issues at all because of prudential concerns about the propriety or wisdom of judicial involvement in the matter in question.¹³⁶ According to Bickel, Wechsler’s interpretation of the doctrine would mean that a court would effectively legitimize a legislative measure that it declared to be a political question—hardly different than if the court declared it to be constitutional.¹³⁷ In doing so, it “will not only tip today’s political balance but may add impetus to the next generation’s choice of one policy over another.”¹³⁸ Bickel thus criticizes Wechsler, relying upon Charles Black’s view that the Supreme Court takes an “affirmative” constitutional role when validating or legitimizing governmental action, in contrast to a “negative” role though a declaration of unconstitutionality.¹³⁹ For Bickel, Wechsler’s view of the political question doctrine essentially would be an affirmative validation of the contested government action. In contrast, Bickel argues that the political question doctrine is a means of “not doing,” in that the Court avoids either condemning

130. *Id.* at 7–8.

131. *Id.* at 9.

132. *Id.*

133. *Id.* at 17.

134. *Id.* at 11, 15, 19.

135. BICKEL, *supra* note 124, at 125.

136. *Id.* at 125–26.

137. *Id.* at 129, 131.

138. *Id.*

139. *Id.* at 131.

or legitimizing government action.¹⁴⁰ The Court therefore avoids involvement in the particular case before it and makes no conclusive, prospective announcements as to whether a branch has constitutional authority over the subject matter in question. The political question doctrine is, accordingly, a “passive” device, according to Bickel, which a court can use to avoid entirely the substantive merits of a constitutional claim—at least for the time being.¹⁴¹ Bickel points to several other passive techniques for case-specific issue avoidance in American law (e.g., standing requirements or ripeness) that courts use to ensure that a constitutional issue comes before them only in a factually developed, sufficiently concrete form that is then more likely to be suitable for resolution by adjudication.¹⁴² A court might then be more institutionally suited to deliver a principled decision at that more propitious time.¹⁴³

Bickel lays out several justiciability criteria resembling those that would later appear in *Baker*. These are (1) the “strangeness of the issue and its intractability to principled resolution”; (2) the “momentousness” of the decision, which unbalances judicial judgment; (3) anxiety that a judgment should be ignored; and (4) the Court’s own self-doubts as to its democratic, electoral irresponsibility.¹⁴⁴ When these concerns exist with a case, a court should prudentially abstain from deciding the constitutional issue based upon the political question doctrine. Abstention in these instances will avoid unwise judicial interference in politically sensitive matters ill-suited to adjudication and better left to the other two branches to resolve. The passive virtues of the political question doctrine thereby allow a court to issue authoritative, principled judgments on more appropriate occasions. In contrast to Wechsler’s view, this application of the political question doctrine is not a principled decision about the constitutional allocation of branch powers, but rather a refusal to decide the issue at all based upon innumerable, subjective variables. The political question doctrine and other passive virtues thus indirectly complement direct decisions, made at other times, to legitimize or condemn government actions. Judicial abstention and legitimization/invalidation in this way form opposing “points on a continuum of judicial power.”¹⁴⁵ In the middle of this continuum are also “lesser” principled constitutional doctrines that allow courts to curb legislative or executive power in a particular case without disposing of the substantive issue. Judicial decisions that a government action is vague, procedurally improper, or

140. *Id.* at 169, 200–01.

141. *Id.* at 201.

142. *Id.* at 169, 205–06.

143. *Id.* at 205–06.

144. *Id.* at 184.

145. *Id.* at 207.

somehow otherwise violates legal requirements governing decision making do not necessarily foreclose later action by the political branches conforming to them.¹⁴⁶

Bickel, too, is not without his critics. As Fritz Scharpf has pointed out, Bickel's prudential argument might apply to standing, ripeness, or other "procedural and jurisdictional techniques of avoidance,"¹⁴⁷ but it does not actually explain the political question doctrine. While a decision on standing, for example, only affects the case at hand and allows a court to return to the issue at a later time, Scharpf argues that the finding of a political question "attaches to the issue itself."¹⁴⁸ Consequently, "[o]nce the political question doctrine has been applied to a particular issue, the rules of precedent and of *stare decisis* come into play and will prevent a judicial determination of this issue in future cases."¹⁴⁹ This criticism of Bickel aligns him with Wechsler's classical position. However, Scharpf goes further, suggesting that the determination that an issue is a political question threatens to remove certain categories of government action from review altogether.¹⁵⁰ Seen through a British lens, this situation at its most extreme might broadly resemble the position pre-*G.C.H.Q.*, when courts would not review any exercise of the Royal prerogative.¹⁵¹ This would abdicate the very responsibility that courts have under the classical view to review constitutional issues as they arise.¹⁵² Thus, a refusal to adjudicate a political question could be seen not as a merits-based act of constitutional interpretation at all, as under the classical view, but more akin to a finding of no subject-matter jurisdiction. Citing the Supreme Court's decisions in *Hirabayashi v. United States*¹⁵³ and *Korematsu v. United States*¹⁵⁴ (upholding the curfew, mass relocation, and internment of Japanese-Americans during the Second World War), Scharpf points out that the Court has often decided controversial questions of branch power as contextually dependent upon extra-legal factors, like the exigencies of war.¹⁵⁵ In doing so, it has not removed vast categories of executive or legislative power from all future judicial review as political questions. Rather, now sounding something like Bickel, Scharpf presupposes that a court cannot or should not decide certain issues found to be more suited to political resolution, despite the arguable existence of

146. Scharpf, *supra* note 121, at 536.

147. *Id.* at 534–35.

148. *Id.* at 537.

149. *Id.* at 536–38.

150. *Id.* at 538.

151. DAVID BONNER, EXECUTIVE MEASURES, TERRORISM, AND NATIONAL SECURITY 104 (2007).

152. Scharpf, *supra* note 121, at 538–39.

153. *Hirabayashi v. United States*, 320 U.S. 81, 104–05 (1943).

154. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

155. Scharpf, *supra* note 121, at 564.

discernible legal standards and other justiciability criteria.¹⁵⁶ In *Hirabayashi* and *Korematsu*, for example, the Court might have made incorrect decisions in deferring to the political branches under the circumstances, rather than adjudicating substantial and very clear rights issues. Nevertheless, it did not decide that the curfews and detentions were broad categories of congressional or executive war powers that always would be beyond all judicial review.¹⁵⁷

In light of these criticisms and apparent contradictions, then, what sense does Scharpf make of the political question doctrine? His explanation is a highly functional one. Through it, he avoids wide pronouncements that place sweeping subject matter into generalized categories of non-justiciable political questions, which fall into legislative or executive spheres of power isolated from any future judicial review:

I am persuaded that much, if not all, of the Court's political question practice should, like the procedural and jurisdictional techniques of avoidance, be explained in functional terms, as *the Court's acknowledgment of the limitations of the American judicial process*. But the difficulties encountered by the broader theories should serve as a reminder of the pitfalls of all generalization in this field. *A satisfactory explanation of the political question doctrine is necessarily tied to the specifics of individual cases.*¹⁵⁸

Under this view, a court's invocation of the doctrine rests upon several factors, which share common concerns with the prudential and justiciability criteria offered by Bickel and the Court in *Baker*.¹⁵⁹ These include judicial difficulties of access to information; the need for uniformity of decision; deference to the responsibilities of the political branches; normative limitations on the doctrine posed by considerations such as individual rights or separation of powers; and other additional factors that might arise in a given situation.¹⁶⁰

Scharpf's functional analysis of the political question doctrine—and, consequently, the judicial role under separation of powers

156. *Id.* at 564–65.

157. Thus, even though courts might fail—perhaps badly—to protect civil liberties in some scenarios such as Japanese internment, they remain able to interpose themselves between the state and the individual in future cases. See *Korematsu*, 323 U.S. at 223–24 (failing to protect the civil liberties of the Japanese). Notwithstanding periodic mistakes and a jurisprudence of deference, David Cole argues that courts have done a better job of protecting rights against majoritarian excesses in wartime than is often appreciated. David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2566 (2003).

158. Scharpf, *supra* note 121, at 566–67 (emphasis added).

159. *Id.* at 566–96.

160. *Id.*; see also Daly, *supra* note 110, at 166–67 (drawing parallels between the American political question doctrine as set out in *Baker* and British approaches to policy questions and justiciability); King, *supra* note 40, at 415–16, 435 (same); Klug, *supra* note 40, at 129 (discussing the appropriate level of deference to be afforded to the British Parliament by British courts).

principles—simultaneously departs from and corresponds with elements of both the classical and prudential theories, depending upon the level of comparison. On the surface, Scharpf's view might appear fairly similar to Bickel's idea of the passive virtues in that Scharpf sees the application of the political question doctrine as a court's attempt to avoid deciding cases where it would be ill-advised to do so for various reasons.¹⁶¹ Nevertheless, Scharpf's justification for the political question doctrine goes beyond, and indeed rejects, the solely prudential concerns of Bickel. Judicial involvement in cases exhibiting Scharpf's criteria would be not only unwise but also institutionally dysfunctional given the judicial branch's limitations in certain kinds of decision making.¹⁶² Just what characteristics of a

161. Scharpf, *supra* note 121, at 566.

162. For a similar point about "deference" under the Human Rights Act, see Jowell, *supra* note 45, at 592 ("[W]hen a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law."). This means that "there is quite a difference between the adoption of a deferential approach to human rights claims out of respect for the other institutions of government, and the adoption of such a stance in submission to them." Edwards, *supra* note 40, at 879 (footnote omitted). Lord Hoffmann later took this line in paragraph 75 of *Pro-Life Alliance v. British Broad. Corp.*, (2004) 1 A.C. 185 (H.L.) (U.K.). While Lord Steyn also characterizes judicial deference as a critical, self-reflective matter of respect for the apposite roles of the executive and legislative branches, he characterizes it as a judicial discretion to abstain, rather than a decision mandated by law (indeed, Lord Steyn refers to Bickel's passive virtues in support of this view). Steyn, *supra* note 21, at 350. Whether characterizing British judicial deference under the Human Rights Act as either a strictly legal or a flexible prudential doctrine (thus, on some level, replicating the Wechsler-Bickel debate), "[t]he degree of deference which the courts should show will, of course, depend on and vary with the context. The true justification for a court exceptionally declining to decide an issue, which is within its jurisdiction, is the relative institutional competence or capacity of the branches of government." *Id.* at 352 (citation omitted). References to the institutional competencies of the courts, Parliament, and Government thus, in turn, lead to a functional argument like that of Scharpf; deference, therefore, "does not mean that the courts are subordinate partners in the tripartite relationship [between the judicial, legislative, and executive branches], but that they recogni[z]e that, in certain areas, the government or Parliament are better placed to make judgments because of the knowledge and experience available to them." Irvine, *supra* note 13, at 314. From this functional perspective, a proper notion and implementation of a doctrine of deference is "of fundamental importance to the proper functioning of our democracy," even while debate about it remains a "controversial subject." Steyn, *supra* note 21, at 346; see also King, *supra* note 40, at 409–10 ("How judges should exercise judicial restraint is a fundamental matter of constitutional principle that concerns the proper role of each branch of government."). *But see* Ewing, *supra* note 46, at 844 (criticizing judicial deference under the Human Rights Act as excessive—especially when applied to national security matters—and is consequently inimical to the very culture of liberty that the Human Rights Act was intended to promote). In light of the American war powers experience as portrayed in this article and some charges that British courts have been overly deferential under the Human Rights Act, there arises the ironic question as to whether statutory reform of the war prerogative should be shunned on grounds that it would not result in *enough* judicial intervention in war powers cases, so as to maintain a proper balance, whatever it might be, between Parliament and the Government.

case render it functionally unsuitable for adjudication and thus a political question constitutionally left to legislative or executive discretion are varied and factually dependent. According to such a functional position, the *Baker* criteria are guidelines for assessing a court's competency to adjudicate particular cases rather than for generally classifying subject matter as permanently justiciable or not. For Scharpf, the political question therefore depends upon a court's contextual, case-by-case analysis of its own institutional competency to adjudicate an issue.¹⁶³ This case-specific emphasis on the limitations of the adjudicatory process similarly justifies avoidance techniques in American law, like standing or ripeness; the criteria involved there permit assessment of whether a case is one increasingly suited to resolution by adjudication because clearly discernible rights are in issue or the political branches are no longer capable of reaching a resolution to the dispute. Thus, Scharpf's assessment of a court's decision not to resolve a case can run deeper than discretionary abstention for the sake of prudence in any one instance. Instead, a court is not only ill-advised to adjudicate controversial and tough political questions, such as war powers disputes, but also *institutionally* ill-suited to do so in many cases. Importantly, however, Scharpf's view of the political question doctrine would not conclusively relegate categories of subject matter to another branch and foreclose judicial review over it in the future.

Judicial assessment of the branches' relative institutional competencies to promote values of efficiency, democratic accountability, and the rule of law underlie all three approaches of Wechsler, Bickel, and Scharpf. Scharpf, however, is even more sensitive to this link between decision making values and processes. For him, justiciability criteria are applied not just to general subject matter but also to the particular decision in question, with regard to the competing interests involved and the whole factual context.¹⁶⁴ This approach therefore reconciles, in a way, the classical view of Wechsler with the prudentialism of Bickel. Under this third approach, the political question doctrine requires that a court assess its own institutional competency to adjudicate a matter on a case-by-case basis, sensitive to context. When it does so, it is at the same time determining the legal authority of the branches to decide the issue in question. The political question doctrine, so understood, explains why the separation of powers principles would mandate that a court defer to the political branches in most war powers disputes, yet still have authority to review those unusual cases when, taking into account the totality of circumstances, justiciability factors

163. Scharpf, *supra* note 121, at 596-97.

164. *Id.* at 528.

indicate escalating rule of law concerns.¹⁶⁵ In this way, a court fulfills its obligation to “say what the law is” by deciding the relative powers of the branches to resolve war powers disputes as they arise, in light of applicable legal standards. This highly functional view is therefore able to “coexist with the premises of the classical theory of judicial review,”¹⁶⁶ at the same time as it gives courts something of a

165. Separation of powers concerns thus remain the basis for the political question doctrine, whether one takes a classical textual or prudential view of the doctrine. FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 229–30 (1986); *see also* Choper, *supra* note 92, at 1462–63 (proposing four similar but alternative criteria for applying the political question doctrine, which “identify questions either that the judiciary is ill-equipped to decide or where committing the issue to some political branch promises a reliable, perhaps even a superior, resolution.”). Choper clarifies that

[t]he basic rationale [of the political question doctrine] rests on notions of institutional competence. By abstaining when the political branches may be trusted to produce a sound constitutional decision, the Justices reduce the discord between judicial review and majoritarian democracy and enhance their ability to render enforceable decisions when their participation is vitally needed.

Id. at 1466. A case-by-case, functional analysis of war powers (or any other separation of powers) cases does not, of course, lead to easy answers about relative branch authority.

Matching the exercise of certain types of power with corresponding decisionmakers is, to say the least, an ambitious undertaking. Assertions that some actors are most capable of, or normatively required to, exercise particular state powers entail a host of difficult or vexing questions. . . . That these questions are vexing does not mean that they should not be asked.

Magill, *supra* note 21, at 655–56. The end result, however, is that “the constitutional relationship between the President and the courts in foreign affairs is complex, producing neither complete judicial abdication nor complete judicial control.” RAMSEY, *supra* note 27, at 376.

166. Scharpf, *supra* note 121, at 59. In a lengthy footnote, Scharpf qualifies his position by disclaiming that a functional understanding of the political question doctrine should be characterized as an act of constitutional interpretation—although it clearly is, nonetheless:

It would, of course, be theoretically possible to elevate the functional factors which in my opinion explain the Court’s political question practice to the dignity of constitutional imperatives. But even if it were clearly understood that this assertion would be no more than a conclusionary label attached to considerations which focus upon the limitations of the American judicial process, rather than upon the constitutional grants of power to the political departments of the government, I would regard such an ‘escalation’ as undesirable. . . . If the Court’s judgment that a particular question under the particular circumstances should be regarded as ‘political’ is expressed in terms of constitutional command, this statement will almost inevitably obscure the need for a close functional analysis in the next case dealing with a seemingly similar question. The Court has often demonstrated its readiness to use the political question label uncritically in situations where the functional reasons for avoidance were far from compelling, and it appears to me that the exceptional character as well as the flexibility of the political question is better

prudential flexibility and avoids sweeping, conclusive, rigid, and thus potentially troubling pronouncements about legislative and executive war powers.

This process-oriented understanding of the political question doctrine explains why varying degrees of judicial deference or levels of review are appropriate in different cases, including those involving war powers. Nevertheless, war powers disputes by their nature will rarely be justiciable at all or, if so, will still usually justify considerable judicial deference to decisions of the other two branches. This view might actually mean, as Louis Henkin has suggested, "that there may be no doctrine requiring abstention from judicial review of 'political questions.'"¹⁶⁷ Rather, the political question doctrine and justiciability criteria, like those in *Baker*, "seem rather to be elements of the ordinary respect which the courts show to the substantive decisions of the political branches."¹⁶⁸ The political question, as an American judicial doctrine, seems to be nothing more than a court's functional or process-focused assessment of its own and the other branches' institutional abilities to promote competing yet complementary values of efficiency, accountability, and the rule of law in particular cases. *Baker* itself suggests this:

[D]eference rests on reason, not habit. The question in a particular case may not seriously implicate considerations of finality – e.g., a public program of importance (rent control) yet not central to the emergency effort. Further, clearly definable criteria for decision may be available. In such case the political question barrier falls away[.]¹⁶⁹

The court's level of deference or scrutiny will therefore depend upon the nature and circumstances of a war powers dispute, such as whether it involves the strategic deployment of the armed forces, specific military regulations of conduct, or the executive imprisonment of "enemy combatants." In those few, uncommon instances when war powers cases are justiciable, a court can then apply not only written legal requirements as to their exercise but also general standards regulating government decision making, such as procedural fairness, reasonableness, and applicable rights

described and better maintained if it is not characterized as a constitutional rule.

Id. at 597 n.275.

167. Louis Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L.J. 597, 600 (1976).

168. *Id.* at 605. Henkin also suggests, like Bickel, that there might be situations in which it is prudent, for whatever reason, for the Court not actively to intervene in the decisions taken by the political branches. *Id.* at 617; see BICKEL, *supra* note 124, at 125–26. It should do this not necessarily by abstaining from judicial review under the political question doctrine, but by withholding relief under equity principles. Henkin, *supra* note 167, at 617–19.

169. *Baker v. Carr*, 369 U.S. 186, 213–14 (1962).

guarantees. As the litany of American war powers cases shows, though, these will be notable exceptions to the general rule, while inter-branch disputes over the initiation and conduct of war (the sort expected to arise under a British war powers act) will almost always command judicial deference.¹⁷⁰

IV. CONCLUSION

This attention to institutional capabilities and processes of decision making, assessed by American courts through the political question doctrine, explains the great deference that they have shown to the executive and legislative branches in most war powers cases. The courts prefer to avoid interference in inter-branch war powers disputes in favor of their resolution through political processes, despite the existence of written constitutional provisions dividing the war powers between the President and Congress. The political question doctrine and its justiciability principles (properly conceived) thus allow judges to manage operational efficiency, democratic accountability, and the rule of law *vis-à-vis* the relative institutional capabilities of the executive, legislative, and judicial branches to actualize them in decisions about war. These concerns all come into play in long-running American and more recent British debates about legal regulation of war powers. A process-oriented view of the American political question doctrine, and thereby the nature of judicial review as a separation of powers phenomenon more generally, initially suggests that British courts, too, might continue to avoid entanglement in matters of war even under a future war powers act.

This Article, however, has called attention only to basic characteristics of judicial review in the United Kingdom. It has shown, where appropriate, that there are enough surface similarities in American and British approaches to justiciability to warrant serious consideration of how U.S. courts do or do not exercise review under legally binding war powers provisions. While it is far beyond the scope of this Article, study of a process-oriented approach to war powers might point towards a broader applicable, “common core” separation of powers theory at work in both the United States, the United Kingdom—and possibly elsewhere. Nevertheless, this Article has focused primarily on American law and legal scholarship without undertaking a deeper comparative analysis of judicial attitudes and the jurisprudence of deference in both systems. Rather, this explanation of judicial deference in the United States, which might seem contradictory given constitutional war powers provisions and a

170. See discussion *supra* pp. 624–25.

strong, vigorous form of judicial review, is intended to assist further political or academic considerations of just how British judges might indeed respond to any future war powers act. Finally, this comparative study also highlights the intricate systemic and doctrinal webs in which any reform would operate—awareness of which has often appeared lacking in Government policy reviews due to its on-going muddled, step-by-step approach to constitutional reform.

If this Article's process-oriented understanding of the separation of powers and its resulting hypothesis about judicial deference is more or less sound, then one might ask what the purpose is of even having a war powers act, as opposed to retaining the prerogative either "as is" or subjecting it to a governing resolution of the sort proposed by the Government. This Article answers that question with three lessons drawn from the American war powers experience, without expressing an opinion as to whether statutory reform of the war prerogative ultimately is a desirable option. First, as discussed above, some legal regulation of the war powers can provide guidelines to courts as to the outer boundaries of the political process, to be factored into a justiciability assessment and invoked in exceptional cases where review becomes appropriate. Second, and related to the first point, the extent of judicial review or deference will partly depend not only upon judicial attitudes towards the relative institutional capabilities of the branches but upon the actual terms of a war powers act. This Article has not dared to speculate that far, although, as shown by the clear provisions of the U.S. War Powers Act, even legal specificity does not guarantee justiciability and might have little bearing on a court's process analysis in most war powers cases.¹⁷¹ Third, and perhaps most importantly, the constitutional significance or impact of a British war powers act would not likely result from regular judicial enforcement, but instead would mostly depend upon its effects on the political process, re-shaping and influencing the attitudes and actions of those in both Parliament and Government. The consequent political dynamic in the United Kingdom would undoubtedly be very different from that in the United States, due to the parliamentary system. The main point is, however, that in some way, shape, or form, Parliament and Government would be expected to consult and work together before committing the nation to war. Executive hubris or legislative lethargy could then no longer be excused by the Crown's ancient prerogative, nor blamed on interventionist judges. Instead, ministers and MPs alike must answer to the public and shoulder the blame if they should try to seize that weighty responsibility for themselves or abdicate it to others.

171. See *supra* text accompanying note 53.