# Book Review: An Essay on Executive Branch Attempts to Eviscerate the Separation of Powers

Thoughts Prompted by E. Firmage & F. Wormuth, To Chain the Dog of War: The War Power of Congress in History and Law, S.M.U. Press 1986. 347 pp. \$27.50

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The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . . <sup>1</sup>

Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our [delegates to the constitutional] convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us.<sup>2</sup>

## I. Introduction

The Reagan Administration has been aggressively attempting to arrogate power to the Executive branch and to undermine the separation of powers in the realm of foreign affairs. To Chain the Dog of War shows that for decades the Executive branch has moved to appropriate Congress' war powers. The Reagan Administration not only has continued that tradition, but also has attempted to erode the Judiciary's power to decide questions of law and fact concerning human rights and liberty in international ex-

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<sup>1.</sup> U.S. Const. art. I, § 8 (the war powers clause).

<sup>2.</sup> F. Wormuth & E. Firmage, To Chain the Dog of War: The War Power of Congress in History and Law 56 (1986) (quoting A. Lincoln, II The Writings of Abraham Lincoln 51-52 (A. Lapsley ed. 1905-06)).

tradition cases involving political offenses. The underlying rationale for this shift has been that decisions to make war or to condemn or condone terrorism are political decisions best made by the Executive. The sinister aspect of this rationale is that it liberates the Executive to initiate acts of war and to promote, or at least condone, acts of terrorism committed by allies against common "enemies," while condemning similar acts committed by the same or other "enemies." This Essay reviews To Chain the Dog of War and extends the principles developed therein to signal more broadly some of the dangers to world peace and to our constitutional system presented by the current administration's approach to foreign affairs.

### II. AN IMPORTANT WORK ON THE WAR POWER

William Patterson, delegate to the Constitutional Convention and later an Associate Justice of the Supreme Court, noted, "[I]t is the exclusive province of Congress to change a state of peace into a state of war." The framers of the United States Constitution intended to separate the power to initiate war from the power to conduct it. Under that original vision, the President may do what is necessary to repel an attack on the territory of the United States, but Congress alone has the power to initiate war. Professors Wormuth and Firmage point out that "[n]o delegate to the Convention, and no delegate to any state ratifying convention, gave a different interpretation to the war clause." They argue convincingly that "[t]hese authorities, rather than modern theorists, should determine the proper constitutional interpretation of the clause."6 Nevertheless, many "modern theorists" have argued that the President needs the power to control international affairs and to institute military action without congressional input because of the dangerous era of nuclear threat in which we live. Wormuth

<sup>3.</sup> See Blakesley, Prosecuting Terrorists: Five Theories of Jurisdiction Over Extraterritorial Crime, 19 Conn. L. Rev. ...... (1987) [hereinafter Blakesley, Prosecuting Terrorists]; Blakesley, Extraterritorial Jurisdiction, in II International Criminal Law: Procedure 3-53 (M. Bassiouni ed. 1986) [hereinafter Blakesley, Extraterritorial Jurisdiction].

<sup>4.</sup> United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

<sup>5.</sup> F. Wormuth & E. Firmage, supra note 2, at 31.

<sup>6.</sup> Id.

<sup>7.</sup> See E. Corwin, The President: Office and Powers, 1787-1957, at 17 (4th ed. 1957); Lewis, The Political Question of the War Powers Resolution, 21 Val. U.L. Rev. 69 (1986); Lofgren, Commentary on War-Making, Original Intent, and Ultra-Whiggery, 21 Val. U.L. Rev. 53 (1986); Rostow, "Once More Unto the Breach": The War Powers Resolution Revisited, 21 Val. U.L. Rev. 1, 2 (1986).

and Firmage answer that, in reality, the extreme danger and the awesome power by which our existence may be ended in this nuclear age cut the other way. The horrible propensity of our weapons and the consequence of nuclear war—devastation beyond belief, comprehension, or experience, beyond our capacity to repair—call for more restraint and care in decision-making, not less. Their evidence of both the framers' position and proper current constitutional analysis is significant and persuasive:

Every just view that can be taken of this subject admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the Constitution, that the power to declare war, including the power of judging of the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite or proper; and that for such, more than for any other contingency, this right was specially given to the executive.

Only Congress has the authority to establish a state of war or to approve or ratify an act of war.<sup>10</sup> Congressional authority is necessary even for an act of reprisal, which is an act of war.<sup>11</sup> Congressional authority is certainly necessary to declare war or to engage in a war de facto.<sup>12</sup> The importance of this understanding of the Constitution is evident, considering that in over 200 years Con-

<sup>8.</sup> F. Wormuth & E. Firmage, supra note 2, at 68.

<sup>9.</sup> Id. at 30-31 (quoting J. Madison, Letters and Other Writings, 642-43 (1884)). Henry Clay considered this aspect of the Constitution one of the things that made the United States unique. "Everywhere else the power of declaring war resided with the Executive. Here it was deposited with the Legislature." 32 Annals of Cong. 1500 (1818).

<sup>10.</sup> See F. Wormuth & E. Firmage, supra note 2, at 35-52; 5 The Collected Papers of John Bassett Moore 195-96 (Yale University Press 1944).

<sup>11.</sup> See F. Wormuth & E. Firmage, supra note 2, at 37. As Secretary of State, Thomas Jefferson wrote:

The making of a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought to precede; and when reprisal follows, it is considered an act of war, and never failed to produce it in the case of a nation able to make war; besides, if the case were important and ripe for that step, Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not with the executive.

Id. (quoting 7 J. Moore, A Digest of International Law 123 (1906) (quoting 7 Jefferson's Works 628)); see also Paust, Responding Lawfully to International Terrorism: The Use of Force Abroad, 8 Whittier L. Rev. 711, 718-19 n.21 (1986).

<sup>12.</sup> F. Wormuth & E. Firmage, supra note 2, at 53-74.

gress has declared war unconditionally on only eleven occasions<sup>13</sup> and conditionally just four times.<sup>14</sup> In the thirty-seven years since 1950,<sup>15</sup> acts of war initiated by the Executive have occurred with increasing frequency. The Korean, Vietnam, and Grenada "conflicts," as well as the Lebanese "experience," the interception of the Egyptian airliner, and the recent Iran-Nicaragua scandal illustrate the presidential usurpation of power.

Some have suggested that article II, section 2 of the Constitution<sup>16</sup> provides the President a "co-ordinate war power," under which he may constitutionally exercise some or all of the powers assigned to Congress by the war powers clause in article I.<sup>17</sup> This is strange because the Commander-in-Chief clause does not purport to invade the powers of Congress articulated in article I. 18 Indeed, Wormuth and Firmage show that "the armed forces exist only by virtue of acts of Congress and that the authority of the President over the armed forces, so far as it exists, is conferred by Congress under its power 'to make rules for the government and regulation of the land and naval forces.' "19 Moreover, they demonstrate not only that "Congress may assign the control of the armed forces to officers other than the President," but also that "aside from the constitutional power of the President to use the forces placed under his control to repel a sudden attack, the armed forces may be used only to pursue legislatively authorized goals and only when Congress has prescribed their use in the pursuit of those goals."<sup>20</sup> Thus, there is no room in the Constitution for any "co-ordinate war power" in the President.

Proponents of the executive power to make war also argue that the war powers clause means that Congress has power only to

<sup>13.</sup> Id. at 53 (War of 1812, Mexican-American War, Spanish-American War, World War I—Germany, World War I—Austria-Hungary, World War II—Japan, World War II—Germany, World War II—Italy, World War II—Bulgaria, World War II—Hungary, World War II—Rumania).

<sup>14.</sup> Id. at 56 (1858—Paraguay, in response to shelling of U.S. naval vessel; 1871—Venezuela, in response to seizure of three U.S. steamships; 1886—Spain, in response to default on agreement according American citizen payment for property losses during Ten Years' War in Cuba; 1898—Spain, to enforce resolution that Spain withdraw from Cuba).

<sup>15.</sup> Before 1950 no President claimed constitutional authority to initiate war, except in response to attack.

<sup>16. &</sup>quot;The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . ." U.S. Const. art. II, § 2.

<sup>17.</sup> See, e.g., Ratner, The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles, 44 S. Cal. L. Rev. 461, 461-62 (1970-71).

<sup>18.</sup> See F. Wormuth & E. Firmage, supra note 2, at 87-88.

<sup>19</sup> Id. at. 88

<sup>20.</sup> Id. See generally id. at 87-104 (discussing government of the armed forces).

"declare" war.<sup>21</sup> Its language, they contend, "is peculiar to international law, and can only be understood in the setting of international law."<sup>22</sup> The next step is interesting. They assert:

[T]he international powers of the United States are conferred and defined by international law. Internationally, the government of the United States possesses all the powers possessed by any other state under international law, including the sovereign power to violate international law. The Constitution commits these powers to the political discretion of Congress and the President in accordance with the principle of functional necessity.<sup>23</sup>

The final step in their argument is that functional necessity requires that the President alone sometimes have the power to make war, that is, to commit acts of war.<sup>24</sup>

Wormuth and Firmage agree that when the nation is attacked the President may have to act and commit our forces to hostilities in self-defense,25 but they show that history and the Constitution require congressional ratification in such cases.<sup>26</sup> The Constitution actually provides expansive authority for Congress to play a much greater role in foreign affairs than mere ratification. Congressional power includes establishing basic policy goals and strategies. Congress has authority to provide for the common defense, to regulate commerce among nations, to declare war and grant letters of marque and reprisal, to raise and support armies, to provide and maintain a navy, to make rules for government of land and naval forces, and to provide for organizing and calling out the militia.<sup>27</sup> The Senate has collegial responsibility and authority with the President in making treaties.<sup>28</sup> Congress also has the authority and power to make all laws necessary and proper to accomplish these constitutional objectives.<sup>29</sup> The significant and specific foreign affairs pow-

<sup>21.</sup> See W. Reveley, War Powers of the President and Congress: Who Holds the Arrows and Olive Branch? 32, 140-41, 144, 171 (1981); Rostow, supra note 7, at 5; see also C. Thach, The Creation of the Presidency, 1775-1789: A Study in Constitutional History passim (1969) (advocating a strong Executive and pointing out Congress' inability to make vigorous decisions).

<sup>22.</sup> Rostow, supra note 7, at 6.

<sup>23.</sup> Id. at 3. But see Paust, The President is Bound by International Law, 81 Am. J. Int'l L. 377 (1987).

<sup>24.</sup> See Rostow, supra note 7, at 5.

<sup>25.</sup> See F. Wormuth & E. Firmage, supra note 2, at 17-31 (discussing the war powers clause).

<sup>26.</sup> Id. at 12-15.

<sup>27.</sup> U.S. Const. art. I, § 8.

<sup>28.</sup> Id. art. II, § 2.

<sup>29.</sup> Id. art. I, § 8.

ers assigned to Congress by the Constitution demonstrate the speciousness of the "functional necessity" argument.

Nevertheless, congressional power in the international arena and the protections it affords each of us and our Republic has been allowed to wither. Notwithstanding Congress' constitutional authority and the War Powers Resolution, 30 some members of Congress have been timid in challenging the President's attempt to exercise a "free hand" in international affairs. At times they have seemed almost apologetic about exercising their proper role of oversight and even control in this arena, especially in the area of the nuclear arms race. To Chain the Dog of War, boldly contradicting conventional "wisdom," makes a sound argument, backed with convincing evidence, that the Constitution assigns power to initiate war solely to Congress. The framers' intentions, as well as the language and logic of the Constitution and constitutional case law, make it clear that the Constitution separates the power to conduct war from the power to initiate it. Recent revelations about apparent attempts by the Executive branch to set policy and take action in relation to military conflict, terrorism, and international affairs without benefit of congressional approval or consideration suggest the need to prompt Congress to take another look at its timidity, its role, and its power.

To Chain the Dog of War should serve as such a prompt to Congress. It presents overwhelming evidence that Congress' power in foreign affairs is rapidly eroding. Current events suggest the extreme danger posed by such erosion. The recent Iranian arms deal and "Contra connection" serve to reemphasize the problem. Patrick Buchanan, presumably speaking for the President, recently suggested that stopping Communism in Latin America, even by pursuing a secret and illegal war, is more important than the law or the Constitution. The Administration manifests deeply rooted disdain for the rule of law, especially in the realm of foreign affairs. It is ironic and tragic that in the name of national security and an extremist ideology the current administration is damaging

<sup>30. 50</sup> U.S.C. §§ 1541-1548 (1982) (joint resolution to assure the collective judgment of Congress and the Executive in introducing armed forces into hostilities).

<sup>31.</sup> See generally J. Tower, E. Muskie & B. Scowcroft, The Tower Commission Report (1987) (discussing arms sales to Iran and diversion of the proceeds to the Contras).

<sup>32.</sup> Wash. Post, Dec. 15, 1986, at A2, col. 5.

<sup>33.</sup> See Blakesley, Prosecuting Terrorists, supra note 3; Blakesley, Extraterritorial Jurisdiction, supra note 3; Oliver, The Law, Morality and the National Interest: Comments for a New Journal, 1 Am. U.J. Int'l. L. & Pol'y 57, 58-59 (1986).

our national security and endangering humanity by eliminating law, morality, and the Constitution from its foreign policy.<sup>34</sup> Events of the recent past suggest the danger; *To Chain the Dog of War* provides the historical, legal, constitutional, and practical evidence that our constitutional order must be restored.

To Chain the Dog of War is not, however, an ideological or emotional diatribe. The authors' focus is on the question of who or what institution should decide if and when we should engage in a military conflict or venture. Accordingly, To Chain the Dog of War analyzes in depth every act of war in American history,<sup>35</sup> from wars with Native American tribes and the Barbary pirates to border crossings and intervention in the Caribbean. It is, of course, when military conflict occurs or is threatened that our institutions may become most strained. Thus, the work's focus is apt and important. The book's implications, however, go beyond war and military conflict to the constitutional separation of powers, the value of our constitutional structure to the preservation of our lives and our Republic, and the need for renewed vigilance to ensure the continuation of our democratic system.

Professors Wormuth and Firmage provide the historical and theoretical foundation for a resurgent Congress to play the role the Constitution establishes for it. To Chain the Dog of War is an important work. It is thought-provoking, articulate, scholarly, and enjoyable. It is written in succinct and clear language; it is meat for constitutional and historical scholars, yet accessible to the lay reader. Anyone interested in foreign affairs, in protecting his or her rights and interests under the Constitution, or in preventing any thoughtless war must read To Chain the Dog of War. I would hope that members of the Senate and House of Representatives will read To Chain the Dog of War. I would hope that President Reagan, his cabinet, and his security council will read it. I wish it had been available when the current administration took office.

To Chain the Dog of War presents extensive historical support and clear constitutional logic for exclusive congressional control over the decision to initiate war. Certainly the President is Commander-in-Chief of the military, but his constitutional authority extends only to military actions allowed by Congress. As Commander-in-Chief, the President can execute a war or military con-

<sup>34.</sup> See Oliver, supra note 33, at 63.

<sup>35.</sup> See, e.g., F. Wormuth & E. Firmage, supra note 2, at 33-52 (acts of war), 123-32 (Indian wars and border crossings), 151-60 (naval landings).

flict initiated by congressional decision, but the decision is for Congress. The President can even make emergency decisions for purposes of self-defense, but the power and authority to make war rests with Congress.<sup>36</sup> The danger facing us all today is that there has been a preemption of congressional action, if not an erosion of congressional power, in this arena. The combination of this preemption and the Reagan Administration's aggressive attack on the constitutional role of the Judiciary, to be discussed below, is ominous.

### III. EXTRADITION AND TERRORISM

To Chain the Dog of War shows that the erosion of congressional power in relation to making war has taken place essentially over the past three decades. The Reagan Administration, while proclaiming an interest in reestablishing an interpretation of the Constitution that is consistent with the intent of the framers, has been aggressively attempting to accelerate this erosion and to compound it by diminishing the role of the Judiciary, even in cases involving questions of human liberty. This action is particularly acute in the realm of international extradition and the political offense exception, although it is clear that the framers intended to protect our liberty by constitutionally requiring a scrupulous separation of powers and significant checks and balances: "there is no liberty, if the power of judging be not separated from the legislative and executive powers."37 The Administration has attempted to eviscerate the role of the Judiciary in questions of foreign affairs, even when matters of human liberty and due process are at stake, such as when issues of extradition and terrorism arise.38

Recently the Administration convinced the Senate to give its "advice and consent" to a supplementary treaty of extradition between our country and Great Britain.<sup>39</sup> The Administration argued that the purpose of this supplementary treaty is to combat terrorism by eliminating the political offense exception to extradition for

<sup>36.</sup> See, e.g., id. at 12-13.

<sup>37.</sup> THE FEDERALIST No. 78, at 100 (A. Hamilton) (M. Dunne ed. 1901).

<sup>38.</sup> See Blakesley, The Evisceration of the Political Offense Exception to Extradition, 15 Den. J. Int'l L. & Pol'y 109 (1986) [hereinafter Blakesley, Evisceration); Blakesley, Anti-Terrorism or Court Stripping?, San Francisco Chron., Feb. 26, 1986, at A6, col. 1; Blakesley, Constitution Falls Victim to Terrorism, 1987 McGeorge Magazine 4; F. Wormuth & E. Firmage, supra note 2, at 229-46. The discussion to follow was adapted from the author's McGeorge Magazine piece.

<sup>39.</sup> Supplementary Extradition Treaty, June 25, 1985, United States - United Kingdom, reprinted in S. Treaty Doc. No. 8, 99th Cong., 1st Sess. 1 (1985).

all but the purely political offenses, such as espionage, sedition, and treason.<sup>40</sup>

Extradition is the means by which a nation may seek the return of fugitives that have escaped to another country.<sup>41</sup> For this purpose, many nations have entered treaties providing for extradition on a showing of probable cause that the fugitive committed an extraditable offense. An extradition decision is based on the substance of the treaty and the facts of the particular case.<sup>42</sup> It is a decision applying the law to the facts. Because the decision to extradite deprives an individual of basic liberties, it is, as a matter of due process and separation of powers, a question for the Judiciary to decide.<sup>43</sup>

The political offense exception developed from asylum and sovereignty principles.<sup>44</sup> It requires denial of extradition if the alleged offense is political in nature. The exception prevents a victorious regime from using an extradition treaty to round up political enemies. Thus, it allows a nation to refuse to participate in "victor's justice."<sup>45</sup> The political offense exception has been the law since the beginning of modern extradition practice in the midnineteenth century and is part of the extradition law of virtually all nations except those in the Soviet bloc.<sup>46</sup>

<sup>40.</sup> See United States and United Kingdom Supplementary Extradition Treaty: Hearings on Treaty Doc. 99-8 Before the Senate Comm. on Foreign Relations, 99th Cong., 1st Sess. 2-6 (1985) [hereinafter Hearings] (statement of Abraham D. Sofaer, Legal Adviser, Department of State). See the debate between the author and Judge Sofaer in Blakesley, Evisceration, supra note 38, at 109, 111, 120-21, and Sofaer, The Political Offense Exception and Terrorism, 15 Den. J. Int'l L. & Pol'y 125, 126, 132 (1986).

<sup>41.</sup> See generally Blakesley, Extradition Between France and the United States: An Exercise in Comparative and International Law, 13 VAND. J. TRANSNAT'L L. 653 (1980) (discussing extradition in light of 1909 Extradition Treaty between France and the United States).

<sup>42.</sup> See id.; Blakesley, Evisceration, supra note 38, at 110-18.

<sup>43.</sup> See Blakesley, Evisceration, supra note 38; F. Wormuth & E. Firmage, supra note 2, at 229-46.

<sup>44.</sup> See Blakesley, Extradition From Antiquity to Modern France and the United States: A Brief History, 4 B.C. Int'l & Comp. L. Rev. 39 (1981); Sofaer, supra note 40, at 126.

<sup>45.</sup> See Blakesley, Evisceration, supra note 38, at 116-17 & nn. 30, 33.

<sup>46.</sup> Yugoslavia, not really within the "Soviet bloc," does have a political offense exception in its extradition treaties. The other Warsaw Pact nations sometimes allow for such an exception, although it is not found in any of their extradition treaties. The exception is not allowed, however, when the conduct has been perpetrated against other socialist or "friendly" states. Gardocki, *The Socialist System*, in II INTERNATIONAL CRIMINAL LAW: PROCEDURE, 133, 140-41 (M. Bassiouni ed. 1986). This "double standard" is a position strikingly similar to that taken by the Reagan Administration. See Sofaer, supra note 40, at 132 (indicating that the exception should not apply to extradition requests made by democratic allies of the United States but should apply to requests from "unstable" and "undemocratic"

A brief analysis of both the recent Supplementary Treaty to the Treaty of Extradition Between the United States and Great Britain, as well as the apologia used to sell it to the United States Senate and the American people, illustrates the Reagan Administration's lack of regard for the rule of law and the constitutional separation of powers.<sup>47</sup> The Supplementary Treaty's elimination of the political offense exception, except for the offenses of sedition, treason, and espionage, provides additional evidence to substantiate Professors Wormuth and Firmage's point that the aggressive agglomeration of power in the Executive is more ominous than many Americans think. The Supplementary Treaty was signed by the Executive branch on June 25, 1985. It provides that the political offense exception does not apply to offenses such as murder, manslaughter, malicious assault, kidnapping, and certain offenses involving firearms, explosives, and serious property damage.

The British promoted the Supplementary Treaty because they wanted to obtain the extradition of several alleged Irish Republican Army terrorists who were in the United States. 48 The Administration and the British government argue that the Supplementary Treaty is necessary because the political offense exception promotes terrorism. The Departments of State and Justice take the position that the exception must not be allowed to apply to the offenses specified in the Supplementary Treaty because the Judiciary sometimes interprets the exception in a way that may grant immunity to terrorists and wanton killers of innocent civilians with political motives for their crimes.49 This argument implies that the Judiciary either cannot or is unwilling to extradite such terrorists, or at least that the Judiciary fails to decide the question consistent with the battle against terrorism. On the basis of these ill-founded assumptions, the Administration would remove such questions from the judicial realm.

Although terrorism, this modern mal du siecle, must be eradicated, the approach adopted by the current Administration, as manifested in the Supplementary Treaty, is dangerous. The threat

regimes).

<sup>47.</sup> For a more detailed analysis, see Blakesley, Evisceration, supra note 38.

<sup>48.</sup> See Blakesley, Evisceration, supra note 38, at 124; Sofaer, supra note 40, at 129-30; see also Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) (holding an alleged member of the Provisional Irish Republican Army extraditable and therefore vacating the contrary trial court decision and remanding the case).

<sup>49.</sup> See Hearings, supra note 40, at 2; Sofaer, supra note 40, at 125-26, 128-31, 132-33; Blakesley, Evisceration, supra note 38.

to the Constitution is apparent and is strikingly similar to that posed by presidential usurpation of Congress' authority to initiate war. The rationale for the Treaty is similarly bankrupt.

Removal of the political offense exception from the judicial realm will not further the battle against international terrorism. In addition, its removal is inimical to the constitutionally required separation of powers as an intrusion by the Executive branch into the realm of the Judiciary. It is dangerously appealing when viewed superficially, but careful scrutiny discloses that it is inconsistent with the Constitution, legal tradition, and social values. It is true that international extradition falls within the realm of foreign relations and that foreign affairs are generally an Executive branch function in collaboration with Congress and, to a lesser extent, the Judiciary.<sup>50</sup> Nevertheless, extradition involves legal issues concerning human liberty. It should go without saying that the Judiciary is the branch that decides issues of law and fact concerning human liberty.<sup>51</sup> Thus, extradition and political offense questions ought to be decided by the Judiciary.

Further scrutiny of the Administration's approach illustrates the danger. The Executive branch has adopted the tactic of suggesting that the law (the political offense exception) and the Judiciary are thwarting the battle against terrorism.<sup>52</sup> The argument is that the Supplementary Treaty is necessary to prevent application of the political offense exception to murder, manslaughter, malicious assault, kidnapping, and other offenses involving firearms, explosives, and serious property damage. 53 Of course, these are heinous offenses. A murderer or a person who has caused serious property damage should not escape justice. Conduct that might constitute these offenses, however, could be committed lawfully by soldiers in a civil war. During the Revolutionary War, American patriots were charged with these offenses, as well as espionage, sedition, and treason. In such contexts these charges are easy to make and, in the abstract, are too easily considered valid. Therefore, the propriety of depriving a person of liberty must be deter-

<sup>50.</sup> See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (holding that joint resolution concerning foreign affairs did not effect an unconstitutional delegation of power to the Executive).

<sup>51.</sup> See U.S. Const. art. III, amends. 5, 14; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

<sup>52.</sup> See, e.g., Sofaer, supra note 40, at 132 ("[W]e cannot continue to permit our courts to endorse the use of violence to accomplish political goals.").

<sup>53.</sup> See Blakesley, Evisceration, supra note 38, at 13.

mined by applying the law to the unique facts of each case. Traditionally and constitutionally, such decisions have been placed with the Judiciary.

The Administration's view, on the other hand, is that the Judiciary should not make these decisions—the Secretary of State should do so.<sup>54</sup> This view is a manifestation of the apparent philosophy that extradition and the political offense exception ought not to be governed by the rule of law, but rather by politics. Ironically, the implication of this philosophy is that the Executive branch will decide what conduct is and what conduct is not a political offense on the basis of politics, not law. Eliminating the political offense exception to extradition liberates the Executive to consider its own or its allies' terrorists to be "freedom fighters" while condemning all others. This undermines the role of the rule of law. It suggests that there may be good terrorism and bad terrorism and therefore may actually embrace "good" terrorism. It certainly eliminates the government's ability to criticize or condemn as illegal, without manifest hypocrisy, terrorism committed by other nations or groups.55

Among the three branches, the Judiciary is the only body that is independent of the extreme political pressures facing the Executive and Congress. <sup>56</sup> In the international arena the Executive sometimes faces pressure to please an ally or the leader of a strategically or politically important regime. Unlike the Judiciary, the Executive branch is susceptible to political and strategic pressures to surrender the liberty of an individual to appease a foreign government or to gain a strategic or tactical advantage. Conversely, the Judiciary's constitutional role is not to promote political expediency, but to neutrally decide due process questions to protect the individual against the development of abusive executive power, es-

<sup>54.</sup> Sofaer, supra note 40, at 132; see also Lubet, Renegotiating Extradition Treaties: A Bilateral Approach, 19 Conn. L. Rev. \_\_\_ (1987). In the most articulate and thoughtful argument favoring the bilateral treaty approach, Professor Lubet takes the interesting view that the Executive branch ought to be able to make and maintain special extradition arrangements with allies based totally on political considerations. The argument is that allies commonly take this position in their bilateral treaty relationships. This approach, however, begs the question whether the Executive can use such treaties to sidestep the Constitution.

<sup>55.</sup> See Blakesley, Extraterritorial Jurisdiction, supra note 3. This runs counter to the Reagan Administration's argument that the Judiciary must be eliminated from the extradition process "to let the world know that we are against terrorism." Keynote Speech by Victoria Toensig, Deputy Assistant Attorney General, Criminal Division, U.S. Dep't of Justice, Connecticut Law Review Symposium, Terrorism and the Law: Protecting Americans Abroad (Apr. 8, 1987).

<sup>56.</sup> A. BICKEL, THE LEAST DANGEROUS BRANCH 49-50 (2d ed. 1986).

pecially when human liberty is involved. The Judiciary, armed with jurisprudence developed over the past 200 years and the constitutional mandate to decide issues of fact and law involving human life and liberty, is better equipped than the Secretary of State to render individual justice, as well as to deter terrorism. Even more important, arrogation of this judicial prerogative violates the primordial constitutional principles of checks and balances and separation of powers. It is also contrary to the due process clause, which "serves to prevent governmental power from being used for purposes of oppression." <sup>57</sup>

The justification for eliminating the political offense exception is that the Judiciary ought to be denied its decision-making role because of the possibility that erroneous decisions may encourage terrorism.<sup>58</sup> The Administration argues that the Judiciary has erred before and will do so again. It bases this argument on "erroneous" decisions concerning Irish Republican Army terrorists.<sup>59</sup> The Administration also relies on the parade of terrorist horrors of the past several years, suggesting that the political offense exception would prevent the extradition of the perpetrators.<sup>60</sup> The implication is that the Judiciary, if allowed to decide the political offense issue, will promote terrorism.

The Administration's campaign in the Senate, the House of Representatives, and the press has consisted of raising the tragic killings of Robert Stethem aboard hijacked TWA flight 847, of Leon Klinghoffer on the Achille Lauro, and of the innocents at the Rome and Vienna airports as examples of terrorism that they claim would be exempt from extradition as political offenses. The

<sup>57.</sup> Daniels v. Williams, 106 S. Ct. 662, 665 (1986) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856)), quoted in Rubin, Deprived Without Due Process: the Fourteenth Amendment and Abuse of Power, 16 N.M.L. Rev. 199, 204 (1986). The Supreme Court also noted in 1986 that "[t]he commander of the State's corps of prosecutors [the chief executive] cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding." Ford v. Wainwright, 106 S. Ct. 2595, 2605 (1986) (finding the Florida law allowing the Governor to decide whether an accused is insane and therefore may not be executed unconstitutional).

<sup>58.</sup> See Sofaer, supra note 40, at 125-26, 128-31, 132-33.

<sup>59.</sup> See Supplementary Extradition Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland, 1985: Hearings on the Impact of the Supplementary Treaty Upon American Domestic Law and Upon the American Constitutional Process in the Fight Against Terrorism Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess., 59 (1985) [hereinafter Hearings] (statement of Stephen Trott, Assistant Attorney General, Criminal Division, Dep't of Justice); Sofaer, supra note 40, at 128-31.

<sup>60.</sup> See Hearings, supra note 58, at 56; Sofaer, supra note 40, at 125-26, 128-31, 132-33.

Administration argues that the Judiciary would interpret the political offense exception to provide immunity to the perpetrators. 61 These offenses, however, are clearly extraditable or punishable. Judicial interpretation of the political offense exception distinguishes clearly between the killing of innocents and the killing of enemy soldiers during a battle. Just as summary execution of innocent civilians or prisoners of war violates international law and the law of war, the politically motivated killing of innocents is a crime; it is extraditable and punishable as such. To claim that the political offense exception would provide immunity to those who killed innocent civilians or an off-duty serviceman in civilian clothes on board a hijacked civilian aircraft is misleading and inaccurate. It does disservice to the Judiciary and the rule of law. Such wanton acts of violence simply do not fall within the political offense exception, and the Judiciary is completely capable of making such a determination.62

Judicial decisions do not promote terrorism. In some cases the legal and factual questions can be extremely difficult. In addition, legal development in the arena of terrorism and international crime is incomplete. Nevertheless, the law is a tool that can be used to combat terrorism without risking harm to the Constitution. Even if the Judiciary does render some erroneous decisions, to argue that it therefore should not decide the question is like arguing that the Judiciary should not interpret the fourth, fifth, and sixth amendments because some criminals may have escaped justice. Traditionally, an independent Judiciary has been considered the only branch capable of deciding questions of guilt and innocence. The possibility of occasional erroneous decisions is acceptable because an independent Judiciary is essential to maintain liberty. No criminal should escape justice, but the suggestion that the offenses recited by the Administration in its apologia for the Supplementary Treaty would not be extraditable is erroneous. The implication of this erroneous suggestion—elimination of the Judiciary from the process—poses a serious threat to the Constitution, legal tradition, and notions of decency. The risk that the Judiciary will promote terrorism is much less than the risk to the Constitution posed by this treaty.

This is not to say that the Judiciary cannot benefit from

<sup>61.</sup> *Id*.

<sup>62.</sup> Blakesley, Evisceration, supra note 38, at 12-16; Blakesley, Prosecuting Terrorists, supra note 3.

guidelines established by another branch. It behooves Congress to pass laws to guide the courts in making these difficult determinations. This author testified before the House of Representatives Judiciary Committee in favor of the Antiterrorism Act of 1986, which could provide such guidance.63 The law should clearly denounce and punish wanton violence against innocents.64 It is no excuse that the violence was promoted or perpetrated by a government, either in power or in exile, a guerilla group, or a terrorist organization for political or military purposes. Extradition law must clearly denounce such conduct. This can be accomplished without eliminating the Judiciary from the quintessentially judicial function of determining the validity of a criminal charge. A soldier in a civil war may not commit murder; he may not kill infants or other innocents. Political motivation is no defense. On the other hand, as tragic and horrible as it is, a soldier may kill enemy soldiers in a firefight or a pitched battle. The Judiciary must have—and it traditionally and constitutionally has had—the authority to decide into which category a defendant's conduct falls. If the Administration automatically sends fugitives back to the states requesting extradition, our country inevitably will be aiding and abetting, at least in some cases, "victor's justice" over the vanquished partisans of a cause. We must not fail to uphold the rule of law over politics in our battle against the mal du siecle.

#### IV. Conclusion

Whether combatting terrorism is accomplished by means of an extradition decision or a decision to initiate an act of war, the constitutional order must be preserved. Although Congress is cumbersome, it, like the Judiciary, was established by the Constitution as a check on the tendency of the Executive to become autocratic. Even as the Bill of Rights was designed to protect against the development of tyrannical power in the government, so was the concept of separation of powers incorporated in part to eliminate the Executive's ability to arrogate power. The vacuous and specious

<sup>63.</sup> On August 27, 1986 Congress passed the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853 (1986). For the legislative history, see H.R. Conf. Rep. No. 783, 99th Cong., 2d Sess., 87 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 1865, 1960. See also Blakesley, Extraterritorial Jurisdiction, supra note 3 (discussing Antiterrorism Act).

<sup>64.</sup> For a detailed analysis of what conduct fits this category, see Blakesley, *Prosecuting Terrorists*, supra note 3 (describing a common core of conduct that is punishable as terrorism).

claim made recently by Patrick Buchanan and others, in the name of "conservatism" but in reality propounding autocracy, that anyone challenging presidential prerogative in the foreign affairs arena is disloyal and unpatriotic<sup>65</sup> is laid bare by the evidence in To Chain the Dog of War. The very language of the Constitution, constitutional case law, historical evidence of the intent of the founding fathers, and current democratic and moral values all support this proposition. Wormuth and Firmage present this evidence and its implications coherently and convincingly. Any person serious about his or her liberties and safety should take the time to read and seriously consider their excellent book. To Chain the Dog of War is a powerful reminder that vigilance is the price of liberty.

<sup>65.</sup> N.Y. Times, Dec. 10, 1986, at A20, col. 1.