WAR-MAKING BY THE PRESIDENT

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I. INTRODUCTION

To a nation wracked by interminable, undeclared war in Vietnam—described by an informed English observer as "the greatest tragedy that has befallen the United States since the Civil War"—the presidential power to commit it to such luckless adventures is of surpassing importance. Thirty-odd years of recurrent international crises, exploding against a background of superpower hostility such as had long been unknown to the American people, have fed swollen executive claims to war-making power, often with the acquiescence if not encouragement of Congress.²

It is not my purpose to conduct yet another inquest into the propriety of the presidential steps that led to our involvement in Vietnam, or whether the war received congressional sanction.³ Instead the focus of discussion will be whether the original constitutional distribution of powers can be restored by statute in order to insure congressional participation in war-making policy. A long overdue step in that direction was recently taken by the Javits-Spong War Powers Bill, approved by a vote of 68 to 16 in the Senate,⁴ which seeks to lay down rules governing the use of armed force in the absence of a declaration of war by Congress. Roughly speaking, the Bill would authorize the President in the absence of a declaration of war by Congress only "to repel an armed attack upon the United States" or upon its armed forces "located outside the United States," and to forestall the "direct and imminent threat of such an attack," such use of the armed forces not to extend beyond thirty days without congressional authorization.⁵


³ N.Y. Times, Apr. 14, 1972, at 1, col. 3.

Secretary of State William Rogers warns that the Bill "would violate the Constitution," that it departs from an allocation of powers which is "basic to our system."6 Rogers' statement may be heavily discounted as self-serving, just as Justice Jackson dismissed his own "self-serving press statements" as Attorney General when they were paraded before the Court.7 The case stands differently with Professor Eugene V. Rostow's elaborate attack on the Javits Bill.8 Although he was one of the executants of the presidential policy, his high repute as a scholar entitles his apologia to careful consideration.

For Professor Rostow, the Javits Bill constitutes a retreat into the "dangerous realm of constitutional myth,"9 a fundamental "change [in] the constitutional relationship between President and Congress,"10 a "serious attack on the Constitution"11 which "would destroy the Presidency" and "abolish the principle of the separation of powers," no less.12 Congress is portrayed as "drawing all power within its impetuous vortex";13 but that hardly squares with the fact that the Supreme Court, in rejecting President Truman's seizure of the steel plants in reliance on alleged war powers, "refus[ed]," in the words of Justice Jackson, "further to aggrandize the presidential office . . . at the expense of Congress."14

In truth, the Constitution withheld from the President the powers claimed for him by Professor Rostow. He makes a mechanical obeisance to "the document, viewed against the background of [the Framers'] words,"15 but spends precious little time on the governing constitutional provisions and none at all on the explanations of those provisions by the Framers, preferring copious generalities about constitutional purposes. His real reliance is on "182 years of opinion and practice"16—the "gloss of life"17—whereby successive Presidents have altered the original constitutional distribution of powers, reallocating

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7 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 647 (1952) (concurring opinion).
8 Rostow, supra note 3.
9 Id. 900.
10 Id. 834.
11 Id. 836.
12 Id. 897, 900.
13 Id. 833. See id. 835, 840.
14 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (concurring opinion).
15 Rostow, supra note 3, at 844. This he does "because the animating principles of their project—democratic responsibility, the theory of checks and balances in the exercise of shared powers, and civilian control of the military—have retained their vitality, and must continue to do so if we hope to survive as a free and democratic society." Id.
16 Id. 886.
17 Id. 843.
to the President powers exclusively conferred on Congress. On this, issue must be joined, bearing in mind that Professor Rostow inveighs against the Javits Bill because "it would permit Congress to amend the Constitution without the inconvenience of consulting the people."\textsuperscript{18} Amen! No amendment without "consulting the people." But the rule cuts both ways; it is not open to the President to amend the Constitution by his "practices."

Professor Rostow recognized that there is a "real crisis of our foreign policy," that

there is no harmony between [the presidential] pattern of action, and widespread, and now perhaps prevailing views as to what . . . foreign policy ought to be.

The tension between public opinion and the behavior of government [read President] is much too great for safety. That tension has already destroyed the careers of two Presidents, Truman and Johnson; divided the nation . . . .\textsuperscript{19}

A crisis of such dimensions, exhibiting such tensions and divisions, entitles one to question the wisdom of a presidential claim single-handedly to commit the nation to such disastrous policies. But I must eschew analysis in terms of wisdom, a matter endlessly debated, and canvassed afresh by Professor Rostow. Let it be assumed that wisdom counsels solo presidential power to meet terrifying contemporary contingencies,\textsuperscript{20} and the core question remains: was such power conferred by the Constitution. "The peculiar circumstances of the moment," said Marshall, "may render a measure more or less wise, but cannot render it more or less constitutional."

The cardinal index of constitutionality is the Constitution itself, not what others have said about it. In the words of the great Erskine, "a statute is ever present to speak for itself";\textsuperscript{22} so too, we must look at the Constitution with eyes unclouded by the opinions of others. On so great a constitutional issue, nothing less suffices than the most searching analysis of the immediately relevant text and what the

\textsuperscript{18} Id. 835.
\textsuperscript{19} Id. 899. The Korean War, Rostow states, "became unpopular and was a decisive factor both in Truman's decision not to seek a second term and in the elections of 1952." Id. 871.
\textsuperscript{20} "Of course Congress should participate," says Professor Rostow, "in decisions involving major and sustained hostilities, through processes of continuous consultation . . . . That is now the pattern of our politics, and of our constitutional usage." Id. 842. It is precisely because there is no such pattern that the Javits Bill went through the Senate. There was no consultation prior to the invasion of Cambodia, note 249 infra, or the mining of Haiphong, although the latter might have precipitated a fearful confrontation. The "pattern" was rolling dice out of sight of Congress.
\textsuperscript{22} Trial of Home Tooke, 25 How. St. Tr. 1, 268 (1794).
Framers stated they meant to accomplish by it. Professor Rostow too quickly cheapens the understanding of the Framers in reliance on Justice Jackson's statement in *Youngstown Sheet & Tube Co. v. Sawyer* that it "must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." Notwithstanding that rhetorical flourish, Jackson experienced no difficulty in finding the intention clear enough to lead him emphatically to reject inflated presidential claims to war powers. So that the reader may readily determine for himself where the truth lies, I shall set forth the sources. The historical records will appear far removed from the "enigmatic dreams of a Pharaoh," from "constitutional myth."

Preliminarily a few words should be said about the historical background—upon which Professor Rostow lays great stress—from which the Constitution emerged. Among the colonists the prevalent belief was that "the executive magistracy" was the natural enemy, the legislative assembly the natural friend of liberty .... This derived first from the fact that the House of Commons had been the cradle of liberty in the seventeenth century struggle against Stuart absolutism, a period that greatly influenced colonial thinking. Then too, colonial assemblies were elected by the colonists themselves whereas governors and judges were placed over them by the Crown. Little wonder that in most of the early state constitutions, the governor's office was "reduced almost to the dimensions of a symbol," with all roots in the royal prerogative cut.

23 343 U.S. 579, 634 (1952) (concurring opinion).
25 One after another Jackson dismissed claims based on the executive power, the commander in chief clause, and inherent power, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640-44, 646-52 (1952) (concurring opinion). Jackson refused to "amend" the work of the Framers. *Id.* at 650.
27 G. TREVELYAN, ILLUSTRATED HISTORY OF ENGLAND 391, 401 (1956).
29 1 J. WILSON, WORKS 292-93 (R. McCloskey ed. 1967). Wilson felt constrained in 1791 to admonish the people that it was "high time" to regard executive officers and judges equally with the legislature as representatives of the people. *Id.* 293.
30 E. CORWIN, supra note 26, at 4-5. For example, the Virginia Constitution of 1776 provided that the Governor shall "exercise the executive powers of government, according to the laws of this Commonwealth and shall not, under any pretence, exercise any power or prerogative, by virtue of any law, statute or custom of England." 2 B. POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 190-11 (1878). Section 33 of the Maryland Constitution makes similar provision. 1 id. 825. Corwin justifiably concludes that under the pre-1787 state constitutions, "'Executive power' ... was cut off entirely from the resources of the common law and of English constitutional usage." E. CORWIN, supra note 26, at 5. In the Federal Convention James Wilson stated that he "did not consider the Prerogatives
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When the colonists assembled in the Continental Congress and adopted the Articles of Confederation, they dispensed with an executive altogether; and in appointing George Washington commander in chief, they made sure, as Professor Rostow remarks, that he was to be "its creature . . . in every respect." Before long the excesses of the new state legislatures led to disenchantment, and the Founders began to think of a genuinely tri-partite structure of government. It was against this background that Madison, in a quotation invoked by Professor Rostow, said that the founders of the several states "seem never for a moment to have turned their eyes from the danger to liberty" from a king to recollect "the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations." This testifies to the need for a strengthened executive coupled with a lively fear of monarchy and of potential executive tyranny. Even so, Madison stated in a subsequent issue of The Federalist that "[t]he legislative authority necessarily predominates," as the Constitution clearly designed in the distribution of the war powers.

To say, as does Professor Rostow, that the Framers intended to go beyond the "Executive" of the Continental Congress is to leave open the scope of his function. Here once more the Framers did not leave us in doubt. Roger Sherman "considered the Executive magistracy as nothing more than an institution for carrying the will of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace . . . ." 1 Records of the Federal Convention of 1787, at 65-66 (M. Farrand ed. 1911) [hereinafter cited as Records].

Professor Rostow's reference to the "weakness of the Executive under the Articles of Confederation . . . ." Rostow, supra note 3, at 844, must therefore be taken to mean the absence of the executive.

Rostow, supra note 3, at 840. The instructions given Washington recited that "you are . . . punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future Congress . . . ." Id. 840 n.14.

For a collection of authorities, see R. Berger, Congress v. the Supreme Court 10-11 (1969).

Rostow, supra note 3, at 833.

The Federalist No. 48, at 322 (Mod. Lib. ed. 1937) (J. Madison).

1 Records, supra note 30, at 66, 83, 90, 96, 101, 113, 119, 152, 425; 2 id. 35-36, 101, 278, 513, 632, 640. In Virginia Patrick Henry said, "Your President may easily become a king." 3 J. Elliot, Debates in the several State Conventions on the Adoption of the Federal Constitution 58 (2d ed. 1836). See id. 60; 4 id. 311. See also notes 42, 72, 84 infra; text accompanying note 52 infra.

The Federalist No. 51, at 338 (Mod. Lib. ed. 1937) (J. Madison). See also Madison's explanation of the limited nature of the President's war-making power, notes 75-76 infra. Justice Brandeis referred to the deep-seated conviction of the English and American people that they "must look to representative assemblies for the protection of their liberties." Myers v. United States, 272 U.S. 52, 294-95 (1926) (dissenting opinion).

Note 31 supra.
Legislature into effect . . . .

Although James Wilson was the "leader of the 'strong executive' party," the "only powers he conceived strictly executive were those of executing the laws and appointing officers . . . ." Madison emphasized that preliminarily it was essential "to fix the extent of the Executive authority . . . as certain powers were in their nature executive, and must be given to that department . . . ." He added that the executive powers "shd. be confined and defined," as they were in the subsequent sparse enumeration of executive powers.

The explanation of executive power to the Ratifying Convention reaffirmed these views. The executive powers were "precisely those of the governors," said James Bowdoin in Massachusetts, as did James Iredell in North Carolina. "What are his powers?" said Governor Randolph in Virginia: "To see the laws executed. Every executive in America has that power." In Pennsylvania James Wilson, in order to defend the President against the charge that he "will be the tool of the Senate," pointed first to the fact that he was to be commander in chief, and then added, "[t]here is another power of no small magnitude intrusted to this officer. 'He shall take care that the laws be faithfully executed.'" Iredell likewise stressed that the "office of superintending the execution of the laws . . . is . . . of the utmost importance;" and this was likewise the view expressed in North Carolina by Archibald Maclaine. Charles Pinckney, a Framer, said in South Carolina, "His duties, will be, to attend to the execution of the acts of Congress"; and to ward off fears of the danger of the executive. Pinckney stressed that the President cannot "take a single step in his government, without [Senate] advice." Another Framer, William Davie, told the North Carolina convention that "jealousy of executive power which has shown itself so strongly in all American governments, would not admit" of lodging the treaty powers in the President alone.

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39 1 RECORDS, supra note 30, at 65.
40 E. CORWIN, supra note 26, at 11.
41 1 RECORDS, supra note 30, at 66.
42 Id. 66-67 (emphasis added).
43 King's notes recorded: "Mad: agrees wth. Wilson in his definition [sic] of executive powers . . . [they] do not include the Rights of war & peace & c. but the powers shd. be confined and defined—if large we shall have the Evils of elective Monarchies . . . ." Id. 70.
44 2 J. ELLIOT, supra note 36, at 128; 4 id. 107. For the governors' powers, see note 30 supra.
45 3 J. ELLIOT, supra note 36, at 201.
46 2 id. 512-13 (emphasis in original).
47 4 id. 106, 136.
48 3 RECORDS, supra note 30, at 111.
49 4 J. ELLIOT, supra note 36, at 258.
50 Id. 120. "Fear of a return of Executive authority like that exercised by the Royal
When Professor Rostow relies on The Federalist and Madison’s notes for a “pattern of shared constitutional authority in this vital area,” he fails to take into account Hamilton’s emphasis on how small the presidential share was to be. “Calculating upon the aversion of the people to monarchy,” Hamilton wrote, opponents of the Constitution “have endeavored to enlist all their jealousies and apprehensions in opposition to the intended President . . . as the full-grown progeny, of that detested parent.” To counter such fears he launched upon a minute analysis of each of the enumerated executive powers; in particular the commander in chief was merely to be the “first General.” Nothing was “to be feared” from an executive “with the confined authorities” of the President. After going through the short list he stated, “The only remaining powers of the executive are comprehended in giving information to Congress of the state of the Union . . .”

On the specifics of the commander in chief function, Hamilton took pains to assure the people that the President’s authority would be “much inferior” to that of the British King, the bulk of whose powers “would appertain to the legislature.” Professor Rostow’s statement that the “British monarch was much more in their [the Framers’] minds as a point of departure than the revolutionary commander” is therefore correct, but in a very different sense than he intends—the prerogatives of that monarch were the very thing that the Framers meant at all costs to avoid.

Governors or by the King had been ever present in the States from the beginning of the Revolution.” C. Warren, The Making of the Constitution 173 (1947). Warren wrote:

It is probable that Madison and Randolph in preparing the Virginia Plan had in mind the conception of Executive power which Thomas Jefferson had set forth in his Draft of a Fundamental Constitution for Virginia in 1783, as follows:

“By Executive power, we mean no reference to those powers exercised under our former government by the Crown as its prerogative, nor that these shall be the standard of what may or may not be deemed the rightful powers of the Governor. We give them those powers only, which are necessary to execute the laws.”

Id. 177.

Rostow, supra note 3, at 847. For Madison, see text accompanying notes 75-76 infra.

The Federalist No. 67, at 436 (Mod. Lib. ed. 1937) (A. Hamilton).

The Federalist No. 69, at 448 (Mod. Lib. ed. 1937) (A. Hamilton), quoted at text accompanying note 71 infra.

The Federalist No. 71, at 468 (Mod. Lib. ed. 1937) (A. Hamilton).

The Federalist No. 77, at 501 (Mod. Lib. ed. 1937) (A. Hamilton) (emphasis added). In the First Congress, Thomas Hartley commented that the President’s “powers, taken together, are not very numerous.” 1 Annals of Cong. 482 (1789). (2d ed. 1836, print bearing running-title “History of Congress”)

See text accompanying note 71 infra.

Rostow, supra note 3, at 841.

See note 30 supra. Bagehot said that the Framers “shrank from placing sovereign powers anywhere. They feared it would generate tyranny; George III had been a tyrant to them, and come what might, they would not make a George III.” W. BAGEHOT, THE ENGLISH CONSTITUTION 218 (1964). “From the American Revolution we inherited a
II. THE INTENTION OF THE FRAMERS

A. The Commander in Chief Clause

The commander in chief as conceived by the Framers bears slight resemblance to the role played by the President today, when, as Justice Jackson said, the clause is invoked for the "power to do anything, anywhere, that can be done with an army or navy." From history the Framers had learned of the dangers of entrusting control of the military establishment to a single man who could commit the nation to war. Let a single quotation suffice. James Wilson, the "most learned and profound legal scholar of his generation," second only to Madison as an architect of the Constitution, who almost single-handedly carried the Constitution through to adoption by the Pennsylvania convention, told that convention that the power to "declare" war was lodged in Congress as a guard against being "hurried" into war, so that no "single man [can] . . . involve us in such distress." It was for this reason that the vast bulk of the war powers was conferred on Congress, leaving to the President a very meager role. Wilson's summary of the constitutional provisions graphically illustrates the glaring disproportion between the allocations to Congress and President:

The power of declaring war, and the other powers naturally connected with it, are vested in congress. To provide and maintain a navy—to make rules for its government—to grant letters of marque and reprisal—to make rules concerning captures—to raise and support armies—to establish rules for their regulation—to provide for organizing . . . the militia, and for calling them forth in the service of the Union—all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress.

Congress was also empowered to "provide for the common defense" and to make appropriations for the foregoing purposes. Since all the powers "naturally connected" with that of declaring war are vested in Congress, it follows, so far as war-making goes, that they

59 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).
60 Text accompanying notes 75-76, 84-85 infra.
62 2 J. ELLIOT, supra note 36, at 528.
63 1 J. WILSON, supra note 29, at 433 (emphasis added). The several powers are set out in U.S. CONST. art. I, § 8.
are not to be exercised by the President.\textsuperscript{64} The President, said Wilson, "is to take care that the laws be faithfully executed; he is commander in chief of the army and navy"; like the Saxon "first executive magistrate . . . he ha[s] authority to lead the army."\textsuperscript{65} How narrowly the function was conceived may be gathered from the instruction by the Continental Congress to George Washington in 1783 to arrange for the take-over from the British of occupied ports and for the liberation of prisoners.\textsuperscript{66}

Virtually every early state constitution made the Governor "captain-general and commander-in-chief" to act under the laws of the State—which is to say, subject to governance by the legislature.\textsuperscript{67} In the Convention, the New Jersey Plan proposed by William Paterson provided that the Executive was "to direct all military operations" but not "on any occasion [to] take command of the troops, so as personally to conduct any enterprise as General," that is, in the field.\textsuperscript{68} In the plan Hamilton submitted to the Convention, he proposed that the Executive should "have the direction of war when authorized or begun," implying it was not for him to "begin" a war.\textsuperscript{69} The words "commander in chief" were adopted without explanation; but it is a fair deduction that Hamilton's explanation in \textit{The Federalist} expressed
As commander in chief, said Hamilton, the President's authority would be "much inferior" to that of the British King: "It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral . . . while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies,—all which, by the Constitution . . . would appertain to the legislature." Hamilton thus deflated this and other executive functions in order to rebut attacks upon the Constitution by those who, "[c]alculating upon the aversion of the people to monarchy" portrayed the President "as the full-grown progeny of that detested parent."

Corwin commented on Hamilton's explanation of the commander role: "this appears to mean that in any war . . . the President will be top general and top admiral of the forces provided by Congress, so that no one can be put over him or be authorized to give him orders in the direction of the said forces. But otherwise he will have no powers that any high military or naval commander who was not also president might not have." So it appeared to Chief Justice Taney as late as 1850. The severely limited role of the President was a studied response to what Madison called "an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence."

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70 Corwin said of The Federalist Number 78: "It cannot be reasonably doubted that Hamilton was here, as at other points, endeavoring to reproduce the matured conclusions of the Convention itself." E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 44 (1916). For example, Richard Spaight, a delegate to the Federal Convention, said in the North Carolina ratification convention that he "was surprised that any objection should be made to giving the command of the army to one man; that it was very well known that the direction of an army could not be properly exercised by a numerous body of men." 4 J. ELIOT, supra note 36, at 114-15 (emphasis added). Lofgren concludes that "the evidence indicates" that the Hamiltonian view with respect to "the President's authority as commander-in-chief . . . accorded well with that of his contemporaries in the state debates." Lofgren, War-Making Under the Constitution: The Original Understanding, 81 YALE L.J. 672, 687 (1972).

71 THE FEDERALIST No. 69, at 448 (Mod. Lib. ed. 1937) (A. Hamilton).

72 THE FEDERALIST No. 67, at 436 (Mod. Lib. ed. 1937) (A. Hamilton). Referring to the proposal to vest appointive power in the President, John Rutledge said in the Federal Convention, "The people will think we are leaning too much towards Monarchy." 1 RECORDS, supra note 30, at 119.

73 E. CORWIN, supra note 26, at 276.

74 Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850). Until 1850, said Corwin, the commander in chief clause "was still . . . the forgotten clause of the constitution." E. CORWIN, TOTAL WAR AND THE CONSTITUTION 15 (1947). So it appeared to President Buchanan, as is disclosed by his message of December, 1859: "after Congress shall have declared war and provided the force necessary to carry it on, the President, as Commander in Chief . . . can alone employ this force in making war against the enemy." 5 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 569 (J. Richardson ed. 1907) [hereinafter cited as Messages]. "Without the authority of Congress," Buchanan continued, "the President can not fire a hostile gun in any case except to repel the attacks of an enemy." Id. 570.

homelier phrase, was to prevent a “single man” from “hurrying” us into war. "Those who are to conduct a war," said Madison, "cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued or concluded. They are barred from the latter function by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws." All appeals to the power of the President as commander in chief must therefore proceed from the incontrovertible fact that the Framers designed the role merely for command of the army as “first General.”

B. “Congress shall have power . . . to declare war.”

Under the Articles of Confederation the Continental Congress had the “sole and exclusive right and power of determining on peace and war.” That practice influenced the Framers; thirty-five of the fifty-five Framers had been members of the Continental Congress. No reference was made to the war-making power in either the Virginia or New Jersey Plans; the former endowed Congress with the “Legislative Rights of,” the latter with all powers vested in, the Continental Congress. Early in the Convention Madison agreed with Wilson that “executive powers . . . do not include the Rights of war and peace . . . .” The draft submitted by the Committee on Detail provided that the legislature should “make war,” lifting this as well as other powers specifically granted to Congress “bodily from the old Articles of Confederation.” It was this provision that became the subject of debate.

Charles Pinckney opposed “vesting this power in the legislature. Its proceedings were too slow”; he preferred the Senate, as Hamilton had proposed in his own plan. Pierce Butler, on the other hand, “was for vesting the power in the President”; but Roger Sherman considered that the Committee’s provision “stood very well. The Executive shd. be able to repel and not to commence war.”

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76 Id. 148. See also text accompanying note 138 infra.
77 H. COTTAMER, DOCUMENTS OF AMERICAN HISTORY 113 (7th ed. 1963).
78 1 RECORDS, supra note 30, at 21, 243.
79 Note 42 supra. Article 26 of the South Carolina Constitution of 1776 carefully spelled out that the governor “and commander-in-chief shall have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly . . . .” 2 B. POORE, supra note 30, at 1619. See also J. WILSON, supra note 29, to the effect that the war power is legislative.
80 2 RECORDS, supra note 30, at 182.
82 2 RECORDS, supra note 30, at 318.
83 1 id. 292.
84 2 id. 318. Butler later explained to the South Carolina legislature that the grant of the power to “make war” to the President “was objected to, as throwing into his
astonished to hear "a motion to empower the Executive alone to declare war." George Mason also "was agst. giving the power of war to the Executive, because not (safely) to be trusted with it . . . . He was for clogging rather than facilitating war."\(^{285}\) The fact that no motion was made to substitute the President for Congress and that the power was left in Congress justifies the conclusion that presidential "commencement" of a war or his power "alone to declare a war" found no favor.

Any power to which the President may lay claim, apart from what he enjoys as commander in chief, derives from a joint motion by Madison and Gerry to substitute *declare* for *make* war "leaving to the Executive the power to repel sudden attacks."\(^{288}\) The textual change from "make" to "declare" was approved; explanation of the change was furnished by Rufus King: "'make war' might be understood to 'conduct' it [war] which was an executive function,"\(^{287}\) a function reserved to the commander in chief. But in that role the President was merely to act as "first General" of the army.\(^{292}\)

The shift from "make" to "declare" has elicited varied explanations;\(^{80}\) for example, Professor Ratner states that the "declare" clause recognized "the war-making authority of the President, implied by his role as executive and commander-in-chief and by hands the influence of a monarch, having an opportunity of involving his country in a war . . . ."\(^{4}\) J. Elliot, *supra* note 36, at 263.


\(^{87}\) Id. 318. The State Department distorts this interchange: "[I]t was suggested that the Senate might be a better repository. Madison and Gerry then moved to substitute 'to declare war' for 'to make war,' 'leaving to the Executive the power to repel sudden attacks.' It was objected that this might make it too easy for the Executive to involve the nation in war, but the motion carried with but one dissenting vote." Office of the Legal Advisor, U.S. Dep't of State, *The Legality of the United States Participation in the Defense of Viet Nam*, reprinted in 75 Yale L.J. 1085, 1101 (1966) [hereinafter cited as Legal Advisor's Memo]. From this one might infer that the Convention intended to "make it too easy for the Executive to involve the nation in war"; but in fact no objection was made to the Madison-Gerry motion, which merely gave effect to the Sherman-Mason-Gerry objections to the grant of war-making power to the President, except to "repel sudden attacks." See Wormuth, *The Vietnam War: The President versus the Constitution*, in 2 *The Vietnam War and International Law* 711, 713-17 (R. Falk ed. 1969).


\(^{89}\) Cf. Ratner, *The Coordinated Warmaking Power—Legislative, Executive and Judicial Roles*, 44 S. Cal. L. Rev. 461, 462 (1971). Clinton Rossiter concludes that "the Court has refused to speak about the powers of the President as Commander in Chief in any but the most guarded terms. . . . The breath-taking estimates of their war powers announced and acted upon by Lincoln and Roosevelt have earned no blessing under the hands of the judiciary." C. Rossiter, *The Supreme Court and the Commander in Chief* 4-5 (1951). Since he wrote, the Court gave such claims a decided setback in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

congressional power to declare, but not make, war.\textsuperscript{90} No war-making power was conferred by the commander in chief clause; and Madison and Wilson agreed that “executive powers . . . do not include the rights of war and peace.”\textsuperscript{91} The grant to Congress of all the powers “naturally connected” with the “declare” power (except the command function) excludes any war-making power from the President’s “role as executive.” Only in a very limited sense—command of the armed forces plus authority to repel sudden attacks—can one accurately refer to a presidential war-making power.\textsuperscript{92} Pretty plainly, when Madison and Gerry proposed to leave to the President power “to repel sudden attacks” they reflected Sherman’s view that the “Executive should be able to repel and not to commence war.” This is the true measure of the presidential power. Certainly Gerry did not mean to repudiate his rejection of the proposition that the Executive could “alone declare war,” still less propel the nation into undeclared war.\textsuperscript{93} It is we who have replaced their blunt realism with semantic speculation.

Viewed against repudiation of royal prerogative, no more can be distilled from the Madison-Gerry remark than a limited grant to the President of power to repel attack when, as the very terms “sudden attack” imply, there could be no time to consult with Congress. Despite the fact, therefore, that the replaced “make” is a verbal component of “war-making,” the shift to “declare” did not remove the great bulk of the war-making powers from Congress; it merely removed the power to conduct a war once declared, as Rufus King explained.\textsuperscript{94} If the war-making power did not remain in Congress, the exception for

\textsuperscript{90} Ratner, supra note 88, at 467.

\textsuperscript{91} Text accompanying note 79 supra.

\textsuperscript{92} In the Convention Hamilton stated that the “Executive ought to have but little power.” He proposed that the Senate should “have the sole power of declaring war” and that the Executive should “have the direction of war when authorized or begun.” 1 Records, supra note 30, at 290, 292. Be it remembered that the Massachusetts Constitution, which expressly authorized the commander in chief to “repel, resist, [and] expel” those who attempted invasion of the Commonwealth (thereby implying that this was not an inherent power of the commander), made the exercise of that power subject “to the laws of the land and not otherwise.” Note 67 supra. And Hamilton explained that the powers of the Massachusetts commander were “larger . . . than could be claimed by the President.” \textit{Id.}

\textsuperscript{93} In the North Carolina convention, James Iredell stated, “The President has not the power of declaring war by his own authority . . . . Those powers are vested in other hands. The power of declaring war is expressly given to Congress . . . .” 4 J. Elliott, supra note 36, at 107-08. Charles Pinckney said in South Carolina that “the President’s powers did not permit him to declare war.” \textit{Id.} 287. These men did not contemplate that he could independently make war, leaving to Congress the empty formality of them “declaring” war.

\textsuperscript{94} After adoption of the Madison-Gerry motion, Pierce Butler “moved to give the Legislature power of peace, as they were to have that of war.” 2 Records, supra note 30, at 319. His motion was adopted without objection, suggesting an understanding that the power of making war, except for “conduct” of the war, remained in Congress.
presidential power “to repel sudden attacks” was superfluous.\textsuperscript{95} Even the power to repel attacks was to some extent left subject to congressional control for, at a time when standing armies were much feared, the Constitution left it to Congress “[t]o provide for calling forth the militia to... repel invasions.”\textsuperscript{96}

In using “declare war,” Professor Rostow argues, the Framers had in mind the sharp distinction drawn by the law of nations between the law of war and law of peace. Under the latter nations enjoyed a right of “self-help,” which was “subsumed under the inherent and sovereign right of self-defense.” Rostow is critical of Hamilton’s suggestion that the President was allocated only the power to exert “self-help in time of peace” on the ground that “[t]he constitutional pattern is, and should be, more complex than any such formula.”\textsuperscript{97} But where is the evidence that such was the understanding of the Framers? However broad the national power of “self-help” may be, the fact, as Justice Frankfurter pointed out, “that power exists in the Government does not vest it in the President.”\textsuperscript{98} Then too, the very careful distribution of powers by the Framers precludes any inference that they intended to grant to the President any incidents of the “nation’s” war power under international law beyond the power to “repel sudden attacks” on the United States.\textsuperscript{99} Professor Rostow would substitute

\textsuperscript{95}Speaking of the need to “provide for the common defence,” which by article I, § 8(1) is vested in Congress, Wilson said, “Defence presupposes an attack... We all know... the instruments necessary for defence when such an attack is made,” and then went on to list the powers conferred upon Congress. 1 J. Wilson, \textit{supra} note 29, at 433. This precludes an inference that the power to “repel sudden attack” was vested in the President ab initio, but rather as a result of ratification of the Madison-Gerry motion. So too, Chancellor R. R. Livingston, in the New York ratification convention, met objections that the Continental Congress did not have “the same powers” as the proposed Congress with the reply, “They have the very same... [including] the [exclusive] power of making war.” 2 J. Elliot, \textit{supra} note 36, at 278.

\textsuperscript{96}Cf. Statement of Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (concurring opinion). Governor Randolph, a Framer, told the Virginia ratification convention that “With respect to a standing army, I believe there was not a member in the federal convention who did not feel indignation at such an institution... In order to... exclude the dangers of a standing army, the general defense... is left to the militia...” 3 \textit{Recordes}, \textit{supra} note 30, at 319. Cf. 2 id. 330 (statements of L. Martin and E. Gerry). See also id. 326 (statement of G. Mason).

\textsuperscript{97}Rostow, \textit{supra} note 3, at 850-51.

\textsuperscript{98}Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 604 (1952) (concurring opinion).

\textsuperscript{99}As a delegate to the Federal Convention, Hamilton may be thought to have had a grasp of the Convention’s understanding of “international law.” In his attack on Jefferson’s restrained response to attacks by Tripoli pirates, Hamilton stated, “it belongs to Congress only, to go to war. But when a foreign nation declares or openly and avowedly makes war upon the United States... any declaration on the part of Congress is... unnecessary.” 8 A. Hamilton, \textit{Letter No. 1 of "Lucius Crassus,"} in \textit{Works} 249-50 (H. Lodge ed. 1904) (emphasis added). What the preponderance of the evidence suggests,” states Lofgren, \textit{supra} note 70, at 688, is that the Founders “conceived of the President’s war-making role in exceptionally narrow terms.” He concludes that “Congress’ power ‘to declare War’ was not understood in a narrow technical sense but rather as meaning the power to commence war, whether declared or not.” \textit{Id.} 699.
unsupported speculations for concrete evidence such as Sherman’s remark that the Executive should not be able to “commence war,” Mason’s statement that the Executive was “not safely to be trusted” with the war power, and Wilson’s explanation that the power to “declare” war was lodged in Congress to prevent a “single man” from “hurrying” us into war—a “propensity” underscored by Madison.

Professor Alexander Bickel suggests that the "‘sudden attack’ concept of the framers ... denotes a power to act in emergencies in order to guard against the threat of attack, as well as against the attack itself, when the threat arises, for example, in such circumstances as those of the Cuban missile crisis of 1962." Gerry and Madison, however, spoke of a “power to repel sudden attacks,” which connotes actual, not threatened attack; and there is reason to believe that a restricted connotation should be given to their remark. Imminent danger of attack had been expressly provided for in the antecedent Articles of Confederation. In conferring the exclusive war power upon the Continental Congress, article IX made an exception for article VI, which provided, “[n]o state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the united states in congress assembled can be consulted ... .” Thus resistance to invasion was limited to invasion of “such state”; it did not extend to invasion of even a contiguous sister state in the “league of friendship.” Georgia was not authorized to resist the invasion of New York, let alone of Canada. And danger of imminent attack permitted reaction only if there was not time for consultation with Congress. We are apt to think that devastating surprise is peculiar to our times, forgetting that the Founders had lived through surprise massacres in frontier forts and settlements and well knew such havoc. It was that experience which led them to leave imminent danger of Indian attacks to the individual threatened state.

A provision similar to the Articles of Confederation exception for state resistance was recommended to the Convention by the Commit-
tee of Detail,\textsuperscript{102} and was embodied in article I, section 10(3). Thus the Framers well understood the distinction between actual invasion and the imminent threat of invasion, and they expressly empowered a state to meet both. No mention whatsoever was made, however, in any of the conventions of a presidential power to react to such imminent danger.\textsuperscript{103} The omission is significant against a background of strictly enumerated presidential powers and pervasive jealousy of the Executive.\textsuperscript{104}

Asserting "it can scarcely be doubted that the President possesses the authority to take whatever action is necessary to protect the interests of the United States in a threatened emergency," McDougal and Lans cite \textit{Martin v. Mott}\textsuperscript{105} for the proposition that "the Supreme Court, in dealing with the powers of the President to call out the militia and employ the armed forces of the United States, concluded that he was empowered to act not only in cases of actual invasion, but also when there was 'imminent danger of invasion.' This latter contingency was held to be a question of fact to be determined by the President."\textsuperscript{106} \textit{Mott} presented a challenge by one called into the militia under the Act of 1795 which authorized the President to call out the militia "whenever the United States shall be invaded, or be in imminent danger of invasion."\textsuperscript{107} Of course, it could not be left to a soldier to determine whether the emergency existed, and the Court held that the decision "whether the exigency has arisen, belongs exclusively to the President . . . ."\textsuperscript{108} This express statutory authorization furnishes no

\textsuperscript{102} The Committee of Detail recommended that no state should, without consent of Congress "engage in any War, unless it shall be actually invaded by Enemies, or the Danger of Invasion be so imminent, as not to admit of a Delay, until the Legislature of the United States can be consulted." 2 \textit{Records}, \textit{supra} note 30, at 169.

\textsuperscript{103} The explanation, in part, may be historical reluctance to permit executive deployment of troops outside the country. In 1701 an act provided that "Englishmen were not to be involved by a foreign king in war for the defence of territory not belonging to the English crown. Henceforth William was scrupulously careful to consult Parliament at every point." C. \textit{Hill}, \textit{The Century of Revolution} 1603-1714, at 278 (1961). The Massachusetts Constitution of 1780, article VII, provided that the governor should not march inhabitants "out of the limits" of the Commonwealth without their consent or "the consent of the general court [legislature]." 1 B. \textit{Poore}, \textit{supra} note 30, at 966. Lofgren, \textit{supra} note 70, at 683, states that the presence of the state invasion provision "in the Constitution at least further suggests that Americans of that day need not have envisaged that the President as Commander in Chief would have an especially broad role in repelling sudden attack."

\textsuperscript{104} R. \textit{Berger}, \textit{supra} note 33, at 260-62.

\textsuperscript{105} 25 \textit{U.S.} (12 \textit{Wheat.}) 19 (1827).


\textsuperscript{107} For Professor Rostow, \textit{Mott} involved "the President's power to call out the militia whenever he deems it desirable to do so." Rostow, \textit{supra} note 5, at 890. The Act conferred no such carte blanche.

foundation for a presidential claim of unlimited constitutional power to forestall "imminent danger of invasion."

Expansion of the "sudden attack" remark in the Convention to include "imminent threat of invasion" requires great caution because it opens the door to a whole multitude of other expansive readings of presidential power. To be sure, there must be a means of meeting a Cuban missile crisis, but that means is through congressional authorization, such as the Act of 1839 exemplifies and the War Powers Bill proposes. For Congress, not the President, was given virtually plenary power to deal with all facets of war-making.

This brings us to the question whether the Javits Bill impermissibly delegates to the President authority to use the armed forces "to forestall the direct and imminent threat" of an armed attack on the United States or on its armed forces located abroad. Professor Rostow defends prior delegations chiefly on the basis of Zemel v. Rusk, where the Court, citing United States v. Curtiss-Wright Export Corp., stated that "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas." In opposition, Professor Francis Wormuth makes an extended analysis of the delegation cases and the history of prior attempts to delegate war powers. From the cases he extracts the principle that Congress may determine the general policy to be pursued and then "authorize the President to determine the facts which call the Congressional policy into play." Although he cites the Zemel v. Rusk remark that Congress cannot "grant the Executive totally unrestricted freedom of choice," he recognizes that war cannot be made "perfectly automatic

109 My analysis leads me to dissent from the statement in the War Powers Report, S. REP. No. 606, 92d Cong., 2d Sess. 4 (1972), that the authorizations contained in § 3 of the War Powers Bill to repel attacks on the United States and to forestall imminent danger of such an attack "are recognized to be authority which the President enjoys in his independent Constitutional office as President/Commander-in-Chief."

110 For the Act of 1839, see text accompanying note 124 infra.

111 S. 2956, 92d Cong., 2d Sess. § 3(1) (1972).

112 381 U.S. 1 (1965).

113 299 U.S. 304 (1936).

114 381 U.S. 1, 17 (1965); Rostow, supra note 3, at 888-89. The analogical leap from the relatively innocuous delegation of authority to embargo arms to the belligerents in the Gran Chaco (South America) war—the issue in Curtiss-Wright—to the delegation of authority to propel the nation into an international holocaust cannot be lightly made. Wormuth, supra note 86, at 789, underlines the quite different considerations that come into play.


116 Wormuth, supra note 86, at 792.

upon the occurrence of a future event."\textsuperscript{118} That is, given a “direct and imminent threat” of attack, the President cannot be left with no choice but to wage war. Wormuth draws the teeth out of this concession, however, by concluding that the decision for war must be taken by Congress contemporaneously with the declaration of war,\textsuperscript{119} a conclusion which amounts practically to a total ban on delegation in the premises. Generally persuaded by Professor Wormuth’s analysis, I find his approach too narrow here. Because, like him, I distrust any doctrine that builds on Justice Sutherland’s vulnerable \textit{Curtiss-Wright} opinion,\textsuperscript{120} I shall outline at least two considerations which suggest a more flexible approach.

First, having concluded that the plenary war-making power was vested in Congress rather than the President, I would be guided by John Marshall’s statement in \textit{McCulloch v. Maryland}:\textsuperscript{121}

\begin{quote}
It must have been the intention of those who gave these powers, to insure . . . their beneficial execution. This could not be done, by confiding the choice of means to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end.\textsuperscript{122}
\end{quote}

\textit{McCulloch}, to be sure, did not involve a delegation problem, but its principle has wide scope.

Second, the historical course of Congress, charted in part by Professor Wormuth, has not been all one way. It will be recalled that article I, section 8(15), empowers Congress “To provide for calling forth the militia . . . to repel invasion.” Instead of providing a detailed expression of policy, Congress was content by the Act of 1795 to authorize the President to call forth the militia “whenever the United States shall be invaded, or be in imminent danger of invasion,” a policy no more detailed than the Javits “direct and imminent threat of an attack [on the United States].”\textsuperscript{123} It is not a little remarkable that the delegation point was not so much as mentioned in \textit{Martin v. Mott}. A similar course was pursued in the Act of March 3, 1839, which empowered the President “to resist any attempt on the part of Great Britain, to enforce, by arms, her claim to exclusive jurisdiction over” a disputed portion of Maine.\textsuperscript{124}

\textsuperscript{118}Wormuth, supra note 86, at 796.

\textsuperscript{119}Id.

\textsuperscript{120}Wormuth, supra note 117, at 694. For a discussion of \textit{Curtiss-Wright}, see text accompanying notes 264–86 infra.

\textsuperscript{121}17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{122}Id. at 415.

\textsuperscript{123}S. 2956, 92d Cong., 2d Sess. § 3 (1972).

\textsuperscript{124}Act of March 3, 1839, ch. 89, § 1, 5 Stat. 355.
Like Professor Wormuth, I little relish congressional issuance of a blank check to determine policy;\footnote{Wormuth, \textit{supra} note 86, at 781; \textit{cf.} \textit{id.} 789.} and I am aware that on the domestic front it was said in \textit{Panama Refining Co. v. Ryan}\footnote{293 U.S. 388 (1935).} that Congress "must establish a criterion to govern the President's course."\footnote{Id. at 415. \textit{Zemel v. Rusk} also stated that it was not true that "simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice." 381 U.S. at 17.} A criterion, however, can be made only as explicit as the particular circumstances admit. If a tighter standard than that of the Javits Bill can be devised, so much the better; but until then I am satisfied to read the Bill's "forestall" phrase\footnote{See text accompanying note 111 \textit{supra}.} as did Professor Bickel, who instanced before the Senate Foreign Relations Committee a threat like that of the Cuban missile crisis, that is "a reactive, not a self-starting affirmative power."\footnote{\textit{Id.} S. \textbf{Rep.} No. 606, 92d Cong., 2d Sess. 4 (1972).} But I would add a provision akin to the early exemption for state action afforded by the Articles of Confederation for resistance when the "danger [of invasion] is so imminent as not to admit of a delay, till the . . . congress assembled can be consulted." Few, if any, recent presidential adventures were launched in circumstances so crucial as to admit of no delay until Congress could be consulted. That circumstances may occur which will render such consultation impossible must be conceded; and it will not do to foreclose \textit{both} Congress and the President from meeting that situation. In fine, the limits on delegation, which some consider a moribund doctrine,\footnote{E.g., K. \textit{Davis}, \textit{Administrative Law Text} 32 (3d ed. 1972).} must not be so rigorously applied as to deprive Congress as well as the President of power to cope with the fearful exigencies of our contemporary world.\footnote{\textit{When it concerns the powers of the \textit{nation}, as distinguished from those of the \textit{President}, we need to recall Hamilton's words, in \textit{The Federalist Number 23}, respecting the "authorities essential to the common defence": "These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them." \textit{The Federalist} No. 23, at 142 (Mod. Lib. ed. 1939) (A. Hamilton) (emphasis added). Any application of the delegation doctrine that would shackle the \textit{nation} must yield to this necessity. \textit{Legal Advisor's Memo, \textit{supra} note 86, at 1101.} \footnote{\textit{Rostow's Evocation of the Original Intention}}\footnote{\textit{Legal Advisor's Memo, \textit{supra} note 86, at 1101.}}}

C. \textit{Rostow's Evocation of the Original Intention}

The Legal Advisor of the State Department had little quarrel with the foregoing reading of the original intention: "In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the \textit{United States}."\footnote{\textit{Rostow's Evocation of the Original Intention}} Professor Ratner, whom Professor Rostow in-
vokes as a Daniel come to judgment,\textsuperscript{133} likewise concedes that "[i]n 1787, 'repel sudden attack' probably meant 'resist invasion or rebellion.'"\textsuperscript{134} Apparently not entirely satisfied to rely solely on the escape hatch resorted to by others—alteration of the Constitution by presidential practices—Professor Rostow intimates that an expanded presidential war power is immanent in the Constitution,\textsuperscript{135} relying on various quotations to create an atmosphere in which any other reading is presumably unthinkable.\textsuperscript{136} Coming from so reputable a scholar, they cannot be dismissed out of hand.

The Rostow article begins with several epigraphs that resemble nothing so much as scareheads. One, Madison's "impetuous vortex" of the legislature that threatens to engulf everything in sight, has been shown to be without relevance to our problem.\textsuperscript{137} When Madison focussed squarely on the distribution of war powers, he stated:

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 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 . . . .\textsuperscript{138}

What better illustrates the futility of citing generalizations which are well enough in their original context to determine a specific issue, than Madison's own judgment on the President's limited war power, so remote from Professor Rostow's claim that it must be free from the "impetuous vortex" of Congress.

\textsuperscript{133} Rostow, \textit{supra} note 3, at 857, finds Ratner's study one of the two "most judicious" in the field. I shall have occasion to comment on the core of this "most judicious" piece.


\textsuperscript{135} Nevertheless Rostow, \textit{supra} note 3, at 886, is critical of those who "discover the source of their rule in what they regard as the original intent of the men who gave Congress the power 'to declare war,' despite 182 years of opinion and practice to the contrary."

\textsuperscript{136} Id. 887-92. According to Rostow, \textit{id.} 835, 843, the Javits Bill "would permit a pleni potentiary Congress to dominate the Presidency (and the courts as well) more completely than the House of Commons governs England . . ."; it "seeks to substitute parliamentary government for the tripartite constitution we have so painfully forged."

\textsuperscript{137} \textit{The Federalist} No. 48, at 322 (Mod. Lib. ed. 1937) (J. Madison), \textit{quoted in Rostow, supra} note 3, at 833. See text accompanying notes 31-37 \textit{supra}.

Another Rostow epigraph is Hamilton's statement in The Federalist Number 23: "The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." Hamilton was concerned there with the needed surrender by the states to the "federal government" of powers "essential to the common defense," not with a plea that presidential war powers must not be shackled. Hamilton's argument for lodging power in the nation rather than the states is not convertible into an argument that power is to be vested in the President rather than in Congress. Well did he know that the presidential powers were indeed limited; and even after he had moved from a narrow to a broader view of the Executive power, he still declared that it is the exclusive province of Congress, when the nation is at peace, to change that state into a state of war; it belongs to Congress only, to go to war. But when a foreign nation declares or makes war upon the United States; any declaration on the part of Congress is unnecessary.

In short, but for a presidential power to defend against attack upon the United States, "it belongs to Congress only to go to war."

Professor Rostow also paraphrases Chief Justice Marshall's statement that "we should never forget it is a constitution we are expounding—a constitution intended to endure for ages to come, and capable of adaptation to the various crises of human affairs." What such

139 Rostow, supra note 3, at 833.
140 See note 131 supra.
141 See text accompanying notes 52-56, 69-71 supra.
142 See note 92 supra.
143 For Hamilton's later expansive reading of executive power in the realm of foreign relations, see E. Corwin, supra note 26, at 217-18. It needs to be viewed in the light of his proposal in the Convention of a permanent body of the "rich and well born" to "check the imprudence of democracy... their turbulent and uncontroverting disposition," 1 Reco. supra note 50, at 290, 299. The patrician Henry Adams stated that "Hamilton considered democracy a fatal curse, and meant to stop its progress." See E. Samuels, Henry Adams, The Middle Years 58 (1965). He would therefore prefer to concentrate power in the executive and to short-circuit the democratic process which contemplated congressional debate. His views found no favor with the Convention.
145 Professor Rostow wrings from Wormuth's statement that "When a foreign country attacks the United States... the President... must... wage the war," a concession of broad war powers to the President, "for most Presidential uses of the armed forces" represent resistance to "the hostile act of another state... directed against the security of the United States." Rostow, supra note 3, at 550 n.28 (emphasis added). But it is precisely this difference between an attack on the United States and acts which are deemed by the President to menace "the security of the United States" upon which the whole debate hinges.
146 Rostow, supra note 3, at 844. McDougal and Lans rely on this Marshall statement for an "adaptive or instrumental" theory, which "treats the Constitution as an
"adaptation" has come to mean may be illustrated by the words of the State Department: "In the 20th century the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation’s security . . . . The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress."\textsuperscript{147} That was not the view of the Framers, of Madison and of Hamilton. What portion of the Constitution confers this astonishing power? Because the world is contracting it does not follow that the President’s constitutional powers are correspondingly expanding.\textsuperscript{148}

Certainly Marshall would have been the last to distil such a proposition from his dictum in \textit{McCulloch v. Maryland}. Too long has the dictum been reiterated without notice of the circumstances in which it was uttered. \textit{McCulloch} presented the question whether Congress had constitutional power to establish the Bank of the United States; the issue turned on whether a bank was a proper \textit{means} for execution of expressly granted federal powers. In granting the powers, said Marshall, the Framers intended to

\begin{quote}
insure, their beneficial execution. This could not be done, by confiding the \textit{choice of means} to such narrow limits as not to leave it in the power of congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various
\end{quote}

\textsuperscript{147}LEaGaL ADVISOR’S MEMO, supra note 86, at 1101.

\textsuperscript{148}In \textit{Youngstown}, Justice Jackson said:

\begin{quote}
The appeal . . . that we declare the existence of inherent powers \textit{ex necessitate} to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. . . . Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion . . . they made no provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work. 343 U.S. at 579, 649-50 (concurring opinion). Emergency powers, Jackson continued, "are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them. That is the safeguard that would be nullified by our adoption of the ‘inherent powers’ formula." \textit{Id.} at 652.

The "emergency power" had been strongly advocated by Justice Clark, \textit{id.} at 660-62 (concurring opinion), but Justice Douglas also rejected it, saying the fact that speed was essential "does not mean that the President, rather than the Congress, had the constitutional authority to act." \textit{Id.} at 629.
crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been... [to give the Constitution] the properties of a legal code.

Manifestly this is merely a plea for some freedom in the choice of "means," not for license to create a fresh power at each new crisis. For this we need not rely on inference, because Marshall himself made this plain in a debate with Judge Spencer Roane, the discovery of which we owe to the happy enterprise of Professor Gerald Gunther.

McCulloch had immediately come under attack and Marshall leapt to its defense. Speaking directly to the above-quoted passage, he stated,

it does not contain the most distant allusion to any extension by construction of the powers of congress. Its sole object is to remind us that a constitution cannot possibly enumerate the means by which the powers of government are to be carried into execution.

Again and again he repudiated any intention to lay the predicate for such "extension by construction." There is "not a syllable uttered by the court," he said, that "applies to an enlargement of the powers of congress." He rejected any imputation that "those powers ought to be enlarged by construction or otherwise." The Court, he stated, never intimated that construction could extend "the grant beyond the fair and usual import of the words..." Even the means are not to be "strained to comprehend things remote, unlikely or unusual." Translated into terms of the present issue, a grant of power to "repel sudden attacks" on the United States is not to be construed as a presidential power to repel an attack by a foreign nation on Korea.

Over-modestly appraising the impact of his discovery, Professor Gunther states:

Clearly these essays give cause to be more guarded in invok-

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151 Id. 185 (emphasis added).
152 Id. 182, 184.
153 Id. 92; see id. 185.
154 Id. 168. "In no single instance does the court admit the unlimited power of congress to adopt any means whatever..." Id. 186. Marshall emphasized that "in all the reasoning on the word 'necessary,' the court does not, in a single instance, claim the aid of a 'latitudinous,' or 'liberal' construction..." Id. 92.
155 "It is not pretended," said Marshall, "that this right of selection may be fraudulently used to the destruction of the fair land marks of the constitution." Id. 173.
ing McCulloch to support views of congressional power now thought necessary. If virtually unlimited discretion is required to meet twentieth century needs, candid argument to that effect, rather than ritual invoking of Marshall's authority, would seem to me more clearly in accord with the Chief Justice's stance.¹⁶⁵

Enough of such incantations!

Against such misinterpretations of Marshall, there is the pledge of Jefferson, after his election to the presidency, to administer the Constitution "according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption—a meaning to be found in the explanations of those who advocated . . . it."¹⁶⁷ Madison also clung "to the sense in which the Constitution was accepted and ratified by the Nation," adding, "if that be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers."¹⁶⁸

Considerations of space and the patience of the reader constrain me to content myself with one last Rostow quotation, Justice Frankfurter's statement in the Youngstown case:

It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written on them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on the Executive Power vested in the President by § 1 of Art. II.¹⁶⁹

Apparently Frankfurter was inspired by the Marshall remark in McCulloch, for he stated:

The pole-star for constitutional adjudications is John Marshall's greatest judicial utterance that "it is a constitution we are expounding." . . . That requires . . . a spacious view in applying an instrument of government "made for an expanding future". . . .¹⁶⁰

Marshall, as we have seen, repudiated a "spacious view" of power conferred by the Constitution; not for him enlargement of those powers "by construction or otherwise." Moreover, Frankfurter's state-

¹⁶⁵ Id. 20-21.
¹⁶⁶ 4 J. Elliott, supra note 36, at 446.
¹⁶⁷ 9 J. Madison, supra note 75, at 191, 372.
¹⁶⁹ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 596 (1952) (concurring opinion).
ment was utterly gratuitous, the sheerest dictum. The setting of the

case, in his own words, was that Congress had “frequently—at least

16 times since 1916—specifically provided for executive seizure . . . .

In every case it has qualified this grant of power with limitations and

safeguards.”161 Congress, he said, had “expressed its will to withhold

this power from the President as though it had said so in so many

words.”162 Thus the facts at bar were 180 degrees removed from the

hypothetical facts to which his dictum was addressed. No more im-

portance should be attached to the Frankfurter dictum, in which no

other member of the Court joined, than Marshall attached to his own

dictum, uttered on behalf of the entire Court in Marbury v. Madison,163

when it was pressed upon him in Cohens v. Virginia.164 Dicta, Marshall explained, never receive the careful consideration that

is given decision of the particular case.165

Youngstown presented the validity of presidential action in the

absence of an express statutory bar; and one may question whether

Frankfurter would deny to Congress exercise of power expressly con-

ferred because the President, by a “gloss of life,” had reallocated the

power to himself. The Marshall who declared in the Roane debate that

the Court’s exercise of the power of judicial review vested in it by the

Constitution “cannot be the assertion of a right to change that instru-

ment,”166 would hardly have concurred with Professor Rostow that the

President’s repeated exercise of power withheld from him and con-

ferred upon Congress constituted a “gloss of life” which converted the

usurpation into constitutional dogma.167 It is time to cry out against

the substitution of such glittering generalities for the hard analysis

that each specific case demands afresh.

The underlying reality, it may be countered, is that Marshall’s

acts were at war with his words, that he did in fact change the Con-

stitution. This is to condone a divorce between words and deeds, to

take a cynical view of adjudication, reminiscent of the lip service

paid by the Renaissance princes to the Holy Church because religion

made the masses more docile. Realism, to be sure, calls on us to look

161 Id. at 597-98.
162 Id. at 602.
163 5 U.S. (1 Cranch) 137 (1803).
164 19 U.S. (6 Wheat.) 264, 399-400 (1821).
165 Id. at 399-400.
166 JOHN MARSHALL’S DEFENSE OF MCCulloch v. Maryland 209 (G. Gunther ed.

1969) (emphasis added).
167 To still fears of usurpation, James Iredell, leader in the fight for ratification in

North Carolina, and later a Justice of the Supreme Court, said, “If Congress, under

pretence of executing one power, should, in fact, usurp another, they will violate the

Constitution.” 4 J. Elliot, supra note 36, at 179.
behind what courts say to what they do; but then ordinary honesty
requires that the American people be told in plain words, which the
man in the street can grasp, that the Court has assumed the function
of amending the Constitution. Continued dissimulation on this score
is unworthy of bench and bar.

In sum, the transformation of the "repel sudden attacks" excep-
tion of Madison and Gerry into an alleged presidential power, without
congressional authorization, to commit the armed forces to battle
against invasion of Korea or Vietnam can find no warrant either in the
constitutional text or in the understanding of the Framers. About this
there is virtually no dispute;
168 instead the apologists for the power
rest it upon "adaptation by usage."

III.  ADAPTATION BY USAGE

"Adaptation by usage" is a label designed to render palatable
the disagreeable claim that the President may by his own practices
revise the Constitution, that he may disrupt the constitutional dis-
tribution of powers, considered inviolable under the separation of
powers. The argument on behalf of presidential "adaptation of the
Constitution by usage" was most forcefully made by McDougal
and Lans who, impatiently brushing aside the "absolute artifacts of
verbal archaeology," 169 "the idiosyncratic purposes of the Framers," 170
concluded that "continuance of [a] practice by successive administra-
tions throughout our history makes its contemporary constitutionality
unquestionable." 171 In plain words, usurpation of power by the Presi-
dent, if repeated often enough, is legitimated. 172

We may put to one side the example of the Supreme Court as the
allegedly necessary engine for "adaptation" of the Constitution to the
needs of a changing society, particularly since the President's single-
handed revision of the Constitution is claimed to be immune from

168 See text accompanying notes 132-34 supra.
169 McDougal & Lans, supra note 146, at 291.
170 Id. 212.
171 Id. 291. Compare their comment, "The phrase 'treaty of peace,' when bereft of
the reification which makes it some mysterious, special kind of an agreement" excluded
from the scope of solo presidential agreements, id. 286, with events in the Convention.
Madison moved to "except treaties of peace" from the two-thirds concurrence provision.
Gerry objected that treaties of peace were of special importance; and Hugh Williamson
stated, "Treaties of peace should be guarded at least by requiring the same concurrence
as in other Treaties." 2 Records, supra note 30, at 540-41. The proposed exception was
rejected. For the Framers a treaty of peace was unmistakably a "special kind of agree-
ment," for reasons which were not at all "mysterious."

so deeply embedded in our governmental structure should be treated as decisive of the
constitutional issue." [H]istory has legitimated the practice of presidential war-making,
Id. 29. For similar views, see Ratner, supra note 88, at 467; cf. Reveley, supra note 3, at
1250-57.
judicial review. So too, the clarification of an ambiguous grant of
power to the President by resort to his long continued practice there-
under is to be differentiated. Here we have an attempted take-over
by the President of war powers plainly conferred upon Congress alone,
and accompanied by an unmistakable intention to withhold them from
the President. It therefore constitutes a bare-faced attempt to alter
the constitutional distribution of powers, and to violate the separation
of powers.

When McDougal and Lans charge those who demur with slavery
to "words of the Constitution as timeless absolutes," to "mechanical
filiopticistic theory," they totally misconceive the issue. The issue
is not one of words but of power: is the President authorized to
transfer power conferred upon Congress to himself? Whence comes
the mandate to the President to rewrite the Constitution?

"The people," said James Iredell, "have chosen to be governed
under such and such principles. They have not chosen to be governed
or promised to submit upon any other." Arguing for executive agree-
ments, McDougal and Lans said, "the crucial constitutional fact is
that the people (Presidents, Supreme Court Justices, Senators, Con-
gressmen and electorate) who have lived under the document for 150
years have interpreted it ... [to] authorize the making of interna-
tional agreements other than treaties on most of the important prob-
lems of peace and war." Now the inescapable fact is that the issue
has never really been explained to "the people"; much less has the
judgment of "the electorate" ever been solicited. Though sympa-

\[173\] For a collection of authorities see Ratner, supra note 88, at 482-83.

\[174\] In Youngstown, Justice Douglas wrote, "If we sanctioned the present exercise
of power by the President, we would be expanding Article II of the Constitution and
rewriting it to suit the political conventions of the present emergency." 343 U.S. at 632
(concurring opinion). Cf. notes 93 & 148 supra.

\[175\] McDougal & Lans, supra note 146, at 212. In their defense of "executive agree-
ments," they further stated, "[w]hether these powers are based on interpretation
of the language of the Constitution or on usage is, strictly, a matter of concern only for
rhetoricians . . . ." Id. 239 n.104.

\[176\] 2 G. McREE, LIFE AND CORRESPONDENCE OF JAMES IRDELL 146 (1857). See also
Berger, supra note 33, at 13-14.

\[177\] McDougal & Lans, supra note 146, at 216 (emphasis added). They also state that
"In preferring to alter the Constitution by informal adaptation, the American people have
also been motivated by a wise realization of the inevitable transiency of political
arrangements." Id. 294 (emphasis added).

\[178\] "The principal enzymes of change have been the emergence of a more democratic
philosophy of government, leading to replacement of some of the patrician institutions
devised by the statesmen of 1787 . . . ." Id. 292. McDougal and Lans were attacking the
power of a senate minority to thwart a foreign policy favored by the nation, exemplified
by Senate rejection of Wilson's Versailles Treaty. Alas for result-oriented jurisprudence:
an even less democratic process has been substituted—executive agreements kept secret
from the Senate, foreign policy fashioned by a behind-the-scenes elitist conclave which
a recent critic, R. J. Barnet, charges, is not accountable either to the people or to
Congress. R. BARNET, ROOTS OF THE WAR (1972). McDougal and Lans have themselves
made the fitting comment: "[U]ntil we are furnished with the formula for the selection
thetic to amendment by usage, Reveley sapiently observes that the "general public takes a relatively blackletter view of the Constitution," and that the "subtleties" of adaptation "by usage . . . would probably be lost on the general public." It is therefore idle to impute informal ratification of the presidential power take-over to "the people." The people have been told by the President that he has acted under the Constitution, by which, in their benighted way, they understand textual warrant, not long-continued violation of the Constitution. It is always hazardous to prophesy how the American people would react in any given situation, but in view of the bitter strife over presidential war-making, I venture to think that a nationwide howl of outrage would greet the disclosure that the presidential blood-letting in Vietnam is justified, not by constitutional grants of power to the President, but by a self-serving theory of boot-strap power built upon successive encroachments on exclusive congressional prerogatives.

Professor Ratner tells us that "constitutional policy for ensuing epochs is not congealed in the mold of 1787 referants." Of course not; the Founders provided for change by a process of amendment. That process is cumbersome, and designedly so; but it is a marvelous non-sequitur that in consequence the servants of the people may informally amend the Constitution without consulting them. In

of the elite, we are entitled to doubt that the minority has any unique monopoly of wisdom. Government by a self-designated elite—like that of benevolent despotism or of Plato's philosopher kings—may be a good form of government for some people, but it is not the American way." McDougal & Lans, supra note 106, at 577-78.

179 Reveley, supra note 3, at 1255 n.31, 1293.
180 See text accompanying note 19 supra.
181 Ratner, supra note 88, at 467.
182 The Founders fully understood the difficulties of amendment. Thus Patrick Henry argued in the Virginia ratification convention, "[I]f our smallest states, that do not collectively contain one tenth part of the population . . . may obstruct the most salutary and necessary amendments." J. ELLIOT, supra note 36, at 49. But the prevailing view was expressed in the North Carolina convention by James Iredell: the Constitution "can be altered with as much regularity, and as little confusion, as any act of Assembly; not, indeed, quite so easily, which would be extremely impolitic . . . so that alterations can without difficulty be made, agreeable to the general sense of the people." 4 id. 177. Charles Jarvis said in Massachusetts, "we shall have in this article an adequate provision for all the purposes of political reformation." 2 id. 116.
183 When, as has proved to be the case in most of the American states, the process of amendment is a relatively simple political problem, adaptation frequently proceeds by way of formal change; when, as has proved to be the case in the Federal Union, the process of amendment is politically difficult, other modes of change have emerged." McDougal & Lans, supra note 146, at 293. Because of the "difficulty of its formal amendment process, alteration by usage has proved to be the principal means of modifying our fundamental law." Reveley, supra note 3, at 1232.

In the First Congress, Gerry, one of the Framers, stated, "if it is an omitted case, an attempt in the Legislature to supply the defect, will be in fact an attempt to amend the Constitution. But this can only be done in the way pointed out by the fifth article of that instrument, and an attempt to amend it in any other way may be a high crime or misdemeanor . . . ." The people, he added, have "directed a particular mode of making amendments, which we are not at liberty to depart from . . . . Such a power would render the most important clause in the Constitution nugatory." 1 ANNS of Cong.
deed, Professor Rostow upbraids the Senate for attempting by the Javits Bill "to amend the Constitution without . . . consulting the people." It is incongruous to insist that congressional restoration of the "original intention" respecting the constitutional allocation of powers must proceed by amendment while maintaining that the President is free unilaterally to alter the Constitution because, as his school insists, amendment is difficult.

Alexander Hamilton, that daring pioneer advocate of broadly-read presidential powers, writing with respect to the express treaty power (as distinguished from a power merely rested on "usage") regarded it as a fundamental maxim that

a delegated authority [e.g. the President] cannot alter the constituting act, unless so expressly authorized by the constituting power. An agent cannot new-model his own commission. A treaty, for example, cannot transfer the legislative power to the executive department.

Marshall, as we have seen, disclaimed judicial power to change the Constitution. Now the followers of Hamilton, the citators of Marshall, would claim that the President can by his own "usage" "new-model his commission" and "transfer the legislative power to the executive."

To a believer in constitutional government, in the separation of powers as a safeguard against dictatorship, there is no room for a take-over by the President of powers that were denied to him and, as our own times demonstrate, denied with good reason. "Ours is a government of divided authority," declared Justice Black in 1957, "on the assumption that in division there is not only strength but freedom

523 (1789). Willard Hurst remarked in our own time that the informal amendment approach "is a way of practically reading Article V out of the Federal Constitution . . . . [The Framers] provided a defined, regular procedure for changing or adapting it." SUPREME COURT AND SUPREME LAW 74 (E. Cahn ed. 1954).

184 Rostow, supra note 3, at 835. Secretary of State Rogers likewise asserts that the presidential allocation of powers "should be changed, if at all, only by Constitutional Amendment." N.Y. Times, Mar. 30, 1972, at 10, col. 3.

185 A. HAMILTON, LETTERS OF "CAMILLUS" in WORKS 166 (H. Lodge ed. 1904) (emphasis added).

186 Notes 151-55, 166 supra & accompanying text.

187 The executive branch clings to the separation of powers when it claims a right to withhold information from Congress under the doctrine of "executive privilege." See HEARINGS ON S. 1125 BEFORE THE SUBCOMM. ON SEPARATION OF POWERS OF THE SENATE COMM. ON THE JUDICIARY, 92d Cong., 1st Sess. 430, 473 (1971) (remarks of Secretary of State William Rogers and Assistant Attorney General William Rehnquist) [hereinafter cited as HEARINGS]. So too, Professor Rostow reminds Congress that it cannot fashion out of the necessary and proper clause "a bootstrap doctrine, empowering Congress to abolish the principle of the separation of powers." Rostow, supra note 3, at 897. The historical facts demonstrate that it is the President, rather than the Congress, who seeks to "abolish" the separation of powers, to preempt powers granted exclusively to Congress.
from tyranny." If present exigencies demand a redistribution of powers originally conferred upon Congress—a presidential power to commit the nation to war without congressional consultation or authorization—that decision ought candidly to be submitted to "the people" in the form of a proposed amendment, not masked by euphemisms. For me Washington's advice remains the pole-star:

The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced . . . . To preserve them must be as necessary as to institute them. If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

A. Presidential "Usage"—The "125 Incidents"

"Since the Constitution was adopted," said the State Department, "there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior Congressional authorization, starting with the 'undeclared war' with France (1798-1800)." Professor Wormuth has located "the first serious discussion of the problem" in 1912, in a monograph by J. Reuben Clark, the Solicitor of the State Depart-

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188 Reid v. Covert, 354 U.S. 1, 40 (1957).
189 Compare Professor Felix Frankfurter's advice to President Franklin D. Roosevelt in 1937: "the Supreme Court for about a quarter of a century has distorted the power of judicial review into a revision of legislative policy, thereby usurping powers belonging to the Congress." And "people have been taught to believe that when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases, it is they who speak and not the Constitution. And I verily believe that that is what the country needs most to understand." ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 383-84 (M. Freedman ed. 1967).
190 35 G. WASHINGTON, WRITINGS 228-29 (J. Fitzpatrick ed. 1940). The Massachusetts Constitution of 1780, which was drafted by John Adams, provided that the people "have a right to require of their lawgivers and magistrates an exact and constant observance" of the "fundamental principles of the constitution" which are "absolutely necessary to preserve the advantages of liberty and to maintain a free government." 1 B. POORE, supra note 30, at 959.
191 LEGAL ADVISOR'S MEMO, supra note 86, at 1101. Wormuth, supra note 86, at 718, justly states of the "undeclared war" with France, "This is altogether false. The fact is that President Adams took absolutely no independent action. Congress passed a series of acts [cited by Wormuth] which amounted, so the Supreme Court said, to a declaration of imperfect war; and Adams complied with these statutes." Bas v. Tingy, 4 U.S. (4 Dall.) 36 (1800), amply confirms that Adams acted under congressional authorization.
ment, entitled *The Right to Protect Citizens in Foreign Countries*. There Clark "opined that, with the exception of our political interventions in Cuba and Samoa, all the earlier cases could be regarded as nonpolitical interposition for the protection of citizens. He suggested that they might fall within the President's constitutional power, but this opinion was 'with no thought or pretense of more than a cursory examination. It is entirely possible that a more detailed and careful study would lead to other or modified conclusions.' His tentative argument turned on the fact that the President possessed executive power . . . . Clark made no reference whatever to the commander-in-chief clause."192

As late as 1912, therefore, the legal theoretician of the State Department sought refuge in the Constitution rather than appeal to the President's own practices for legitimation of prior presidential nonpolitical interpositions for protection of citizens. From this frail seedling, in the short space of 38 years, grew the present overweening executive claims. In 1950 the President committed troops to repel the sudden invasion of South Korea. Dean Acheson, then Secretary of State, recommended to the President that he "should not ask for a resolution of approval, but rest on his constitutional authority as Commander in Chief . . . ." Later he wrote, "There has never . . . been any serious doubt . . . of the President's constitutional authority to do what he did. The basis for this conclusion in legal theory and historical precedent," he said, was a State Department memorandum of 1950 which "listed eighty-seven instances in the past century in which [Truman's] predecessors" had exercised "presidential power to send our forces into battle. . . . And thus yet another decision was made."193 Decisions can be made by executive fiat; but fiat cannot supply constitutional sanction.

The painstaking analysis of the "125 incidents" by Professor Wormuth cuts the ground from under the claims of Acheson and his associates.194 Under Secretary of State Nicholas Katzenbach himself stated that "most of these [incidents] were relatively minor uses of

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192 Wormuth, supra note 117, at 663.
193 D. ACHESON, PRESENT AT THE CREATION 414-15 (1969). The argument had been made in 1945 by McDougal and Lans, supra note 106, at 612: "Now that the technology of war has made it imperative in the interests of national safety that aggressors be met with the threat of overwhelming force before they can commence their own military operations, it can scarcely be doubted that the President possesses the authority to take whatever action is necessary to protect the interests of the United States in a threatened emergency."
194 See Wormuth, supra note 86. See also Wormuth, supra note 117, at 652-64. Reveley, supra note 3, at 1258, states, "[a]s precedent for Vietnam . . . the majority of the nineteenth century uses of force do not survive close scrutiny."
force. The "vast majority" of such cases, said Edward Corwin, "involved fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts [to protect American citizens], the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border. For one reason or another such cases presented little or no possibility of armed conflict or bloodshed so there was no occasion to approach Congress for authorization to make war; even so, some Presidents did seek such authorization. These incidents are far from "precedents" for sending our troops "into battle."

Even were these incidents to be regarded as equivalent to executive waging of war, the last precedent would stand no better than the first; illegality is not legitimated by repetition. It is one of the ironies of history that such "precedents" should be invoked for vastly greater incursions at a time when "gunboat diplomacy" has been discredited and abandoned. To extrapolate from a practice of landing "six sailors in a long boat to rescue a citizen" to a right to commit the nation to a Vietnam War, which has cost 30 billion dollars a year, engaged upwards of 500,000 men, resulted in some 200,000 wounded and 45,000 dead, is to make a breath-taking analogical leap across a chasm of non-equivalence.

Professor Monaghan criticizes Wormuth's deflation of these "incidents" on which the State Department relies, first on the ground

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106 Corwin, The President's Power in The President's Role and Powers 361 (D. Haight & L. Johnston eds. 1965). Elsewhere Corwin has written, "The vast proportion of the incidents... comprised... efforts to protect definite rights of persons and property against impending violence, and were defended on that ground as not amounting to acts of war." E. Corwin, supra note 74, at 146. See also id. 147-48; Wormuth, supra note 86, at 742-43, 746-48.
107 Reveley, supra note 3, at 1258; Wormuth, supra note 86, at 742.
108 Text accompanying notes 209-12, 214 infra.
109 Perhaps President Polk's dispatch of troops into Mexico in 1846 may be deemed an exception, although when hostilities broke out he immediately asked Congress for approval; after bitter debate over his assertions that his acts were "defensive," Congress declared war. Power to Commit Forces, supra note 3, at 1780. In 1848, the House of Representatives, by a resolution in which Lincoln joined, condemned Polk's action. Wormuth, supra note 86, at 726. See text accompanying notes 228-29 infra.
110 Powell v. McCormack, 395 U.S. 486, 546 (1969), reminded us "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."
111 E. Corwin, supra note 26, at 241, perhaps the most influential 20th century apologist for enlarged presidential powers, states that the President has gathered "to himself powers with respect to war making which ill accord with the specific delegations in the Constitution of the war-declaring power to Congress." Cf. note 93 supra.
112 Reveley, supra note 3, at 1289.
113 Cf. Wormuth, supra note 86, at 762.
114 Professor Bickel has said that "there comes a point when a difference of degree achieves the magnitude of a difference in kind." S. Rep. No. 606, 92d Cong., 2d Sess. 16 (1972).
that "To dismiss American interventions in Latin America as 'minor' amounts to recognition of presidential power to wage war against weak opponents for limited purposes." Consider, for example, the bombardment by an over-zealous navy captain of the "sovereign state of Greytown," Nicaragua, in 1854, in reprisal for some negligible "outrages" by what President Pierce described as a band of outlaws rather than an organized society, and which Secretary of State Marcy wrote was "an embarrassing affair" that could not be repudiated because of domestic political repercussions. Professor Monaghan is welcome to regard this as the "waging of war"; but few would equate it with the presidential commitment of troops to resist the invasion of South Korea.

What if the "incidents" do demonstrate that "with ever-increasing frequency, presidents have employed that amount of force that they deemed necessary to accomplish their political objectives . . . . Whatever the intention of the framers, the military machine has become simply an instrument for the achievement of foreign policy goals, which in turn have become a central responsibility of the presidency." Monaghan's dismissal of "the intention of the framers" vastly simplifies the presidential argument; the Constitution is then merely a scrap of paper to be respected or disregarded at will. On the assumption that it remains, however, a charter of government, the hitching of the "military machine" to the "achievement of foreign policy goals" is a choice example of the tail wagging the dog. By endowing the President with authority to receive ambassadors, and, with Senate consent, to appoint ambassadors and make treaties—such are the slight sources of his claim to be the sole organ of foreign relations—the framers hardly intended to confer upon him a power unmistakably withheld when the war powers were under consideration, the power singlehandedly to "commence" a war.

Against such dubious precedents there is the testimony of great contemporaries of the Constitution. In 1801, President Jefferson was confronted by Tripoli's declaration of war; when an American naval vessel was attacked it disarmed but released the attacker. Jefferson explained to Congress, "Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by

205 Monaghan, supra note 172, at 27.
206 Wormuth, supra note 86, at 743-46.
207 Monaghan, supra note 172, at 27.
208 These and other presidential utterances were collected by Putney, Executive Assumptions of the War Making Power, 7 Nat'l U.L. Rev. 1 (1927).
authorizing measures of offense also, they will place our forces on an equal footing with that of its adversaries.\textsuperscript{209} And later, in 1805, when Spain disputed the boundaries of Louisiana, President Jefferson advised Congress that Spain evidenced an "intention to advance on our possessions," adding, "Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force...."\textsuperscript{210} "Imminent danger" of invasion did not deter Jefferson from consultation with Congress.

James Madison, the leading architect of the Constitution, who took a very narrow view of the presidential war power,\textsuperscript{211} maintained that view after becoming President. In his message of June 1, 1812, he called attention to English outrages on American commerce, and to the failure of American "remonstrances," and then he referred the question whether we should oppose "force to force in defense of [our] national rights" to Congress as a "solemn question which the Constitution wisely confides to the legislative department of the Government."\textsuperscript{212}

After adoption of the Monroe Doctrine, Colombia asked for protection against France in 1824. President James Monroe, a participant in the Virginia ratification convention, stated in a letter to Madison that "The Executive has no right to compromit the nation in any question of war"; and his Secretary of State, John Quincy Adams,

\textsuperscript{209} 1 Messages, supra note 74, at 314. In December 1790, Secretary of State Jefferson submitted a report to Congress respecting American seamen captured at Algiers, stating, "it rests with Congress to decide between war, tribute, and ransom, as the means of re-establishing our Mediterranean commerce." 1 American State Papers, Foreign Relations 105 (1832). In 1793, Jefferson, then Secretary of State, said of reprisal, "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." Wormuth, supra note 86, at 758.

Hamilton, then in private life, attacked Jefferson's Tripoli position on the ground that a declaration of war by a foreign nation unleashes the President's defensive powers so that no congressional declaration of war was required for retention of the Tripolitaniand ship and crew. 8 A. Hamilton, Letter No. 1 of "Luctus Crassus," in Works 246-52 (H. Lodge ed. 1904). This was a shift in position apparently dictated by political considerations, if we may credit the explanation by his sympathetic editor, Henry Cabot Lodge, that the letter "really constitutes a defence of the Federalist party and an elaborate and bitter criticism of their opponents." Id. 246 n.1. For, when in 1798 the French greatly endangered American shipping, Hamilton wrote Secretary of War James McHenry, "I am not ready to say that he [the President] has any other power than merely to employ ships or convoys, with authority to repel force by force (but not to capture), and to repel hostilities within our waters .... Anything beyond this must fall under the idea of reprisals, and requires the sanction of that department which is to declare or make war. In so delicate a case, in one which involves so important a consequence as that of war, my opinion is that no doubtful authority ought to be exercised by the President." 10 id. 281-82. In 1798 he was therefore in accord with Jefferson's view, reflecting his own earlier narrow view of presidential war powers. See text accompanying notes 65, 71, 144 supra. See also note 67 supra & note 209 infra.

\textsuperscript{210} 1 Messages, supra note 74, at 376-77.

\textsuperscript{211} See text accompanying notes 26, 27, 62 supra.

\textsuperscript{212} 2 Messages, supra note 74, at 484-85, 489.
replied to Colombia that "by the Constitution . . . the ultimate decision of this question belongs to the Legislative Department."213

Few Presidents had a more jealous regard for presidential prerogatives than Andrew Jackson; yet when faced with recognition of Texas he referred the question to Congress, stating, "It will always be consistent with the spirit of the Constitution, and most safe, that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war alone can be declared, and by whom all the provisions for sustaining its perils must be furnished."214 Can it be doubted that he would have been equally reluctant, without congressional authorization, to send troops into Texas to "defend" it against an attack by Mexico? His view was later reiterated by Secretary of State Daniel Webster when the issue was a possible attack by France on Hawaii: "the war making power . . . rests entirely with Congress . . . no power is given to the Executive to oppose an attack by one independent nation on the possessions of another."215

In brief, Jefferson and Madison did not regard attacks on American shipping or commerce on the high seas as dispensing with the constitutional requirement for consultation with Congress. And Monroe, Jackson, J. Q. Adams, and Webster did not view attacks on foreign nations, even though within the American sphere of influence, as a warrant to meet force without congressional authorization. Misguided as is the construction put by the State Department on the actions of Madison, Adams, and Jefferson,216 the Department yet agrees that "Their views and actions constitute highly persuasive evidence as to the meaning and effect of the Constitution."217 Their actions were faithful to the intention of the Framers as expressed by the constitutional text and in the records of the Convention; and were that intention in doubt, the actions of these early statesmen provide a contemporaneous construction which carries very great weight in the interpretation of the Constitution.

213 See Wormuth, supra note 86, at 738. Professor Rostow expatiates on Monroe's instructions to General Andrew Jackson "to proceed into Spanish Florida to put down the Seminoles, who were raiding settlements in Georgia from bases in Spanish Florida," on the ground of "Spain's inability to exercise effective control over her territory." Rostow, supra note 3, at 860. But Monroe well knew the distinction between such policing and committing "the nation in any question of war."
214 4 Messages, supra note 74, at 1484.
216 LEGAL ADVISOR'S MEMO, supra note 86, at 1106. It is a mark of the State Department Legal Advisor's careless advocacy that he could argue against this background that "James Madison . . . Presidents John Adams, and Jefferson all construed the Constitution, in their official actions during the early years of the Republic, as authorizing the United States to employ its armed forces abroad in hostilities in the absence of any Congressional declaration of war." Id. 1106.
217 Id.
To the contemporaneous construction by the great statesmen who participated in the formation and adoption of the Constitution, we may add the voice of Chief Justice Marshall, himself a vigorous participant in the Virginia Ratification Convention, who stated in *Talbot v. Seeman*:218 "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."219 Not even the crisis of the Civil War led the Court to depart in *The Prize Cases*220 from the earlier view: "By the Constitution, Congress alone has the power to declare a national or foreign war." The President "has no power to initiate or declare a war either against a foreign nation or a domestic State . . . . If a war be made by invasion of a foreign nation, the President is . . . bound to resist force by force. He does not initiate the war, but is bound to accept the challenge . . . ."221

And so we come to Lincoln's "complete transformation in the President's role as Commander-in-Chief," by wedding it, says Corwin, to his duty to execute the laws to derive the "war power."222 So far as the original meaning and intention are concerned, neither power taken alone conferred a "war-making power," and when nothing is added to nothing the sum remains nothing. In considering Lincoln's acts it needs to be borne in mind that they were triggered by a "sudden attack" on *American soil*, the firing upon Fort Sumter, and this when Congress was not in session,223 exactly the situation envisioned by the Framers as the sole exception to the exclusivity of congressional war powers.224 Congress was convened by Lincoln and met in about ten weeks,225 in the words of Corwin, it accepted "willy-nilly"226

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218 5 U.S. (1 Cranch) 1 (1801).
219 Id. at 28.
221 Id. at 668.
222 E. CORWIN, supra note 26, at 275, 277.
223 Id. 277.
224 The dissenting Justices in *The Prize Cases* admitted that war had been initiated by the South in a "material sense," but maintained that it did not exist in a "legal sense" as "within the meaning of the law of nations" in the absence of a declaration of war by Congress. But the early statutes, which authorized the President to use the military and naval forces to suppress insurrection, would include a blockade as a measure of suppression. Act of Feb. 28, 1795, ch. 36, 1 Stat. 424; Act of Mar. 3, 1807, ch. 39, 2 Stat. 443. Whatever merit the dissenting argument may have is overcome by the fact that the Convention rejected the application of the law of nations to rebellion. 3 RECORDS, supra note 30, at 158.
Against this background, McDougal and Lans seem to me mistaken in stating that "the logic of the Civil War *Prize Cases* leads ineluctably to the conclusion that the President may recognize the existence or imminence of a war, which threatens American interests, before there is an actual invasion of our territory . . . ." McDougal & Lans, supra note 106, at 613. Lincoln held to the tenet that the Union is indissoluble, that no state can secede. The firing upon Fort Sumter therefore represented an "actual invasion of our territory," and Lincoln was empowered by statute to suppress insurrection.
225 7 MESSAGES, supra note 74, at 3214-16; E. CORWIN, supra note 26, at 277-78.
226 E. CORWIN, supra note 26, at 282.
when it did not expressly ratify the results of Lincoln’s actions. It would be pointless to enter upon an examination of Lincoln’s acts on the domestic scene, for they do not serve as a “precedent” for presidential resistance to a “sudden attack” on a foreign country.227

Such conduct had in fact been earlier condemned by Lincoln. When President Polk sent an army into territory disputed with Mexico, which engaged in battle, Congress declared war on Mexico.228 But in 1848 the House adopted a resolution that the war had been “unconstitutionally begun by the President,” and Lincoln, who voted for the resolution along with J. Q. Adams, explained to Herndon:

Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you ... allow him to make war at his pleasure. ... The provision of the Constitution giving the war-making power to Congress was dictated by the [fact that] Kings had always been involving and impoverishing their people in wars ... and they resolved so to frame the Constitution that no one man should hold the power of bringing oppression upon us.229

That his conduct on the domestic front during the Civil War did not spell repudiation of his 1848 view may be gathered from the fact that in his first annual message, he referred to a prior authorization by Congress to American vessels to “defend themselves against and to capture pirates,” and recommended an additional authorization “to recapture any prizes which pirates may make of United States vessels and their cargoes [in the Eastern seas specially].”230 Clearly this constitutes a disclaimer of power to employ force abroad without the consent of Congress.

It was Congress rather than the reluctant President McKinley which clamored for the Spanish-American War and issued a declaration of war.231 The nineteenth century, in sum, offers no example of a President who plunged the nation into war in order to repel an attack on some foreign nation.232 That remained for the twentieth century.

Although World War I proved the truth of Madison’s apothegm that “War is ... the true nurse of executive aggrandizement,”233 this

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227 Cf. id., 279-80.
228 Wormuth, supra note 86, at 726.
229 Id. 727.
230 7 Messages, supra note 74, at 3245-48.
232 Putney, supra note 208, at 1-2; Power to Commit Forces, supra note 3, at 1790.
233 6 J. Madison, supra note 75, at 174.
was again largely on the domestic front, a development traced by Corwin.\textsuperscript{234} Reelected in 1916 on the slogan “He kept us out of war,” Wilson asked Congress in February, 1917, for authority to arm American merchant ships for their defense. The measure was stalled in the Senate by a filibuster led by Senators Robert LaFollette and George Norris. Wilson then ordered the arming on his own,\textsuperscript{235} though he later acknowledged that the action was “practically certain” to draw us into war.\textsuperscript{236} Repeated attacks without warning by German submarines together with disclosure of the “Zimmerman note”\textsuperscript{237} fueled the rising war fever as Wilson summoned Congress to a special session on April 20. Upon Wilson’s request that Congress declare “the recent course of the German Government to be, in fact, nothing less than war . . . ,” it declared war.\textsuperscript{238} Thus he withstood the temptation “to resist force with force,” singlehandedly to commit the nation to war. Much as Wilson expanded the war power for domestic purposes, his conduct gives no comfort to the thesis that invasion of a foreign land affords an excuse for presidential war-making.

Franklin Roosevelt, more far-sighted than the nation, also took measures which might have involved us in World War II; he exchanged fifty destroyers for British bases in the Western Atlantic, and occupied Greenland and Iceland to insure the defense of America.\textsuperscript{239} Doubts have been expressed as to the legality of the destroyer deal;\textsuperscript{240} but it was soon ratified by Congress. While these measures might have involved the nation in war, they did not commit our troops to battle on foreign soil. In truth, the country, moving slowly from post-World War I isolationism, was sorely divided, and without the Japanese attack on Pearl Harbor, which united the nation, Roosevelt might have had to remain content with measures “short of war.”\textsuperscript{241}

The historical record therefore confirms the statement by the

\textsuperscript{234} See E. Corwin, supra note 26, at 284-87.
\textsuperscript{235} S. Morison, supra note 231, at 855, 859.
\textsuperscript{236} 55 Cong. Rec. 103 (1917).
\textsuperscript{237} See 2 H. Carman & H. Syrett, A History of the American People 415 (1955). The “Note,” sent by the German foreign minister urged Mexico to consider attacking the United States.
\textsuperscript{238} S. Morison, supra note 231, at 859-60; E. Corwin, The President’s Control of Foreign Relations 141 (1917).
\textsuperscript{239} E. Corwin, supra note 26, at 288-89; Power to Commit Forces, supra note 3, at 1786.
\textsuperscript{241} S. Morison, supra note 231, at 991, 995, 997. Justice Frankfurter “said that he had asked Byrnes (then Supreme Court Justice, later economic boss, former senator) if the President had called for a declaration of war the day before Pearl Harbor what the vote would have been. Byrnes estimated that at least two-thirds of Congress would have been in opposition.” C. Sulzberger, A Long Row of Candles 200 (1969).
Senate Foreign Relations Committee that "only since 1950 have Presidents regarded themselves as having authority to commit the armed forces to full scale and sustained warfare."242 In that year President Truman ordered our troops to repel the sudden invasion of South Korea.243 Acheson's conversion of the "longboat" incidents into "historical precedents" for commitment to full scale warfare244 exhibits a high order of fantasy, but to elevate it to constitutional doctrine is something else again.

Whether or not the Tonkin Gulf Resolution (1964)245 authorized President Johnson to commit our armed forces to war in Vietnam, a hotly-debated issue, need not detain us because, like Acheson, Johnson and Under Secretary of State Nicholas Katzenbach claimed plenary power. "[W]e did not think the resolution was necessary to do what we did and what we are doing," the President told the press; "we think we are well within the grounds of our constitutional responsibility."246 And Katzenbach asserted that the administration could continue to fight the Vietnam War even if Congress repealed the Tonkin resolution.247 The resolution has since been repealed;248 and the war goes on and has indeed been extended by the President to Cambodia and Laos.249

In summary, the nineteenth century "incidents" mustered by the State Department for a presidential war-making power are wide of the mark;250 the acts of Wilson and Franklin Roosevelt in the twentieth

242 S. Rep. No. 797, 90th Cong., 1st Sess. 24 (1967). Writing in 1951, Clinton Rossiter said, it is a "canon of our constitutional system that the nation cannot be finally and constitutionally committed to a state of war without the positive approval of both houses of Congress." C. Rossiter, THE SUPREME COURT AND THE COMMANDER IN CHIEF 66 (1951).

243 The Senate Foreign Relations Committee observed that "President Truman committed American Armed Forces to Korea in 1950 without Congressional authorization. Congressional leaders and the press were simultaneously informed of the decision but the decision had already been made." S. Rep. No. 797, 90th Cong., 1st Sess. 16 (1967). Dean Acheson stated that Truman consulted with congressional leaders, and that at a second meeting several days later there was a "general chorus of approval." D. Acheson, supra note 193, at 408-09, 413. See also Reveley, supra note 3, at 1263 n.57; J. Robinson, CONGRESS AND FOREIGN POLICY MAKING 48 (1962).

244 See note 193 supra & accompanying text.


246 Wormuth, supra note 86, at 711 n.1.


248 But the repeal did not "direct the termination of Indo-Chinese hostilities, disapprove continuing combat, or correct the President's prior interpretation." Ratner, supra note 88, at 474.

249 American military forces were committed "to Cambodia in 1970, and to Laos in 1971, without the consent, or even the knowledge of Congress." S. Rep. No. 606, 92d Cong., 2d Sess. 8 (1972).

250 It needs to be borne in mind that such statements are mere "advocacy" for a predetermined policy, such as led Justice Jackson to dismiss as "self-serving" earlier statements he had made as Attorney General. See note 7 supra & accompanying text.
century were provocative and might have drawn the nation into war, but they were still "short of war"; neither Wilson nor Roosevelt sent combat troops to engage in actual hostilities on foreign soil until Congress declared war. So far as the Korean War is viewed against the over-blown claims of Acheson, it is a "precedent" created by the President only yesterday, and thus is far from "embedded in the Constitution."

The Senate Foreign Relations Committee has handsomely acknowledged that "Congress . . . bears a heavy responsibility for its passive acquiescence in the unwarranted expansion of Presidential power," that "Congress has acquiesced in, or at the very least has failed to challenge, the transfer of the war power from itself to the executive." Various explanations have been proffered for this inertia, the sufficiency of which need not here come in question. Coke long since said that no "act of parliament by nonuser can be antiquated or lose [its] force . . . ." Even less can Congress, by passivity or otherwise, divest itself of powers conferred upon it by the Constitution and accomplish the transfer of those powers to the President. It is a necessary consequence of the separation of powers that "none of the departments may abdicate its powers to either of the others." Nor can any department, as John Adams was at pains to spell out in the Massachusetts Constitution of 1780, exercise the powers of another. If powers, said Justice Jackson, are "granted, they are not

251 S. Rep. No. 606, 92d Cong., 2d Sess. 18 (1972). Referring to the Middle East debate in 1957, the 1967 senate report on national commitments, S. Rep. No. 797, 90th Cong., 1st Sess. (1967), states, "Senator Fulbright, whose view has changed with time and experience, thought at the time that the President had power as Commander in Chief to use the armed forces to defend the 'vital interests' of the country . . . ." Id. 18. The report concludes: "The Gulf of Tonkin resolution represents the extreme point in the process of constitutional erosion." Id. 20.


254 1 E. COKE, COMMENTARY ON LITTLETON § 81b (1832).


256 The Massachusetts Constitution of 1780 provides: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers . . . the executive shall never exercise the legislative and judicial powers . . . the judicial shall never exercise the legislative and executive powers . . . to the end it may be a government of laws, and not of men." 1 B. POORE, supra note 30, at 960. The New Hampshire Constitution of 1784 is similar, 2 Id. 1283.

Charles Pinckney submitted to the Convention that the President "cannot be clothed with those executive authorities the Chief Magistrate of a Government often possesses, because they are vested in the Legislature and cannot be used or delegated by them in any but the specified mode." 3 RECORDS, supra note 30, at 111. In the Jay Treaty debate, Jonathan Havens "laid it down as an incontrovertible maxim, that neither of the branches of the Government could, rightly or constitutionally, divest itself of any powers . . . by a neglect to exercise those powers that were granted to it by the Constitution . . . ." 5 ANNALS OF CONG. 486 (1797). See also id. 447 (remarks of John Nicholas).

Madison regarded the separation of powers as "a fundamental principle of free
lost by being allowed to lie dormant, any more than non-existent powers can be prescribed by unchallenged exercise.257

On the foregoing analysis, the sole presidential “war-making” powers conferred by the Framers are to serve as commander in chief of the armed forces and to repel sudden attacks on American soil.

IV. “INHERENT” POWER AND United States v. Curtiss-Wright Export Corp.

Before considering how far these two presidential functions are exclusive and beyond congressional control, it is necessary to examine the oft-invoked doctrine of “inherent” power, of which United States v. Curtiss-Wright Export Corp.258 was the finest flowering. In a recent Yale memorandum,259 the writers, after setting forth Justice Jackson’s categorization of exclusive presidential power, exclusive congressional power, and a “twilight area” in which either branch can act,260 assert that in the latter area “there is a residuum of power over and above those specifically enumerated in the constitution.”261

Preliminarily it needs to be noted that Justice Jackson’s remarks were uttered in the context of action on the domestic scene—President Truman’s seizure of strike-bound steel plants during the Korean War—that Jackson none too obliquely cast doubt upon the legitimacy of Truman’s commitment of troops to Korea,262 and that he made no
government.” 2 RECORDS, supra note 30, at 56. In 1796 President Washington, speaking to the demand of the House for information about the Jay Treaty, said, “it is essential to the due administration of the Government, that the boundaries fixed by the Constitution between the different departments should be preserved . . . .” 5 Annals of Cong. 761-62 (1797). No incident is more frequently cited by the executive branch for the separation of powers when the issue is executive privilege than this Jay incident.


259 The memorandum, entitled Indochina: The Constitution Crisis, is reprinted in two parts at 116 Cong. Rec. S7117-22 (daily ed. May 13, 1970) (Part I), and id. S7528-31 (daily ed. May 20, 1970) (Part II) (hereinafter cited as Yale Memo). The memorandum was prepared for filing with the Senate by a group of Yale Law School students under the auspices of several eminent professors and former high government officers.

260 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (concurring opinion).

261 Yale Memo, supra note 259, at S7528-29. The plenary grant to Congress and the severely limited grant of war power to the President leave little “twilight” zone in this area.

262 When the government argued in Youngstown, 343 U.S. at 632, that the President “had invested himself with ‘war powers’” by sending troops to Korea “by an exercise of the President’s constitutional powers,” Justice Jackson said, “How widely this doctrine . . . departs from the early view of presidential power is shown by a comparison” with Jefferson’s message to Congress respecting the Tripoli pirates (note 209 supra) 343 U.S. at
reference to a "residuum" of extraconstitutional power, but rather rejected what may be regarded as its equivalent—a claim to "inherent" power.263

Reliance for that "residuum" is placed by the Yale memorandum on dicta in the Curtiss-Wright case,264 itself dismissed by Jackson because it "involved, not the question of the President's power to act without congressional authority, but the question of his right to act... in accord with an Act of Congress."265 Justice Sutherland, it is true, threw off a dictum that in foreign affairs there are supraconstitutional powers outside the sphere of "enumerated" powers on the theory that since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source... the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States.... Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. See Penhallow v. Doane, 3 Dall. 54, 80-81.266

Sutherland did violence to the historical facts.267 To the minds of the colonists, "thirteen sovereignties," as Chief Justice John Jay268 said in 1793, "were considered as emerged from the principles of the Revolution."269 For this we need go no further than the Articles of

642 n.10. Professor Rostow repeatedly cites this Jackson opinion but takes no account of Jackson's rejection of inflated executive claims.

Prior to Youngstown, Clinton Rossiter had noted, "The breath-taking estimates of their war powers announced and acted upon by Lincoln and Roosevelt have earned no blessing under the hands of the judiciary." C. ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 5 (1951). The Court, he said, "has refused to speak about the powers of the President as commander-in-chief in any but the most guarded terms," or "to approve a challenged presidential or military order solely on authority of the commander-in-chief clause if it can find a more specific and less controversial basis," such as "any evidence of congressional approval." Id. 4, 6.

263 See note 148 supra. "The United States is entirely a creature of the Constitution, Its power and authority have no other source." Reid v. Covert, 354 U.S. 1, 5-6 (1957).


267 Although they rely heavily on Curtiss-Wright, McDougal and Lans concede that Sutherland's analysis "unquestionably involves certain metaphorical elements and considerable differences of opinion about historical facts." McDougal & Lans, supra note 106, at 257-58. The Framers, as we shall see, would have no part of such metaphors. The issue is not, as McDougal and Lans suggest, merely a "quarrel about the naming of powers," id. 258, but a claim to powers not granted under a system of enumerated powers.

268 Jay had served as Secretary of Foreign Affairs to the Continental Congress.

269 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470 (1793). The Massachusetts Con-
Confederation, agreed to by the Continental Congress on November 15, 1777, signed by all but Maryland in 1778 and 1779, and ratified March 1, 1781.\[270\] Article II recited, "Each State retains its sovereignty, freedom and independence, and every power . . . which is not . . . expressly delegated to the United States, in Congress assembled."\[271\] Article III provided, "The said states hereby severally enter into a firm league of friendship with each other for their common defense . . . ."\[272\] They entered into a "league"; they did not purport to create a "corporate" or "sovereign" body. Article IX declared that "The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . . [and] entering into treaties and alliances."\[273\] This express grant of war and treaty powers undermines Justice Sutherland's central premise that these powers were derived from "some other source" than the several states. If the fledgling Continental Congress possessed "inherent" war and treaty powers from the outset, the express grant was superfluous.

Nor did the Framers share Justice Sutherland's views on sovereignty. More pragmatic than he, they spoke, not in terms of sovereignty, but of power; and they were quite clear that the *people*, not even the cherished states, were sovereign. Power flowed from them, not from the Crown to fill a vacuum. Hear James Iredell in North Carolina: "It is necessary to particularize the power intended to be given . . . as having no existence before . . . ."\[274\] The people, stated Madison in the Convention, "were in fact, the fountain of all power";\[275\] a part they conferred upon the individual states. In the clause "We, the people of the United States . . . do ordain and establish this Constitution," said Chief Justice Jay, "we see the people acting as sovereign of the whole country."\[276\] "Sovereignty" was taken by the people to themselves.

Justice Sutherland's citation of *Penhallow v. Doane* referred
solely to the opinion of Justice William Paterson,\textsuperscript{277} ignoring the contrary majority opinions of Justices Iredell and Cushing. The case arose on a state of facts that antedated the adoption of the Articles of Confederation; and Paterson stated that the Continental Congress exercised the "rights and powers of war and peace" that "states individually did not." This does not tell the whole story. For example, Congress resolved on November 4, 1775, "That the town of Charleston ought to be defended against attempts that may be made to take possession thereof by the enemies of America, and that the convention or council of safety of the colony of South Carolina, ought to pursue such measures, as to them shall seem most efficacious for the purpose, and that they proceed immediately to erect such fortifications and batteries in or near Charleston, as will best conduce to promote its security, the expence to be paid by the said Colony."\textsuperscript{278} Other testimony that the war-making power was thought to reside in each of the colonies is furnished by the July 12, 1776, draft of the Articles of Confederation: "The said Colonies unite themselves . . . and hereby severally enter into a firm League of Friendship . . . binding the said Colonies to assist one another against all Force offered to or attack made upon them . . . ."\textsuperscript{279} Indeed, as Justice Chase was to remark in a cognate case, the very fact of delegation of war power by the states to the Congress demonstrates that the states must have "rightfully possessed" it.\textsuperscript{280} In course of time the states did not "individually" exercise the power of war; but that did not spring from absence of original power but from a voluntary surrender expressed both in the article IX delegation and in article XIII of the 1776 draft Articles: "No Colony . . . shall engage in any War without the previous Consent of the United States assembled," a provision that was preserved in article VI of the Articles as adopted.\textsuperscript{281}

Justice James Iredell, whose opinion in \textit{Penhallow} went unnoticed by Sutherland, understood all this full well. Each province, he pointed out, had comprised "a body politic," in no wise connected with the others "than as being subject to the same common sovereign."\textsuperscript{282} "If Congress," he continued, "previous to the articles of confederation,

\textsuperscript{277} 3 U.S. (3 Dall.) 54, 80-81 (1793).
\textsuperscript{278} 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 326 (1937).
\textsuperscript{279} Id. 546.
\textsuperscript{280} "Virginia had a right, as a sovereign and independent nation, to confiscate any British property within its territory, unless she had before delegated that power to Congress . . . . [I]f she had parted with such power, it must be conceded, that she once rightfully possessed it." \textit{Ware v. Hylton}, 3 U.S. (3 Dall.) 192, 231 (1796).
\textsuperscript{281} 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 549 (1937); H. COMMAGER, \textit{supra} note 77, at 112.
\textsuperscript{282} 3 U.S. (3 Dall.) at 90.
possessed any authority, it was an authority derived from the people of each province . . . "[T]his authority was conveyed by each body politic separately, and not by all the people in the several . . . states, jointly . . . ." And he concluded that the war-making authority "was not possessed by congress, unless given by all the states." In this view he was joined by Justice William Cushing; and both are abundantly confirmed by the specific grants of war and treaty powers to the Congress in the Articles of Confederation.

Reliance for "inherent" war and treaty powers that antedate the Articles of Confederation also has been placed upon some remarks of Justice Chase in Ware v. Hylton: "The powers of Congress originated from necessity . . .; they were revolutionary in their very nature . . . . It was absolutely and indispensably necessary that Congress should possess the power of conducting the war against Great Britain, and therefore if not expressly given by all (as it was by some [who had ratified in 1778]) of the States . . . Congress did rightfully possess such power." A simpler and more prosaic explanation is at hand. Sitting and working together, the delegates from the thirteen states, who as early as July, 1776, proposed in the draft Articles of Confederation to reduce to writing the necessary delegation by the states to Congress and who agreed to the Articles of Confederation in November, 1777, presumably were agreed that the conduct of the war required centralization and thus authorized the necessary "confederated" acts pending formal adoption of the proposed Articles. Roughly that view was taken by Iredell, one of the great Founders who led the struggle for adoption of the Constitution in North Carolina.

The invocation of the treaty with France signed by Benjamin Franklin and his fellow commissioners in February, 1778, and ratified by Congress in May, little advances the argument for "inherent" national power. Franklin and the other commissioners had proceeded to France under express instructions to enter into a treaty with the King of France, carrying with them "letters of credence" (September, 1776), running not from the Congress but from "the delegates

283 Id. at 92.
284 Id. at 94.
285 Id. at 95.
286 Id. at 116. Cushing stated, "I have no doubt of the sovereignty of the states, saving the powers delegated to congress . . . to carry on, unitedly, the common defense in the open war." Id. at 117.
287 McDougal & Lans, supra note 106, at 258.
288 3 U.S. (3 Dall.) 199 (1796).
289 Id. at 232.
of the United States of New Hampshire, Massachusetts Bay" and each of the other enumerated states. Doubtless the delegates from the several states believed themselves authorized to send Franklin in search of an alliance, so that again we have a power delegated by the states. The resulting treaty, it bears emphasis, was concluded with "the thirteen United States of North America, viz. New Hampshire, Massachusetts Bay" and so forth, scarcely testimony that France deemed it was concluding an alliance with a "sovereign" nation. But give the "revolutionary central government" its widest scope and the question remains: what relevance do deeds resulting from "revolutionary necessity" in the absence of an existing structure have to a subsequent written document, such as the Articles of Confederation, which carefully enumerates the powers granted and reserves all powers not "expressly delegated"? John Jay wrote of the cognate treaty making power in The Federalist Number 64, that it "should not be delegated but . . . with such precautions, as will afford the highest security . . . ."

Study of the constitutional records convinces that the Framers jealously insisted on a federal government of enumerated, strictly limited powers. Avowal of a supraconstitutional "residuum" of powers not granted expressly or by necessary implication would have affrighted them and barred adoption of the Constitution. We

291 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 827, 833 (1937) (emphasis added). McDougal and Lans say that "these early Congresses . . . although controlling foreign policy, essentially functioned as councils of ambassadorial delegates from a group of federated states . . . ." the very point I have been making. McDougal & Lans, supra note 106, at 537. But this statement is at war with Sutherland's dictum that the states never had external "sovereignty."

292 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 421 (1937). Rufus King's remarks in the Convention exhibit ignorance of the background: "The States were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances nor treaties." 1 RECORDS, supra note 30, at 323.

293 THE FEDERALIST No. 64, at 417 (Mod. Lib. ed. 1939) (John Jay) (emphasis added).

294 For example, in the Virginia Ratification Convention, Governor Edmund Randolph, defending the Constitution against powerful onslaughts, said that the powers of government "are enumerated. Is it not, then, fairly deductible, that it has no power but what is expressly given it?—for if its powers were to be general, an enumeration would be needless." 3 J. ELLIOT, supra note 36, at 464. See text accompanying notes 42, 274 supra. Other authorities are collected in Berger, supra note 33, at 13-14, 377 n.52.

295 In his 1791 lectures, James Wilson, then a Justice of the Supreme Court, referred to the executive powers granted by the Constitution and to the presidential veto as "a guard to protect his powers against their encroachment. Such powers and such a guard he ought to possess: but a just distribution of the powers of government requires that he should possess no more." 1 J. WILSON, supra note 29, at 319 (emphasis added).

Justice Sutherland's easy assumption of supraconstitutional foreign powers contradicts Madison's statement that "The powers delegated by the proposed Constitution are few and defined. . . . [They] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce." THE FEDERALIST No. 45, at 303 (Mod. Lib. ed. 1937).

296 As Alexander White of Virginia stated in the First Congress, after insisting that
have the testimony of James Wilson that all the "powers naturally connected" with that of declaring war were conferred on the Congress. And John Quincy Adams, after serving as Secretary of State and as President, stated, "in the authority given to Congress by the Constitution . . . to declare war, all the powers incidental to war are, by necessary implication, conferred upon the Government of the United States." The "war power," he continued, "is strictly constitutional." To invoke an extraconstitutional "residuum" of war powers can only deepen the "twilight" gloom.

V. EXCLUSIVE PRESIDENTIAL POWER OVER WAR-MAKING

The statement in the Yale memorandum that there is an "exclusive" war-making zone where the President "is authorized to act even against the express will of Congress," requires a caveat insofar as it is rested on the schema set forth by Justice Jackson in Youngstown. Jackson preferred three categories for presidential activities. First, when "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." The steel seizure, he said, "is eliminated from the first" category "for

the federal government must adhere to the limits described in the Constitution: "This was the ground on which the friends of the Government supported the Constitution . . . it could not have been supported on any other. If this principle had not been successfully maintained by its advocates in the convention of the State from which I came, the Constitution would never have been ratified." 1 ANNALS OF CONG. 515 (1789). Cf. R. BERGER, supra note 33, at 13-16.

297 Text accompanying note 63 supra.

298 12 CONG. DEB. 4037-38 (1836). In Reid v. Covert, 354 U.S. 1, 69 (1957) (concurring opinion), Justice Harlan wrote: "Chief Justice Marshall, in McCulloch v. Maryland, . . . has taught us that the Necessary and Proper Clause is to be read with all the powers of Congress, so that 'where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government'" the Court will not "inquire into the degree of its necessity . . . ." So read, the war powers are little short of plenary.

299 It has been said that the "executive power clause is capable of indefinite expansion," that a construction thereof "as a broad grant of residual power to the executive was given the imprimatur of judicial approval in Myers v. United States [272 U.S. 52 (1926)]." McDougal & Lans, supra note 146, at 252, 260. The argument, it is true, had been advanced by Chief Justice Taft, over the vigorous dissent of Justices Holmes and Brandeis, whose views were later espoused by Justices Black, Douglas, Frankfurter, and Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). See text accompanying notes 39-58 supra; cf. notes 256 (statement of C. Pinckney), 294, 295 supra. See generally Berger, Executive Privilege v. Congressional Inquiry, 12 U.C.L.A. L. REV. 1043, 1074-76 (1965).

Justice Jackson brushed aside the claim of residual power with the query, why did the Framers expressly empower the President to "require the Opinion, in writing" of each department head, a trifling power that "would seem inherent in the executive if anything is," 343 U.S. at 640-41 (Jackson, J., concurring). Taft's view is squarely contrary to the design of the Framers to create a government of "enumerated" powers, an executive of "defined" and limited functions, and to preclude utterly any "inherent" executive prerogative.

300 YALE MEMO, supra note 259, at 57529.
it is conceded that no Congressional authorization exists for this seizure.\textsuperscript{301}

His second category "is a zone of twilight in which he [the President] may have concurrent authority, or in which its distribution is uncertain." Here again presidential authority is subject to that of Congress. The steel seizure, said Jackson, "seems clearly eliminated from that class because Congress... has covered [the field] by three statutory policies inconsistent with this seizure."\textsuperscript{302} Given concurrent powers, as Chief Justice Marshall held in an early war-powers case,\textsuperscript{303} a congressional statute must prevail.

There remains the third category: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."\textsuperscript{304} Judicial caution is required in such cases lest "by disabling the Congress from acting upon the subject... the equilibrium established by our constitutional system" be disturbed.\textsuperscript{305} Jackson stressed that where the Court can sustain the President only by holding that his actions were "within his domain and beyond control by Congress," the President's position was "most vulnerable to attack and in the least favorable of possible constitutional postures."\textsuperscript{306} Jackson went on to reject the argument that Truman's commitment of troops to Korea vested him with power to seize the nation's steel mills.\textsuperscript{307} He could find no such power under the "executive power," the "commander-in-chief power," or in an "inherent power" (presumably drawn out of the "residuum") which he pre-emptorily rejected.\textsuperscript{308}

If, following Jackson's analysis, we are to speak of an "exclusive" presidential power "beyond control by Congress," we should keep in mind Jackson's warning that such claims are the most difficult to sustain. Where they are raised the "presidential power [is] most vulnerable to attack and in the least favorable of possible constitutional postures."\textsuperscript{309}

\textsuperscript{301} 343 U.S. at 635, 638 (Jackson, J., concurring).

\textsuperscript{302} Id. at 637, 639. So far as Jackson's "concurrent authority" or "uncertain distribution" tests go, there is next to no "twilight" zone in the area of war powers. Congress cannot encroach on the President's command of the armed forces, that is, it cannot conduct a campaign. \textit{But see} note 310 \textit{infra} & accompanying text. The Framers left little doubt about the restricted nature of the presidential power "to repel sudden attacks."

\textsuperscript{303} Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804).

\textsuperscript{304} 343 U.S. at 637 (Jackson, J., concurring).

\textsuperscript{305} Id. at 637.

\textsuperscript{306} Id. at 640.

\textsuperscript{307} Id. at 642; \textit{see} note 61 \textit{supra}.

\textsuperscript{308} 343 U.S. at 641-52 (Jackson, J., concurring).

\textsuperscript{309} Professor Rostow sets forth the three Jackson classifications in extenso, and
Is the role of commander in chief altogether beyond the control of Congress? This can be confidently affirmed of one set of circumstances only: once war is commenced, Congress cannot conduct a campaign; it cannot “deprive the President of command of the army and navy.” But in the words of Justice Jackson, “only Congress can provide him an army or navy to command.” What it gives it can take away, in whole or in part.

Presidential peace-time deployment of the armed forces in troubled areas sharply focuses the problem. Testifying in 1951 on behalf of President Truman’s plan to station six divisions of American soldiers in Europe, Secretary of State Acheson asserted:

Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by Congress in the exercise of powers which it has under the Constitution.

Acheson spoke ex cathedra, disdaining the citation of authority. His claim will not withstand scrutiny. Deployment of the armed forces in “hot-spots” may invite or provoke attack, dangerously risk American involvement in war, and present Congress with a fait accompli.
It is Congress that is to "provide for the common Defense," which implies the right to decide what is requisite thereto. Congress also is to "raise and support armies," and by necessary implication it can withhold or withdraw that support. In determining the size of the army it will "support" it is entitled to weigh priorities: shall troops be stationed in Germany or deployed in Cambodia? Indeed the constitutional mandate that "no appropriation" for support of the armies "shall be for a longer term than two years" implies that it is for Congress to decide at any point whether further appropriations should be made and in what amounts. The duty of Congress, in Hamilton's words, "to deliberate upon the propriety of keeping a military force on foot," surely comprehends the right to insist that a portion of the military forces should not be kept "on foot" in Vietnam or Europe.

With the power of appropriation goes the right to specify how...
appropriated moneys shall be spent. This is not a mere matter of logic but of established parliamentary practice. After 1665, states Hallam, it became “an undisputed principle” that moneys “granted by Parliament, are only to be expended for particular objects specified by itself . . . .”319 The Framers were quite familiar with parliamentary practice;320 and we may be sure that in reposing in Congress the power of raising revenues and of making and reviewing appropriations for support of the armies they conferred the concomitant right to “specify” the “particular objects upon which its appropriations are to be expended.”321 So an early Congress read its constitutional powers in enacting a statute that all “sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated.”322 The 1971 Act which prohibits use of appropriated funds “to finance the introduction of United States ground combat troops into Cambodia” is in this tradition.323 If we may safely infer that the long-established parliamentary practice was adopted by the Founders, such statutes do not

319 2 H. HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND 357 (1884). In 1624 “The king consented that the supplies granted should be used solely for purposes designated and spent under the direction of officers accountable to the house of commons.” Turner, Parliament and Foreign Affairs 1603–1760, 34 ENG. HIST. REV. 172, 174 (1919). In 1701 the Act of Settlement, 12 & 13 Will. 3, c. 9, § 27, provided that appropriations were to be applied “to the several Uses and Purposes by this act directed and intended as aforesaid, and to no other Use, Intent or Purpose whatsoever.” For an earlier example (1697), see 5 W. COBET, supra note 315, at 1168. In 1711 the Commons complained to Queen Anne that the armed “service has been enlarged, and the charge of it increased beyond the bounds prescribed . . . a dangerous invasion of the rights of parliament. The Commons must ever assert it as their sole and undoubted privilege, to grant money and to adjust and limit the proportions of it.” 6 id. 1027. Queen Anne replied that she would “give the necessary directions to redress the Grievances you complain of.” Id. 1031. In 1697 the Commons resolved to disband the army notwithstanding opposition by royal adherents. 5 id. 1167. The principle remains vital in England. I. JENNINGS, PARLIAMENT 292, 338 (2d ed. 1957). Sir Edward Seymour was impeached for having applied appropriated funds to public purposes other than those specified. 8 How. St. Tr. 127–31 (1680). The misapplication of public moneys issued to the Earl of Ranelagh, Paymaster General of the Army, “to be applied to the use of the army and forces only, and to no other use or purpose whatsoever” was branded a “high crime and misdemeanor,” and he was expelled from the Commons. 6 W. COBET, supra note 315, at 97, 127.

320 On a related point, Mason said in the Convention, “He considered the caution observed in Great Britain on this point as the paladium of the public liberty.” 2 RECORDS, supra note 30, at 327. Madison referred to British appropriation practices in The Federalist No. 41, at 265 (Mod. Lib. ed. 1937). Madison, John Marshall and others assured the Virginia convention that the provision for jury trial carried with it all its attributes under English practice, including specifically, the right to challenge jurors. 3 J. ELLIOT, supra note 36, at 531, 546, 558–59, 573.


322 Act of March 3, 1809, ch. 28, 2 Stat. 535. The foregoing history refutes the executive argument that Congress’ attempt “to command the expenditure of moneys that it appropriated for the construction” of the B-70 super-planes “would be a violation of the separation of powers, the invasion of presidential prerogative under the Constitution” Kurland, supra note 240, at 630. See also note 324 infra.

constitute an invasion of the President's powers as commander in chief.\footnote{324}{\textit{Cf.} Justice Jackson's statement: "Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement." \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 643 (1952) (Jackson, J., concurring).}\footnote{325} There remains the congressional power "To make Rules for Government and the Regulation of the land and naval forces."\footnote{326} This was added from the existing Articles of Confederation; but the Framers omitted the phrase that followed—"and directing their operations"\footnote{327}—having in mind that the President would be commander in chief who, in the words of the New Jersey Plan, would "direct all military operations."\footnote{328} Thus the Framers separated the presidential direction of "military operations" in time of war from the congressional power to make rules "for the government and regulation of the armed forces," a plenary power enjoyed by the Continental Congress. The word "government" connotes a power to control, to administer the government of the armed forces; the word "regulate" connotes a power to dispose, order, or govern. Such powers manifestly embrace congressional restraint upon deployment of the armed forces. Since the Constitution places no limits on the power to support and to govern the armed forces and to make or withhold appropriations therefor, arguments addressed to the impracticability of regulating all deployments go to the wisdom of the exercise, not the existence, of the congressional power.

The commander in chief clause empowers the President to conduct a campaign once a war is initiated by Congress or by foreign invasion of American soil, not to create incidents which embroil the nation in war. No "first General" may provoke, extend, or persist in a war against the will of Congress.\footnote{329} The duty of the President is to "take care that the laws be faithfully executed," and nothing in the Constitution absolves him from that duty in the role of commander in chief. Indeed the early state constitutions were careful to spell out that the executive was subject to the laws in his capacity of commander in chief.\footnote{330} In fine, the constitutional distribution of powers refutes Acheson's assumption that the President may deploy the armed forces as
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he sees fit in disregard of congressional will. This is the logic of Jefferson's statement that "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."330

Against this background, I submit, the constitutionality of the proposed War Powers Bill is unassailable. In limiting the President's use of the armed forces "to repel an armed attack upon the United States," section 3 of the Bill is declaratory of the Madison-Gerry "sudden attacks" remark in the Convention, upon which any claim to presidential power, apart from the "first General's" direction of the military forces, ultimately rests.331 The section 3 authorization to repel an attack on the armed forces "located outside the United States," and "to forestall the direct and imminent threat of such an attack," goes beyond the Madison-Gerry remark; but it lies within the power of Congress, and it enables the President to meet modern exigencies.

I would add a requirement that congressional authorization be had for deployment of the armed forces outside the United States, recognizing that matters of practical convenience may be left to the legislative draftsmen. My concern herein has not been with the sufficiency or wisdom of the Javits Bill, but with whether Congress is prevented by the Constitution from enacting a bill which would draw back unto itself powers conferred upon it by the Constitution and preempted by the President without constitutional warrant. Only if the "intention of the Framers" counts for little,332 is it possible to argue on the basis of the "125 incidents" that "a practice so deeply embedded in our constitutional structure should be treated as decisive of the constitutional issue."333

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331 Text accompanying notes 77-99 supra.
332 Cf. text accompanying note 207 supra.
333 Monaghan, supra note 172, at 31. Monaghan questions the constitutionality of a requirement that "the president obtain authorization from Congress before making any (major?) commitment of the armed forces to hostilities" on the ground that "it is too uncertain in what it demands." "What," he asks, "precisely is the President to ask of Congress?" Id. 29. Let him ask, as a succession of early Presidents did, an authorization for a given "commitment of the armed forces to hostilities" and leave it to Congress to determine whether the authorization should take the form of a statute, a resolution, a declaration of war, or any other form deemed by it appropriate. The Act of March 21, 1839, ch. 69, § 1, 5 Stat. 355, may serve as a guide; it authorized the President to resist any attempt by Great Britain "to enforce, by arms, her claims to exclusive jurisdiction over that part of Maine which is in dispute between the United States and Great Britain." If Congress is too divided to act clearly, the President will not obtain his authorization. Monaghan, supra note 172, at 29. He should not be permitted to commit a divided nation to war or to the grave risk of war. Even the strong-willed Franklin Roosevelt had to wait for Pearl Harbor.
Who would maintain that the President, by proclamation, can revise the Constitution in particulars he considers sadly wanting? Why should his progressive revision by actions rather than by writing be entitled to more respect? The fact that Congress countenanced the encroachments cannot lift them to the plane of constitutional dogma any more than the President and Congress can revise the Constitution by mutual consent without submitting an amendment to the people. At bottom the President lays claim "to set aside, not a particular clause of the Constitution, but its most fundamental characteristic, its division of powers between Congress and the President, and thereby gather into his own hands the combined power of both." It cannot be that a statute which seeks to give effect to the original intention of the Framers, aptly expressed in the text of the Constitution, is unconstitutional.

V. CONCLUSION

Surveying the labors of the Framers some forty years later, Joseph Story said:

[T]he power of declaring war is . . . so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation . . . . The representatives of the people are to lay the taxes to support a war [and to draft men for combat], and therefore have a right to be consulted, as to its propriety and necessity.

For this reason the Constitution conferred virtually all of the war-making powers upon the Congress, leaving to the President only the power "to repel sudden attacks" on the United States. They meant, in the words of James Wilson, to put it beyond the power of a single man to hurry us into war. Their wisdom is confirmed by recent events: the mounting frightfulness of war, its staggering costs in blood, money, disruption of the national and international economies, the wounds it inflicts on the national psyche—alienation of the young, desertion, draft evasion—all cry out for consultation before plunging into war.

Monaghan also questions the "textual basis" of an authorization that falls short of a declaration of war. Id. 30. A power to "declare" war surely comprehends authorization of steps short of war; the greater embraces the lesser, the more so as all power "naturally connected" with the power of declaring war is vested in Congress. Congress is authorized to wage both "perfect" and "imperfect" war. Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40-42 (1800). See also Lofgren, supra note 70, at 699.

E. Corwin, supra note 74, at 65.


The "executive, by acquiring the authority to commit the country to war, now
Some have referred to Congress' occasional lack of wisdom, but that lack cannot justify a presidential take-over of power confided to Congress. Courts, for example, cannot overturn legislation merely because it is unwise; the choice of options is for the grantee of the power. Then too, lack of wisdom may also be exhibited by the President, as the Vietnam conflict shows. Arthur Schlesinger, who sat close to the throne while some of the fateful commitments were being made, stated that "in retrospect, Viet Nam is a triumph of the politics of inadvertence"; and if we are to credit General de Gaulle, a triumph of wrongheadedness. Perhaps the decisions would not have been better had they been debated in Congress, but, as George Reedy, former special assistant and then Press Secretary to President Lyndon Johnson, remarked, they could not have "been much worse.

Since exercises something approaching absolute power over the life or death of every living American—to say nothing of millions of other people all over the world. . . . Plenary powers in the hands of any man or group threaten all other men with tyranny or disaster." S. Rep. No. 797, 90th Cong., 1st Sess. 26-27 (1967). Even those who take a broad view of presidential powers conclude on practical grounds that "Congress must be given an opportunity to say whether it finds the potential gains from the use of force worth the potential losses." Reveley, supra note 3, at 1298, 1299-301; Moore, supra note 106, at 814.

In the course of a tremendous effort on behalf of "executive agreements," McDougal and Lans conclude that "surely the history of the United States affords every reason to believe that powers given to permit rapid action in an emergency will be used as sparingly as possible. Except in case of imperative self-defense, it is to be assumed that no President will commit the use of American troops without prior consultation of Congress. If direct action by the President will sometimes be necessary, it is again to be assumed that, as soon as possible, the situation will be explained to Congress and its views sought." McDougal & Lans, supra note 106, at 615. In connection with these words consider the presidential commitment of troops in Cambodia and Laos after repeal of the Gulf of Tonkin Resolution. Note 249 supra.

Reveley, supra note 3, at 1293; Monaghan, supra note 172, at 25 n.33. Former Ambassador John Kenneth Galbraith stated, "Over the last half-decade Fulbright, Morse, Gruening, Kennedy, Cooper, Church, Hatfield and McGovern have surely been more sensible than the senior officials of the Department of State. On the average I think we are safer if we keep foreign policy under the influence of men who must be re-elected." Galbraith, Book Review, N.Y. Times, Oct. 8, 1972, § 6 (Book Reviews), at 1, 12.

Consider President Kennedy's disregard of the informed advice of President Charles de Gaulle. On the occasion of his visit to France in May, 1961, Kennedy "made no secret of the fact that the United States was planning to intervene [in Indochina]." De Gaulle records that he told Kennedy "he was taking the wrong road" that would lead to "an endless entanglement . . . We French have had experience of it. . . . You Americans . . . want to . . . revive a war which we brought to an end. I predict that you will sink step by step into a bottomless military and political quagmire . . . ." C. De Gaulle, Memoirs of Hope, Renewal and Endeavor, reprinted in N.Y. Times, Mar. 15, 1972, at 47, col. 5. Buchan observed of our Vietnam involvement "one cannot fail to be impressed by the slapdashed manner in which decisions of profound importance were taken." Buchan, supra note 1, at 38.

The wage-control powers presently being exercised by the President derive from a statutory grant which he did not want. Hearings, supra note 187, at 519.

The National Commitments Report, S. Rep. No. 797, 90th Cong., 1st Sess. (1972), states that, "Congress, it seems clear, was deficient in vision during the 1920's and 1930's, but so were Presidents Harding, Coolidge and Hoover and—prior to 1936—Roosevelt. Just as no one has a monopoly on vision, no one has a monopoly on myopia either." Id. 14.

Hearings, supra note 187, at 460, 464. See also R. Dale, Congress and Foreign Policy 245 (1950) (assessment of Roosevelt's World War II policy).
a nation of many millions cannot be convened in a town meeting, the great arena of public debate is necessarily the Congress.\footnote{Hearings, supra note 187, at 462. "Congressional inquiry, discussion and debate ought to serve a second function: facilitating a rational decision by the electorate outside the Congress." R. Dahl, supra note 341, at 125.} Debate may bring into the open risks that executive advisers have overlooked; it may deflate the supposed advantages of a recommended course of action; it substitutes the experience of the many for that of the one; and above all it may serve to secure the consent of the people.

"[W]ithin the executive branch," states Reedy, "there exists a virtual horror of public debate on issues," compounded by the complacent assumption that the executive branch "have some sort of a truth that comes out of their technical expertise and that this truth . . . is not something to be debated."\footnote{Hearings, supra note 187, at 455, 459. The philosopher Charles Frankel, who served as an Assistant Secretary of State, shed his outsider's respect for governmental expertise: "often the government does know something that people on the outside don't, but its something that isn't so . . . . After a while I came to suspect that I might not be dealing with hard facts but rather with a world created out of hunch, hope, and collective illusion." Id. 480. Military reports of constant progress in Vietnam illustrate the point. As Professor Dahl said, "The more closely debate moves toward broad and basic policy, the more competent is the legislative decision likely to be, and correspondingly less competent is the expert." R. Dahl, supra note 341, at 244.}

But executive decision itself suffers from a deep-seated malady; as Reedy points out, it lacks the benefit of "adversary discussion of issues"; the "so-called debates are really monologues in which one man is getting reflections of what he sends out."\footnote{Hearings, supra note 187, at 465-66. Reedy states of some meetings of the Cabinet and of the National Security Council that "everyone [was] trying desperately to determine just what it is that the President wants to do." Id. 466. Former Attorney General Ramsey Clark stated that "he had been wrong not to speak out against the Vietnam war when he was . . . Attorney General in President Johnson's cabinet while the war was expanding," and is quoted as saying, "There is too much tendency in the executive branch not to argue with policy." N.Y. Times, Aug. 16, 1972, at 7, col. 1. Of course, there is the occasional maverick, like Under Secretary of State George Ball, who persisted in opposition to Vietnam escalation in the face of an inner-circle consensus.}

That courtiers are apt to reflect the desires of the monarch needs little documentation.\footnote{Senator Charles Mathias said, "The more a President sits surrounded by his own views and those of his personal advisers, the more he lives in a house of mirrors, in which all views and ideas tend to reflect and reinforce his own." Hearings, supra note 187, at 17.}

Even worse is a situation such as that of President Eisenhower. Ambassador Douglas Dillon, according to C. Sulzberger, supra note 241, at 1018, said that "Eisenhower never
Of course public criticism is painful; but official pain is outweighed by public benefit. A seasoned observer, Sir Ivor Jennings, stated, "Negotiations with foreign powers are difficult to conduct when a lynx-eyed Opposition sits suspiciously on the watch. We might have a better foreign policy if we had no Parliament: but we might have a worse ... We are a free people because we can criticize freely ...."

It is quite likely, as Reedy concludes, that the present division in our country, the loss of confidence in the government, results in large part from the fact that the Vietnam commitments were made without consultation with the people.

Whatever the merits of debate, this is a requirement of our democratic system. Those who are to bleed and die have a right to be consulted, to have the issues debated by their elected representatives. Unlike the totalitarian nations, we have not placed our faith in a "Fuehrer," a "Big Brother"; a benign dictatorship is not for us.

It is for that reason that there is an "American propensity to substitute 'for ... the question of the beneficial use of the powers of government ... the question of their existence.'" Events since 1936, when Corwin penned the quoted words, have demonstrated still again that "use" of power may be not only "beneficial" but "malign, fearsome, hateful and dangerous."

It was because the Framers were alive to the insatiable maw of power that they contrived the separation of powers. It remains a bulwark against oppression, not a hollow shibboleth. "With all its

reads the newspapers and therefore doesn't know what goes on, and the apparatus around him sees that he doesn't know what goes on, The President's information nowadays is limited to what he is allowed to see by his entourage."


Hearings, supra note 187, at 455-56. "In the conduct of foreign relations, unity is one of the most important assets leadership can possess, disagreement one of the greatest liabilities." R. DAHL, supra note 341, at 221, 262. In addition to the examples cited by Dahl, there is the current divisiveness over Vietnam, which toppled one President, and has strewn boulders in the path of another, in no little part because the people were not really consulted.

Senator Fulbright stated, "the Congressman or Senator has to respond to the wishes ... of his electorate. This anchor in reality is the elected Representative's one indispensable credential for participation in the policymaking process." Hearings, supra note 187, at 23.


Monaghan, supra note 172, at 19.


Justice Black stated in Reid v. Covert, 354 U.S. 1, 40 (1957), "Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny."
defects, delays and inconveniences,” said Justice Jackson, “men have
discovered no technique for long preserving free government except
that the Executive be under the law, and that the law be made by
parliamentary deliberations.” That is what the Framers provided
in distributing the war-powers, and to that scheme we must return.

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854 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson,
J., concurring).