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What the Constitution Means by Executive Power

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What the Constitution Means by Executive Power

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I. CHARLES J. COOPER

The topic of this panel—the nature of executive power as it

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relates to foreign affairs—is an extraordinarily timely one. The President and Congress are currently engaged in a number of disputes over their respective powers in the field of foreign affairs. The use of American naval vessels to escort reflagged merchant ships in the Persian Gulf has once again raised questions concerning the War Powers Act,¹ and the boundaries between the President's powers as Commander-in-Chief and the Congress' power to declare war. In the pending Department of State authorization bill,² Congress has asserted a right to use its appropriations power to micromanage the foreign policy of the United States. Similarly, in the Department of Defense authorization bill,³ Congress again invoked the appropriations power in an attempt to control the President's implementation of a treaty to which the Senate consented fifteen years ago.⁴ Furthermore, the imminent publication of the Iran-Contra Committee's report⁵ will remind us that our brief respite from that matter has been all too temporary.

Clearly, the issue of presidential, as opposed to congressional, power in the field of foreign affairs is very much with us. Today, however, I propose not to discuss current events but to examine this

1. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1982 & Supp. IV 1986)).

2. H.R. 1777, 100th Cong., 1st Sess. (1987). The bill was subsequently enacted, in somewhat modified form, as the Foreign Relations Authorization Act, 1988 and 1989, Pub. L. No. 100-204, 101 Stat. 1331 (1987). For examples of this congressional micromanagement, see the Foreign Relations Authorization Act, 1988 and 1989, Pub. L. No. 100-204, § 123, 101 Stat. 1331, at 1341 (1987) (closing of consular and diplomatic posts in Antigua and Barbuda); *id.*, § 151, at 1351-52 (withdrawal from U.S.-U.S.S.R. embassy agreement); *id.*, § 1003, at 1407 (prohibitions regarding the Palestine Liberation Organization); *id.*, § 1234(b), at 1418-19 (U.S. policy toward Iran-Iraq War). The act also contains numerous "sense of the Congress" provisions that are purely hortatory and, therefore, constitutionally unobjectionable.

3. H.R. 1748, 100th Cong., 1st Sess. (1987). The House bill adopted most of the Senate proposals contained in S. 1174. After the delivery of these remarks, Congress enacted the House bill as the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, 101 Stat. 1019 (1987).

4. The treaty in question is, of course, the "ABM" Treaty. Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-USSR, 23 U.S.T. 3435, T.I.A.S. No. 7503 (entered into force Oct. 3, 1972). The Levin-Nunn amendment to S. 1174 sought to restrict the Reagan Administration's so-called "broad" interpretation of the ABM Treaty by limiting the expenditure of funds for the Strategic Defense Initiative to activities consistent with the "narrow" interpretation. See 133 CONG. REC. S6355-6379 (daily ed. May 13, 1987); 133 CONG. REC. S6453-6473 (daily ed. May 14, 1987); 133 CONG. REC. S12,134-12,195 (daily ed. Sept. 16, 1987); 133 CONG. REC. S12,235-12,243 (daily ed. Sept. 17, 1987); see also National Defense Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-108, § 225, 101 Stat. 1019, 1056 (1987) (relevant provision of bill as enacted).

5. The Select Committees issued a joint report on the Iran-Contra affair in November, 1987. H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. (1987). Chapter 25 of the majority report, *id.* at 387-93, and chapters 2-4 of the minority report, *id.* at 457-79, set forth opposing views of the extent of presidential power in the field of foreign affairs.

issue from an originalist's perspective; that is, to examine the framers' original understanding of the executive power as it relates to foreign affairs.

Let us begin not with the framers themselves, but with their teachers. John Locke's *Two Treatises of Government*⁶ was one of the framers' primers on political science. Locke divided the power of government into three parts: the Legislative, which prescribes the internal or municipal laws of the society;⁷ the Executive, which enforces the municipal laws;⁸ and the Federative, which deals with foreign states.⁹ What is particularly interesting about Locke's view is that even though he ultimately believed in the supremacy of the Legislature, his concept of executive power was quite broad. Locke's Executive was not a mere functionary, which carried out the Legislature's wishes. Rather, the holder of executive power possessed the ability to use the power for the benefit of society. Locke explained his broad view of executive power as follows:

Many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require . . . [in some cases] it is fit that the laws themselves should . . . give way to the executive power¹⁰

In short, by executive power Locke meant the "power to act according to discretion for the public good, without the prescription of the law and sometimes even against it."¹¹

Locke believed that the executive power, notwithstanding its breadth, was not the only power that should be given to the Executive. Although he viewed the executive and federative powers as distinct, he believed that "they are [not] to be separated and placed at the same time in the hands of distinct persons."¹² Locke defined the federative power as "the power of war and peace, leagues and alliances, and all the transactions with all persons and all communities without the commonwealth."¹³ Thus, Locke envisioned a system of govern-

6. J. LOCKE, *TWO TREATISES OF GOVERNMENT* (P. Laslett rev. ed. 1960). For a discussion of Locke's influence on the framers, see B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27-30 (1967).

7. J. LOCKE, *supra* note 6, at 382-84.

8. *Id.* at 382-84.

9. *Id.* at 382-84.

10. *Id.* at 384-85.

11. *Id.* at 384-85.

12. *Id.* at 384.

13. *Id.* at 385.

ment in which the Executive had broad discretionary powers, particularly in foreign affairs.

The theories of Locke, and of Blackstone¹⁴ and Montesquieu,¹⁵ who also perceived the direction of foreign relations as within the power of the Executive,¹⁶ did much to define what the framers *understood* by executive power, but the way the framers *felt* about executive power was shaped by their experiences. By the time that the Declaration of Independence was signed, Americans who had long suffered the oppression of King George III and his royal governors had grown suspicious of executive power and placed their confidence in legislative assemblies.¹⁷

The first state constitutions drafted after independence reflected this distrust of executive power and, therefore, generally featured strong Legislatures and very weak Executives.¹⁸ The Virginia Constitution of 1776, for example, stated that the Chief Executive "shall

14. See W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765) (Univ. Chicago facsimile ed. 1979).

15. See C. MONTESQUIEU, THE SPIRIT OF LAWS (1762) (J. Prichard rev. ed 1912).

16. See E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 462 n.1 (5th rev. ed 1984).

17. See J. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689-1776 (1963). Professor Greene argues that much of the struggle between the colonies and Great Britain took place in the context of political contests between appointed royal governors and locally elected assemblies. Thus Americans quite naturally viewed legislatures positively and executives negatively. When independence afforded them the opportunity to construct their own political arrangements, they reacted accordingly.

The evolution of American opinion in regard to executive power is illustrated by the colonists' shifting attitude toward the British crown. As late as 1760, Americans had cheered the accession of George III to the throne. Benjamin Franklin predicted that under George III's rule "faction will dissolve and be dissipated like a morning fog before the rising sun." Letter from Benjamin Franklin to William Strahan (December 19, 1763), *reprinted in* 10 THE PAPERS OF BENJAMIN FRANKLIN 406, 407 (L. Labaree ed. 1966). John Adams noted in his diary, after reading George III's first speech to Parliament, that "these are sentiments worthy of a king—a patriot king." Diary of John Adams, 1761, *reprinted in* 2 THE WORKS OF JOHN ADAMS (C. Adams ed. 1850) (exact date unknown; entry between dates of February 9 and March 3, 1761).

The subsequent colonial crisis that resulted in independence profoundly affected American notions of the desirability of a strong Executive. By 1776, Americans had come to view the King in a somewhat different light. No longer the "rising sun" dissipating the fog, George III was now "the royal brute of Great Britain," descended from a "French bastard" who had conquered England with "an armed banditti." Abigail Adams wrote to her husband John that "we have in George a match for a Borgia or a Cataline, a wretch callous to every humane feeling." R. KETCHAM, PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789-1829, at 69-73 (1984).

18. See W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS (1980); F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, at 89-91 (1966 ed.); J. MAIN, THE SOVEREIGN STATES, 1775-1783, at 143-44 (1973); A. NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789, at 164-170 (1924); C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775-1789, at 25-54 (1923).

with the advice of a Council of State, 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*.”¹⁹ Jefferson, who served as Governor of Virginia during the Revolution, complained that all powers of the government “result to the legislative body,” and that its direction of the Executive had become “habitual and familiar.”²⁰ Similarly, the Pennsylvania Constitution of 1776 provided for a virtually omnipotent, unicameral legislature, and a correspondingly impotent executive council.²¹ Indeed, the council complained in a message to the legislature:

[I]t has been one of the greatest objections made to this Constitution, that it has left too little power in the executive branch; and yet we see daily attempts to make that little less. We cannot suppose that it is intended practically to show the people what mischief and abuse a single legislature may do, and yet we are at a loss otherwise to account for those proceedings which are particularly the objects of this message.²²

To be sure, a few states resisted this trend. The New York Constitution of 1777,²³ and the Massachusetts Constitution of 1780,²⁴ both provided for strong Executives, but these were distinct exceptions. James Madison lamented during the Philadelphia Convention that:

Experience proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability and encroachments of the latter, a revolution of some kind or other would be inevitable.²⁵

If one turns from the states to the national government under the

19. VA. CONST. OF 1776, ch. II, art. IX.

20. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 113-14 (T. Abernethy ed. 1964).

21. PA. CONST. OF 1776, ch. II, §§ 1-3. See R. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA, 1776-1790 (1942). See generally J. SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776 (1936). Pennsylvanians, like other Americans, came to appreciate the necessity of executive power and, just a year after the adoption of the Constitution of the United States, replaced their 1776 constitution with a more balanced system.

22. Quoted in C. THACH, *supra* note 18, at 32-33.

23. NEW YORK CONST. OF 1777, arts. XVII-XIX.

24. MASS. CONST. OF 1780, part II, c. II, § 1, art. VII. See generally O. & M. Handlin, *Introduction*, THE POPULAR SOURCES OF POLITICAL AUTHORITY (O. & M. Handlin eds. 1966).

25. 2 THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787, at 35 (M. Farrand rev. ed. 1937) [hereinafter M. FARRAND].

Articles of Confederation, the situation was even worse. The Articles of Confederation established no executive authority at all.²⁶ Throughout the Revolution, executive power was exercised by the Congress through a series of ad hoc committees and boards.²⁷ Such an arrangement was hardly conducive to conducting a war and led General Washington to complain—with magnificent understatement—that “there is a vital and inherent principle of delay incompatible with Military service in transacting Business, through such various and different channels.”²⁸ As Alexander Hamilton noted, “the want of an executive” was one of the primary deficiencies of the Articles of Confederation.²⁹ Hamilton wrote:

Congress have [sic] kept the power too much in their own hands and has meddled too much with details of every sort. Congress is properly a deliberative corps and it forgets itself when it attempts to play the Executive. It is impossible that such a body, numerous as it is, constantly fluctuating, can ever act with sufficient decision or with system.³⁰

By the time that the Constitutional Convention met in Philadelphia in 1787, the pendulum of opinion had begun to swing in favor of a strong Executive.³¹ Gouveneur Morris explained that political theorists believed:

Republican Government is not adapted to a large extent of the Country, because the energy of the Executive Magistracy can not reach the extreme parts of it. Our Country is an extensive one. We must either renounce the blessing of the Union, or provide an Executive with sufficient vigor to pervade every part of it.³²

Needless to say, Morris favored the latter alternative. Far from fearing the concentration of power in the Executive, Morris argued that he would be “the great protector of the Mass of the people against legislative tyranny.”³³

26. C. THACH, *supra* note 18, at 55-75. See generally M. JENSEN, *THE ARTICLES OF CONFEDERATION* (1940); M. JENSEN, *THE NEW NATION* (1950).

27. C. THACH, *supra* note 18, at 55-69.

28. Letter from George Washington to the President of Congress (July 10, 1775), reprinted in 3 *THE WRITINGS OF GEORGE WASHINGTON* 320, 324 (Fitzpatrick ed. 1931). The situation Washington complained of improved dramatically when Congress appointed Joseph Trumbull as Commissary-General, but Trumbull later resigned because of a departmental reorganization that eliminated his power to remove key subordinates and placed it in Congress. When the supply system then returned to its pre-Trumbull state of inefficiency, Congress relented and restored the Commissary-General's power of removal. C. THACH, *supra* note 18, at 65-67.

29. Letter from Alexander Hamilton to James Duane (September 3, 1780), reprinted in 2 *THE PAPERS OF ALEXANDER HAMILTON* 400, 404 (H. Syrett ed. 1961).

30. *Id.* at 404.

31. C. THACH, *supra* note 18, at 76.

32. 2 M. FARRAND, *supra* note 25, at 52.

33. *Id.*

The new Constitution created a unitary Executive, unburdened by an executive council. The President was to be elected by an electoral college selected by the people³⁴ and was neither responsible to, nor removable by, the legislative branch, except insofar as he should be guilty of an impeachable offense.³⁵ The President was given broad powers of appointment,³⁶ the power to receive foreign ambassadors,³⁷ the preeminent role in making treaties,³⁸ command of the military,³⁹ and a qualified veto over legislative action.⁴⁰ In short, the Executive that emerged from the Philadelphia convention was an independent repository of government power, subject to "checks and balances,"⁴¹ but possessed of full dignity and authority in his own right.

The extent of the President's power over foreign affairs was soon put to the test. England and France declared war on each other in 1793. This presented an immediate problem for the United States because of our treaty obligations to France under the 1778 Treaty of Amity and Commerce⁴² and the Treaty of Alliance.⁴³ The free colonies had entered into these treaties with the King of France prior to the French Revolution, and there was some question as to whether they continued in force under the new revolutionary government.⁴⁴ A further question arose as to whether it was for the President or the Congress to make that determination. After consulting with his cabinet, President Washington decided, on his own authority and without Congressional approval, to issue a proclamation of neutrality.⁴⁵

34. U.S. CONST. art. II, § 1, cls. 2-3.

35. U.S. CONST. art. II, § 4.

36. U.S. CONST. art. II, § 2, cls. 2-3.

37. U.S. CONST. art. II, § 3.

38. U.S. CONST. art. II, § 2, cl. 2.

39. U.S. CONST. art. II, § 2, cl. 1.

40. U.S. CONST. art. I, § 7, cls. 2-3.

41. See, e.g., U.S. CONST. art I, § 7, cl. 2 (congressional override of presidential veto); U.S. CONST. art. II, § 2, cl. 2 (Senate's advice and consent to appointments and treaties); U.S. CONST. art. II, § 4 (removal of President by impeachment and conviction by Senate).

42. Treaty of Amity and Commerce, February 6, 1778, United States-France, 8 Stat. 12, 18(2) Stat. 203, Act Separate and Secret, 17 Stat. 795, 18(2) Stat. 213, T.S. No. 83, *annulled by* ch. 67, 1 Stat. 578 (1798).

43. Treaty of Alliance, February 6, 1778, United States-France, 4 Stat. 6, 18(2) Stat. 201, T.S. No. 82, *annulled by* ch. 67, 1 Stat. 578 (1798). For the best texts of these treaties, including both the English and the original French versions, as well as a useful introductory essay, see *THE TREATIES OF 1778 AND ALLIED DOCUMENTS* (G. Chinard ed. 1928).

44. See *Pacificus No. II*, Gazette of the United States (Philadelphia) July 3, 1793, in 15 H. SYRETT, *infra* note 46, at 55-63 (arguing that the treaties were defensive alliances and that the United States was not obligated to honor them because in the Anglo-French conflict France was the aggressor). See generally A. DECONDE, *ENTANGLING ALLIANCE: POLITICS AND DIPLOMACY UNDER WASHINGTON* (1958) (general discussion of the politics and tensions of the period).

45. Proclamation of Neutrality, No. 65, *ASP, Foreign Relations I*, 140, 93d Cong., 1st Sess.

Washington was supported by Secretary of the Treasury Alexander Hamilton, who defended the constitutionality of the proclamation in a series of essays published under the pseudonym "Pacificus."⁴⁶

Hamilton's principal argument was based on the twin conclusions that the proclamation was properly understood as an executive act, and that all the executive authority of the federal government belonged to the President.⁴⁷ Although Hamilton's first proposition is debatable, the second is seemingly indisputable, given the clear language of the first sentence of article II, section 1, of the Constitution.⁴⁸

Having first concluded that issuing the neutrality proclamation was an executive act,⁴⁹ Hamilton then noted that article II conferred the "Executive Power" on the President.⁵⁰ This grant of the entire executive power, Hamilton argued, was in sharp contrast to the wording of article I, section 1, which states "all legislative powers herein granted shall be vested in a Congress of the United States."⁵¹ In other words, the President was granted all executive powers, while the Congress was granted only those legislative powers specifically enumerated. Hamilton argued that the recitation of specific presidential powers in article II was merely illustrative of the "Executive power," rather than an exhaustive catalog of its limits.⁵²

Hamilton acknowledged that the executive power was not unlimited.⁵³ For example, the Senate's right of advice and consent limited the treaty power and⁵⁴ the appointment of ambassadors.⁵⁵ In addition, the Commander-in-Chief power was limited by the Congress'

(1793), reprinted in 32 THE WRITINGS OF GEORGE WASHINGTON 430-31 (J. Fitzpatrick ed. 1939) [hereinafter J. FITZPATRICK]. The standard source on this episode is C. THOMAS, AMERICAN NEUTRALITY IN 1793 (1931). See A. DECONDE, *supra* note 43; F. GILBERT, TO THE FAREWELL ADDRESS: EARLY AMERICAN FOREIGN POLICY (1961); P. VARG, FOREIGN POLICIES OF THE FOUNDING FATHERS (1963).

46. Hamilton's *Pacificus* essays were originally published in the *Gazette of the United States* (Philadelphia) June 29-July 20, 1793. They are reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33-43, 55-63, 65-69, 82-86, 90-95, 100-06, 130-35 (H. Syrett ed. 1969) [hereinafter H. SYRETT].

47. *Pacificus No. I*, *Gazette of the United States* (Philadelphia) June 29, 1793, in 15 H. SYRETT, *supra* note 46, at 33-43.

48. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1.

49. 15 H. SYRETT, *supra* note 46, at 37-38.

50. *Id.* at 38.

51. *Id.* at 39-40.

52. *Id.* at 39.

53. *Id.* at 42.

54. *Id.*

55. *Id.*

power to declare war.⁵⁶ But he argued:

As the participation of the [S]enate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general 'Executive Power' vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.⁵⁷

Because neither of those two powers, strictly construed, was implicated by the proclamation of neutrality, its issuance was within the executive power of the President.⁵⁸

Although Secretary of State Thomas Jefferson favored a policy of neutrality, he believed that unilateral action of this kind by the President was unconstitutional.⁵⁹ Jefferson maintained that "a declaration of neutrality was a declaration [that] there should be no war, to which the executive was not competent."⁶⁰ Jefferson was particularly exercised by Hamilton's *Pacificus* essays, and he urged his friend and colleague, James Madison, to prepare a response.⁶¹ Jefferson wrote: "For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in the face of the public. There is nobody else who can and will enter the lists with him."⁶²

Although reluctant, Madison complied with Jefferson's request and prepared a series of essays published under the pseudonym "Helvidius."⁶³ In his essays, Madison denounced Hamilton's notion of executive power as having been inspired by the royal prerogatives of the British government and, therefore, to be "condemned as no less vicious in theory than it would be dangerous in practice."⁶⁴ Madison concluded that the power to declare neutrality was a legislative power vested in Congress, and not an executive power granted to the

56. *Id.*

57. *Id.*

58. *Id.*

59. D. MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* 55-163 (1962); M. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 479-517 (1970). In addition to his constitutional scruples, Jefferson opposed a gratuitous American declaration of neutrality, preferring instead to exact some consideration, in the form of trade concessions, from the belligerents. D. MALONE, *supra*, at 70; M. PETERSON *supra*, at 484-85.

60. Letter from Thomas Jefferson to James Madison (June 23, 1793), reprinted in 15 *THE PAPERS OF JAMES MADISON* 37 (T. Mason, R. Rutland, J. Session eds. 1985) [hereinafter T. MASON].

61. Letter from Thomas Jefferson to James Madison (July 7, 1793), reprinted in 15 T. MASON, *supra* note 60, at 43.

62. *Id.*

63. Madison's five *Helvidius* essays were originally published in *Gazette of the United States* (Philadelphia) August 24-September 18, 1793. They are reprinted in 15 T. MASON, *supra* note 60, at 64-120.

64. *Helvidius No. I*, *Gazette of the United States* (Philadelphia) August 24, 1793, in 15 T. MASON, *supra* note 60, at 72.

President.⁶⁵

We do not know why Madison was so reluctant to respond to Hamilton's *Pacificus* essays, but it may well have been because Hamilton's views of executive power mirrored views previously expressed by both Jefferson and Madison. In arguing that the executive power of article II, section 1, was an independent grant of presidential authority above and beyond the specific powers listed in section 2, Hamilton reiterated an argument that Madison had used in a debate over the President's removal power during the first Congress.⁶⁶ And Jefferson, in an opinion to President Washington in April, 1790, wrote:

[The Constitution] has declared that the executive power shall be vested in the President, submitting only special articles of it to a negative by the Senate The transaction of business with foreign nations is executive altogether. It belongs then to the head of that department, except as to such portions of it as are specifically submitted to the Senate. Exceptions are to be construed strictly.⁶⁷

Jefferson's view, at least at that time, was very similar to Hamilton's.

A critical component of the President's executive power that is of obvious importance in the field of foreign affairs is his authority as Commander-in-Chief.⁶⁸ Modern theorists are reluctant to give that power the scope that its wording seems necessarily to imply, which prompts one to wish that the framers had further elaborated on the

65. Madison argued:

A declaration that there shall be war, is not an execution of laws; it does not suppose pre-existing laws to be executed; it is not in any respect, an act merely executive. It is, on the contrary, one of the most deliberative acts that can be performed; and when performed, has the effect of *repealing* all the laws operating in a state of peace, so far as they are inconsistent with a state of war; and of *enacting* as a rule for the executive, a new code adapted to the relation between the society and its foreign enemy. In like manner a conclusion *annuls* all the laws peculiar to a state of war, and *revives* the general laws incident to a state of peace.

Helvidius No. I, Gazette of the United States (Philadelphia) August 24, 1793, in 15 T. MASON, *supra* note 60, at 69 (emphasis in original).

Madison, however, seemed to waffle on the question of which branch, in fact, had the power to make such determinations and concluded:

[It] is plainly neither the one nor the other [Legislative or Executive]. It relates neither to the execution of the subsisting laws, nor to the enactment of new ones, and still less to an exertion of the common strength. . . . The power in question seems therefore to form a distinct department, and to belong neither to the legislative nor to the executive.

Id. at 73.

66. E. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 28-30 (1917).

67. Opinion on the Powers of the Senate Respecting Diplomatic Appointments (April 24, 1790), in 16 *THE PAPERS OF THOMAS JEFFERSON* 378-379 (J. Boyd ed. 1961).

68. U.S. CONST. art. II, § 2, cl. 1. For a historical analysis of the commander-in-chief power, see C. ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* (R. Longaker rev. ed. 1976).

commander-in-chief power in the Constitution. The authors of the Massachusetts Constitution of 1780 apparently foresaw these modern theorists because they elaborated considerably. Article VII of the Massachusetts Constitution provided:

The governor of this Commonwealth, for the time being, shall be the commander-in-chief of the army and navy and of all the military forces of the State, by sea and land; and shall have full power, by himself, or by any commander, or other officer or officers, from time to time, to train, instruct, exercise and govern the militia and navy; and for the special defence and safety of the Commonwealth, to assemble in martial array, and put in warlike posture the inhabitants thereof, and to lead and conduct them, and with them, to encounter, repel, resist, expel[,] pursue, by force of arms, as well by sea as by land, within or without the limits of this Commonwealth, and also to kill, slay and destroy, if necessary, and conquer, by all fitting ways, enterprises and means whatsoever, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprise the destruction, invasion, detriment or annoyance of the Commonwealth; . . . and to take and surprise, by all ways and means whatsoever, all and every such person or persons, with their ships, arms, ammunition and other goods, as shall, in a hostile manner, invade or attempt the invading, conquering or annoying this Commonwealth; and that the governor be intrusted with all these and other powers incident to the offices of captain-general and commander-in-chief, and admiral to be exercised agreeably to the rules and regulations of the constitution, and the laws of the land, and not otherwise.⁶⁹

In simpler terms, the Governor, as Commander-in-Chief, was authorized to use military force to protect and defend the Commonwealth.

Presidents have generally interpreted their power as Commander-in-Chief in the same manner. President Jefferson's actions against the Barbary pirates provides an entertaining illustration of this point. I might add that any resemblance between this episode and current events in the Persian Gulf is entirely intentional.

During the late 18th and early 19th century, piracy was the major economic activity of four Barbary states: Algeria, Morocco, Tripoli, and Tunis.⁷⁰ Merchant ships sailing the Mediterranean were often attacked by pirates, who would not only steal their cargoes, but

69. MASS. CONST. OF 1780, part II, c. II, § 1, art. VII, *annulled and replaced by art. 45 of the Amendments* (1918).

70. Jefferson's efforts against the Barbary pirates are surveyed in M. SMELSER, *THE DEMOCRATIC REPUBLIC, 1801-1815*, at 57-61 (1968). A discussion of the Dale mission appears in 1 *THE GROWTH OF PRESIDENTIAL POWER* 369-74, 376-78 (W. Goldsmith ed. 1974) [hereinafter W. GOLDSMITH].

would also kidnap the crew for ransom. In addition to these income-producing activities, the Barbary states also extorted bribes to refrain from conducting these illegitimate pursuits.

In May, 1801, Tripoli declared war on the United States. Tripoli was upset that the United States had recently paid lavish bribes to the Dey of Algiers, but not to them. Fortunately, however, President Jefferson received advance warning of Tripoli's intentions. Even before word of the declaration of war had arrived in Washington, the Secretary of the Navy dispatched a squadron of four vessels under the command of Commodore Richard Dale to the Mediterranean on an "observation cruise."⁷¹

Dale's orders were to sail into the Mediterranean and inform the Barbary states that the attitude of the American government was friendly, but that the United States intended to protect American commerce from attack.⁷² Dale was also instructed that if he should find that any, or all, of the Barbary states had declared war on America, he was to "chastise their insolence—by sinking, burning, or destroying their ships wherever you shall find them."⁷³

Commodore Dale ordered the four ships to fly only the English flag while at sea, until such time as there was "a necessity for the contrary."⁷⁴ That necessity occurred when one of the ships in the squadron, the schooner *Enterprise*, encountered a Tripolitan cruiser in the Mediterranean. The pirate commander was completely fooled by the English flag and somewhat indiscreetly confided to the American captain that he was in search of American merchant ships. Upon hearing that, *Enterprise* lowered the English flag and raised the American flag—an early 19th century version of "reflagging." The Americans then opened fire and severely damaged the pirate ship, which eventually surrendered after more than half of her crew were either

71. Letter from General Samuel Smith to Commodore Richard Dale (May 20, 1801), No. 165, *ASP, Foreign Relations II*, 359, 7th Cong., 1st Sess. (1801), quoted in 1 W. GOLDSMITH, *supra* note 70, at 373.

72. Letter from General Samuel Smith to Commodore Richard Dale (May 20, 1801), No. 165, *ASP, Foreign Relations II*, 359, 7th Cong., 1st Sess. (1801), reprinted in part in 1 W. GOLDSMITH, *supra* note 70, at 374.

73. Letter from General Samuel Smith to Commodore Richard Dale (May 20, 1801), No. 165, *ASP, Foreign Relations II*, 359, 7th Cong., 1st Sess. (1801), reprinted in part in 1 W. GOLDSMITH, *supra* note 70, at 375-76.

74. 1 W. GOLDSMITH, *supra* note 70, at 376. In his orders to Commodore Dale, General Smith had suggested that "[B]y disguising your ships, it will be some weeks before they [the Tripolitans and other North African states] will know that the squadron is cruising in the Mediterranean, and give you a fair chance of punishing them." Letter from General Samuel Smith to Commodore Richard Dale (May 20, 1801), No. 165, *ASP, Foreign Relations II*, 359, 7th Cong., 1st Sess. (1801).

killed or injured. The Americans suffered no serious casualties.⁷⁵

The significant point about this episode is that President Jefferson, pursuant to his article II powers and without consulting, much less obtaining the approval of, Congress, sent American military forces half way around the world with explicit orders to engage in hostilities if necessary. Not only did Jefferson take this initiative on his own authority, he did not even inform Congress of the episode until six months later.⁷⁶

This necessarily brief survey establishes several points that I think are important for determining the original understanding of presidential power in the foreign affairs field. First, the founding generation understood executive power as conferring a broad authority that extended beyond the mere execution of the laws. Second, the unhappy experience with weak Executives in the states and in the national government during the Revolution and the Confederation led the Philadelphia Convention to establish a strong, unitary Executive under the new Constitution. Finally, the understanding of article II displayed by Washington, Madison, Hamilton, and Jefferson indicates that the conduct of foreign relations is an aspect of the executive power entrusted to the President, subject only to narrowly defined exceptions. I submit, therefore, that the way that Presidents have historically handled foreign affairs is in accord with the way that the framers intended for them to act.

II. MICHAEL TIGAR

A. *Introduction*

Nearly twenty years ago, I wrote an article entitled *Judicial Power, the "Political Question Doctrine," and Foreign Relations*.⁷⁷ I wrote in the shadow of significant military activity in Vietnam, and the incursion into Cambodia. I asked what, if any, role the Constitution required, or permitted, the federal judiciary to play in finding, declaring, and enforcing the rules of domestic and international law

75. 1 W. GOLDSMITH, *supra* note 70, at 376-77. Commodore Dale described the circumstances in a letter to the Secretary of the Navy written shortly after their occurrence, and enclosed a copy of the action report of *Enterprise's* commanding officer, Lieutenant Andrew Sterrett. See Letter of Commodore Dale to the Secretary of the Navy (Malta Harbor, August 18, 1801), including Copy of Letter from Lieutenant Andrew Sterrett to Commodore Richard Dale, dated on board the United States' schooner *Enterprise* (At Sea, August 6, 1801), No. 165, *ASP, Foreign Relations II*, 360, 7th Cong., 1st Sess. (1801).

76. Jefferson informed Congress of the Dale mission in his First Annual Message to Congress, December 8, 1801. See 11 ANNALS OF CONG. 11 (J. Gales ed. 1801), reprinted in 1 MESSAGES AND PAPERS OF THE PRESIDENTS 314 (J. Richardson rev. ed. 1908).

77. Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135 (1970).

that limit military action by the executive branch.⁷⁸ Today we live in the shadow of other conflicts. Therefore, we must once again measure the roles of the executive, legislative, and judicial branches in the areas of foreign and military affairs.

In the years following the publication of my article, Presidents representing both of our nation's political parties have claimed the unreviewable power—a power that the Constitution seems to forbid—to take action, and then have justified that action by invoking a vaguely defined concern for national security and a theory that the Court ought to keep its hands off. For example, President Nixon sought to justify warrantless domestic electronic surveillance.⁷⁹ President Carter made a more extensive claim in the context of alleged espionage.⁸⁰ The Reagan administration has taken the argument several steps further, claiming a broad immunity from both congressional and judicial scrutiny of its actions.⁸¹

There are three questions that I want to address: First, what role does the Constitution assign to the judiciary in the conduct of foreign and military affairs? Second, what are the sources of law that the judiciary might apply in its sphere of competence? Third, what are the implications of these conclusions in today's international situation? The basic theme of my 1970 article was that the political question doctrine is all too often a judicial code word for avoiding a judicial duty to protect litigants from unlawful exercises of executive power.⁸² Unfortunately, all too often that definition holds true today.

78. *Id.* at 1147-52, 1167-78. See Henkin, *Is There a "Political Questions" Doctrine?*, 85 YALE L.J. 597 (1976) (concluding political question doctrine is "deceptive packaging").

79. *United States v. United States District Court for the Eastern District of Michigan (Keith)*, 407 U.S. 297, 303, 320-21 (1972) (18 U.S.C. § 2511(3) does not confer power on President to conduct warrantless electronic surveillance based on national security grounds, and the Fourth Amendment requires prior judicial approval for Executive to conduct domestic security surveillance.).

80. See *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *appeal after remand*, 667 F.2d 1105 (4th Cir. 1981), *cert. denied*, 454 U.S. 1144 (1982). The Fourth Circuit held that the "foreign intelligence" exception to the Fourth Amendment permits warrantless electronic surveillance so long as (1) the object of the surveillance is a foreign power, its agent, or collaborators, and (2) the surveillance is primarily for foreign intelligence reasons. When the investigation becomes criminal, however, a warrant is then required. *Id.* at 915-16.

81. See *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987); *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), *aff'd in part, rev'd in part sub nom.*, *Boos v. Barry*, 108 S. Ct. 1157 (1987); *Von Avlock v. Smith*, 720 F.2d 176 (D.C. Cir. 1983). As to the objections to Congressional scrutiny, see *United States v. Lavelle*, 751 F.2d 1266 (D.C. Cir. 1985). See also Kennedy, *Treaty Interpretation by the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, 80 AM. J. INT'L L. 854-77 (1986); Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L. REV. 683, 711-12 (1984).

82. Tigar, *supra* note 77, at 1165-67.

B. *The Constitution, Foreign Affairs, and the Judiciary*

In *Marbury v. Madison*,⁸³ Chief Justice Marshall acknowledged that some executive acts are beyond judicial review.⁸⁴ Since that dictum was pronounced, Presidents and judges have tussled about its meaning. In *United States v. Burr*,⁸⁵ however, Chief Justice Marshall made it clear that the President was not immune from the judicial process.⁸⁶ Marshall's opinion in *Burr* formed the cornerstone of Dean Wigmore's treatment of executive privilege,⁸⁷ and is an implicit term in arguments about the role of the rule of law in matters of state.

Harry Truman thought that he could seize the steel industry and run it during the Korean conflict because he was the President, there was shooting in Asia, and the steel industry was threatened with a shutdown.⁸⁸ The Supreme Court, however, had no trouble spelling out some truths about constitutional governance. First, Presidents must obey the law.⁸⁹ Second, in our society, the laws are not silent,

83. 5 U.S. (1 Cranch) 137 (1803).

84. *Id.* at 165-66.

85. 25 F. Cas. 30 (C.C.W.D. Va. 1807) (No. 14,692d) (cited with approval in *United States v. Nixon*, 418 U.S. 683 (1974)).

86. *Id.* at 34.

87. 8 J. WIGMORE, EVIDENCE §§ 2369-79 (McNaughton rev. ed. 1961 & Supp. 1987).

88. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

89. Speaking for the Court, Mr. Justice Black delineated the President's role in the "law life" of our Nation with succinctness. He stated:

The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. . . . In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute. . . . The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

Id. at 585-88. Mr. Justice Frankfurter, at least on this point, phrased it somewhat more bluntly:

'The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress see fit to leave within his power.' The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution give essential content to undefined provisions in the frame of our government.

Id. at 610 (Frankfurter, J., concurring) (quoting Mr. Justice Holmes in *Myers v. United States*, 272 U.S. 52, 177 (1926)).

Mr. Justice Clark, in his concurrence, concluded that:

[W]here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis;

even in times of war.⁹⁰ Third, the judiciary has the power to declare the law, regardless of who the parties are, when a real case or controversy requires such a declaration in order to decide who wins and who loses.⁹¹ Recently, a majority of the District of Columbia Circuit, sitting en banc, echoed these principles when an American citizen sued the Secretary of Defense because the United States Government had taken over his land in Honduras to help mount covert military operations in Central America.⁹²

These cases reflect a proper judicial attitude towards executive claims of unreviewable power to conduct foreign and military policy. After all, some who opposed the adoption of the Constitution did so because the executive branch appeared to possess too much unfettered power. In the Virginia debate, Patrick Henry wondered whether a lawless President would really obey the Supreme Court, or whether he would use his power as Commander-in-Chief to defy it.⁹³ Similarly, many people may recall that Abraham Lincoln, as a Congress-

but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation.

Id. at 662.

Mr. Justice Burton also concurred based upon the President's failure to follow the congressionally prescribed procedures. *Id.* at 660. Mr. Justice Jackson's three bases of presidential authority are discussed *infra* in text accompanying note 193.

90. Mr. Justice Black phrased the second truth as follows:

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. . . . Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.

Youngstown, 343 U.S. at 587.

91. *Id.* at 583-84. Mr. Justice Frankfurter was more explicit on this point:

To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action.

Id. at 596.

92. *Ramirez de Arrellano v. Weinberger*, 724 F.2d 143 (D.C. Cir. 1983), *rev'd and remanded*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc) (The destruction of a United States citizen's Honduran cattle ranch by construction of United States military base presented justiciable case, and the act of state doctrine did not bar judicial relief.), *vacated and remanded for reconsideration*, 471 U.S. 1113 (1985) (mem.) (vacated and remanded in light of enactment of Pub. L. No. 98-473, 98 Stat. 1884, 1893-1894, which provided compensation for Americans in Honduras whose property was taken by United States government action).

93. 3 J. ELLIOT, *THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787* 59 (3d ed. 1941) [hereinafter *ELLIOT'S DEBATES*] (remarks by Mr. Henry at the Virginia ratification convention, June 5, 1788), *quoted in* Tigar, *supra* note 77, at 1172.

man from Illinois, inveighed against the idea that the President could make himself like a king, "involving and improvising" the people in war.⁹⁴ Patrick Henry's concern, whether one agrees with it or not, expresses a contemporaneous understanding that the original purpose of the judicial branch was to ensure that the laws were faithfully executed.

Of course, Congress was also empowered to restrain foreign military activity through the control of appropriations,⁹⁵ declaration of war,⁹⁶ and grant of letters of marque and reprisal.⁹⁷ In addition, the Senate's power of concurrence in treaties⁹⁸ gave it a role in shaping foreign policy, although sadly, some are arguing that the Senate can consent to a treaty without understanding what the executive branch thinks the treaty means.⁹⁹ Although the President may embark upon a course of foreign policy, or step down the road of foreign military adventure, however, the judiciary will presumptively have power to fashion some remedy when that conduct infringes upon a private right.

The opposition to this view, as expressed by the dissenters in *Arellano*,¹⁰⁰ is based on both factual and legal solecisms. *Arellano* did not involve a presidential decision to respond to a sudden attack, so the hypotheticals conjured out of such imaginings by the dissenters exult drama over common sense. The dissenters went on to question why non-elected judges should be telling an elected President that he was trampling private rights in his march towards a military objective.¹⁰¹ The answer is plain in the Constitution's text, and in the "law life" of the nation. The text recognizes that war is so calamitous an event, for both public and private interests, that the President, alone, is not supposed to propel us into one. Justice Story said as much in his *Commentaries on the Constitution*.¹⁰² Our national experience

94. U.S. CONST. art. I, § 8, cls. 1, 12.

95. U.S. CONST. art. I, § 8, cl. 11.

96. *Id.*

97. Goldman, *The President, the People and the Power to Make War*, 21 AMERICAN HERITAGE, April, 1970, at 28, reprinted in 3 R. FALK, *THE VIETNAM WAR AND INTERNATIONAL LAW* 489 (1972).

98. U.S. CONST. art. II, § 2.

99. For a discussion of this dangerous "constitution busting" tactic, see Glennon, *Interpreting "Interpretation": The President, the Senate, and When Treaty Interpretation Becomes Treaty Making*, 20 U.C. DAVIS L. REV. 913 (1987).

100. 745 F.2d at 1545-74.

101. *Id.* at 1546-49 (Tamm, J., dissenting); *id.* at 1561-62 (Scalia, J., dissenting).

102. See J. STORY, *COMMENTARIES ON THE CONSTITUTION* §§ 1166, 1171, at 95-97 (3d ed. 1858); see also *THE FEDERALIST* NOS. 24-26 (A. Hamilton) (G. Carey & W. Kendall ed. 1966); Comment, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968); Comment, *The President, the Congress, and the Power to Declare War*, 16 U. KAN. L. REV. 82 (1967).

demonstrates that the rush towards improvident armed conflict is often associated with jingoistic rhetoric, systematic assaults on the right of dissent, and a public atmosphere of intolerance.¹⁰³ Non-elected judges are supposed to restrain such things in the service of the countermajoritarian values built into the Constitution by the framers.¹⁰⁴

C. *The Sources of Law*

What do I mean by "law" in this context? Article VI of the Constitution makes supreme the "Constitution," "laws" and "treaties" of the United States.¹⁰⁵ I am sorry to have to say something that sounds tautological, but the point appears to have been lost in recent days: Military activity in violation of "laws" of the United States is unlawful.

I am not talking solely about the so-called Boland amendment,¹⁰⁶ but also about the network of laws that limit the use of United States funds, territory, and personnel to conduct hostile actions against countries with whom we are at peace.¹⁰⁷ Nothing in the text, history, or authoritative interpretation of the Constitution gives the President a shred of justification for violating, or purporting to authorize violation of, such laws. To argue the contrary is to sunder the most basic understanding upon which the Constitution was ratified: namely, that the states party to this compact were not installing as head of state a king by some other name.¹⁰⁸ Certainly, then, these parties did not intend to create a "king" free to disregard the law. As Lord Coke explained in *Dr. Bonham's Case*,¹⁰⁹ the law stands indifferent between sovereign and citizen and binds them both.¹¹⁰ Military activity under-

103. See generally 1 T. EMERSON & D. HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 254-338 (2d ed. 1958).

104. For a more extended discussion of this question, and a detailed response to such authors as Alexander Bickel, who rather derided the idea of a countermajoritarian institution asserting itself in this way, see Tigar, *supra* note 77, at 1136.

105. U.S. CONST. art. VI.

106. The Boland amendment provisions have appeared in various statutes. See, e.g., Further Continuing Appropriations Act, 1983, Pub. L. 97-377, § 793, 96 Stat. 1830, 1865 (1982). The Congressional Research Service compiled a legislative history and summary of the "Boland amendments" through the summer of 1987, and the report was subsequently published in the Congressional Record. See 133 CONG. REC. H4585-4987 (daily ed. June 15, 1987); see also H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 395-410 (1987) (Chapter 26 of the Iran-Contra Report, "The Boland Amendments and the NSC Staff").

107. Relevant statutes are legion. Some examples include the Neutrality Act provisions codified at 18 U.S.C. §§ 956, 959, 960, and the War Powers Resolution provisions codified at 50 U.S.C. §§ 1541-1548. See J. STORY, *supra* note 102, §§ 1163-82, at 94-102.

108. See authorities cited *supra* notes 97 & 102.

109. 77 Eng. Rep. 646 (1610).

110. *Id.* at 652 ("[W]hen an Act of Parliament is against common right and reason, or

taken without affirmative congressional approval may also be unlawful, depending on one's interpretation of the Constitution.¹¹¹ I have defended the view that all presidential military activity, other than repelling a sudden attack, requires congressional authorization, at least if the activity involves what are, under international law, acts of war.¹¹²

Treaties, such as the United Nations Charter,¹¹³ and agreements on arms limitation,¹¹⁴ also define the limits of lawful executive power. But there is another, long recognized source of "law" in the United States—namely, customary international law. For example, when the Spanish-American War broke out, the United States Navy put a blockade around Cuba. Two Cuban fishing vessels, returning with their cargoes of fish, were seized by the Navy, claimed as prizes of war, and taken to Key West, Florida. There, they were forfeited to the United States by judicial order. In *The Paquete Habana*,¹¹⁵ however, the Supreme Court reversed the seizure order, holding that the rules of customary international law were part of the "laws" embraced within the supremacy clause.¹¹⁶ Under customary international law, fishing vessels peaceably engaged in their trade were exempt from seizure as prizes of war.¹¹⁷ Therefore, the Navy was

repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."); see Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

111. The most complete collection of material from the Vietnam War era is the series of volumes edited by Richard Falk, *supra* note 97. More recent military incursions have added urgency to the debate, but not much to the scholarship in the area.

112. See Tigar, *supra* note 77, at 1170 nn.152-54. See generally authorities cited in R. FALK, *supra* note 97.

113. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (entered into force October 24, 1945).

114. See, e.g., Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-USSR, 23 U.S.T. 3435, T.I.A.S. No. 7503 (entered into force Oct. 3, 1972); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, February 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337 (entered into force May 18, 1972); Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (entered into force March 5, 1970); Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, August 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (entered into force October 10, 1963).

115. *The Paquete Habana*, 175 U.S. 677 (1900).

116. *Id.* at 700. See Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U.L. REV. 321 (1985); see also Agora, *May the President Violate Customary International Law?*, 81 AM. J. INT'L L. 371 (1987) (comments by Kirgis, D'Amato, Paust); Agora, *May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986) (comments by Charney, Glennon, and Henkin); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

117. *The Paquete Habana*, 175 U.S. at 686.

ordered to restore the proceeds of sale to the vessel owners, with damages and costs.¹¹⁸

Since 1900, international law has undergone enormous change. Its content has grown to embrace new rights of persons, entities, and nations.¹¹⁹ Most courts have agreed that individuals as such are beneficiaries of rights granted by international law, and may enforce such rights in judicial proceedings.¹²⁰ Some judges, such as Judge Bork in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*,¹²¹ have doubted that individuals, who are not subject to obligations under international law in their individual, as opposed to official, capacities, may enforce such rights. Such views, however, are inconsistent with a growing international consensus.¹²²

118. *Id.* at 714.

119. See, e.g., African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58 (not yet in force); Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (Organization of American States (OAS) Convention) (entered into force Oct. 20, 1976); American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, Jan. 7, 1970 (entered into force June, 1978); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217, 3 U.N. GAOR, U.N. Doc. A/777 (1948); Articles 1 and 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993 (entered into force Oct. 24, 1945). See also Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, § 511, 101 Stat. 1329, 1329-155 (prohibiting expenditure of funds to aid any government's effort to "repress the legitimate rights of the population of such country contrary to the Universal Declaration of Human Rights.").

120. See Tigar, *The Foreign Sovereign Immunities Act and the Pursued Refugee: Lessons from Letelier v. Chile*, 1982 MICH. Y.B. INT'L LEGAL STUD. 421, 426-27; see also Bassiouni, *International Criminal Law and Human Rights*, in 1 INTERNATIONAL CRIMINAL LAW 15 (M.C. Bassiouni ed. 1986).

The principle that international law may of its own force confer individually enforceable rights has long been a part of American law. See *United States v. Rauscher*, 119 U.S. 407 (1886) (violation of the rule of specialty under an extradition treaty violates the rights of both the requesting state and the prisoner).

121. 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring).

122. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (Deliberate torture under color of official authority violates international norms of human rights behavior so that Alien Tort Statute (28 U.S.C. § 1350) provides jurisdiction over alleged torturer found and served with process within United States borders, regardless of nationality of parties.); see also *Government of Costa Rica (In the Matter of Vivian Gallerdo et al.)*, No. G101/81, 2 Inter-Am. Ct. H.R. 12 (1982) (Decision of Nov. 13, 1981) (Determination of whether death of citizen in prison constituted human rights violation was responsibility of Inter-American

In sum, Presidents and their agents—including military commanders and troops—are subject to the commands of customary international law that limit violations by one nation of another nation's sovereignty and territorial integrity, and that limit interference in another nation's internal affairs. My summary of the sources of law is quite independent of my earlier discussion of the proper role of the judiciary. Even if one believes that judges should not interfere with particular kinds of executive decisions, the rules of law are still there, and a President's obedience to them is at least a function of the oath of office.

Let me make no mistake about my meaning. I tremble for my country when I see the President proclaim that he and his staff are not bound by congressional restrictions on how appropriated funds are spent, even though article I of the Constitution clearly gives the Congress the power over the public monies.¹²³ Similarly, the supremacy clause makes binding on the United States those treaties to which it is a party, including those provisions that accord jurisdiction over disputes to international tribunals. The President, as with the spending of the public monies, cannot choose to ignore or deride these provisions. Everyone who takes the supremacy clause seriously must insist that the President not be permitted to pick and choose which parts of the Constitution, laws, and treaties he will obey.

For example, in *Nicaragua v. United States*,¹²⁴ the United States

Commission on Human Rights.); *Case of X v. United Kingdom*, 62 Eur. Ct. H.R. (ser. A) (1981) (scrutinizing procedures for confinement to mental institutions); *Golder Case*, 18 Eur. Ct. H.R. (ser. A) (1975) (European Convention creates right of access to courts and right to counsel); *Lawless Case*, 1 Eur. Ct. H.R. (ser. A) (1961) (Detention without trial under unusual circumstances did not violate Articles 5 and 6 of European Convention.). *But see* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring) (rejecting *Filartiga*, arguing congressional grant of jurisdiction did not create a cause of action, and concluding treaties do not confer privately enforceable rights unless treaty self-executing).

For a discussion of the issues raised by the erection of an international human rights standard, see HUMAN RIGHTS, AN INTERNATIONAL AND COMPARATIVE LAW BIBLIOGRAPHY (J. Friedman & M. Sherman eds. 1985); HUMAN RIGHTS IN INTERNATIONAL LAW (T. Meron ed. 1984); E. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1973); L. SOHN & T. BUERGENTHAL, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973); THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (L. Henkin ed. 1981); THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS (K. Vasak ed., P. Alston trans. ed. 1982); Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231 (1982); Henkin, *International Human Rights as "Rights,"* 1 CARDOZO L. REV. 446 (1979); Lillich & Paxman, *State Responsibility for Injuries to Aliens Caused by Terrorist Activity*, 26 AM. U.L. REV. 217 (1976-1977); Schwelb, *The International Court of Justice and the Human Rights Clause of the Charter*, 66 AM. J. INT'L L. 337 (1972); Watson, *Legal Theory, Efficacy and Validity of Human Rights Norms*, 1979 U. ILL. L.F. 609.

123. U.S. CONST. art. I, § 8, cls. 1, 12; art. I, § 9, cl. 7.

124. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*

attempted to revoke its long standing acceptance of jurisdiction by the International Court of Justice. Laudably, despite the opening provided by the United States' continued insistence that the International Court of Justice lacked jurisdiction, the court fulfilled its duty by accepting the case, investigating the facts, finding the law, and ruling on the merits.¹²⁵ By a lopsided majority, the court proclaimed that the United States' actions violated settled rules of international law, regarding the conduct of nations.¹²⁶

The President and his advisers first derided, then ignored, the Court's decision¹²⁷—a defiance that sets them against the supremacy clause, and weakens an already fragile, though decisively important, participant in the quest for peace and freedom in the international community. I would add that in grasping at the prerequisites of the imperial presidency, the incumbent has sought to curb dissent by imposing far reaching curbs on free access to governmental information, all in the name of national security, and supposedly insulated from meaningful judicial review.¹²⁸

(Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment on Merits of June 27, 1986), discussed in Highet, *Evidence, the Court and the Nicaragua Case*, 81 AM. J. INT'L L. 1 (1987); see also Maier, *Appraisal of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AM. J. INT'L L. 77 (1987) (comments by Briggs, Boyle, Christenson, D'Amato, Falk, Farer, Franck, Glennon, Gordon, Hargrove, Janis, Kirgis, Moore, Morrison, Reisman, Teson).

125. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at 17, 22-26 (Judgment on Merits of June 27, 1986). On November 26, 1984, the court found that it had jurisdiction and accepted the Nicaraguan application. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392 (Judgment of Jurisdiction and Admissibility of Application of November 26, 1984). In response, the Agent of the United States, on January 18, 1985, informed the court that the United States would no longer appear. *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1985 I.C.J. 3 (Memorial Order of Jan. 22, 1985). Although expressing its regret, the court did not refuse to further hear the case. The court recalled to the United States:

Having taken part in the proceedings to argue that the Court lacked jurisdiction, the United States thereby acknowledged that the Court had the power to make a finding on its own jurisdiction to rule upon the merits. In the normal course of events, for a party to appear before a court entails acceptance of the possibility of the court's finding against that party. Furthermore the Court is bound to emphasize that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its judgment. Nor does such validity depend upon the acceptance of that judgment by one party. The fact that a State purports to "reserve its rights" in respect of a future decision of the Court, after the Court has determined that it has jurisdiction, is clearly of no effect on the validity of that decision.

Nicaragua, 1986 I.C.J. at 23-24.

126. *Nicaragua*, 1986 I.C.J. at 146-50.

127. See Highet, *supra* note 124. See also Maier, *supra* note 124.

128. See, e.g., *Federal Polygraph Limitation and Anti-Censorship Act, 1984: Hearings on H.R. 4681 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the*

D. *Implications for Today*

More years ago than I care to remember, I studied with the French conservative political theorist Bertrand de Jouvenel. I was eager to judge political decisions of the past and present as right or wrong by my perhaps dim, but always unwavering, lights. Professor de Jouvenel reminded me that the most enduring lesson of great controversies, such as Truman's steel seizure and the commitment of troops to the Korean conflict, was that in our passion to see a decision made in a particular way, we too quickly forgot our most cherished convictions as to who was competent to make that decision.

Now, as then, that is the first lesson. Agreement or disagreement with the policies of a particular President cannot blind us to the duties of the legislative and the judicial branches to play their important parts. It is no answer to say, "The President is elected to make these decisions." The members of Congress are elected for this purpose as well. And, as the very structure of the Constitution makes clear, the non-elected judges are put in place precisely to enforce constitutionally based principles of supremacy of law, even when those principles are rooted in countermajoritarian values.

A corollary principle is that the political question doctrine, invoked at times by the courts as a barrier to deciding the legality of foreign and military affairs decisions that touch on private rights, is unprincipled and illegitimate. I argued this in 1970 and am more than ever convinced of this fact by the laudatory terms in which the doctrine is described by its adherents. They like it precisely because of its "flexibility," although they concede that its "contours are murky and uncertain."¹²⁹ For me, this flexibility and uncertainty translates in practice into an unfettered judicial discretion to duck the duties and surrender the powers that article III clearly confers.

The second lesson is this: In the criminal law of Texas, if you have suffered an indignity or endured a threat, you can go home, stew about it for a while, return to the scene hours, or days, or weeks later, blow away your antagonist, and still have a good defense to a murder charge.¹³⁰ In the 19th-century, it was sort of like that for big powers.

Judiciary, H.R. REP. NO. 123, 98th Cong., 2d Sess. 16 (1984) (statement of Michael E. Tigar, Raybourne Thompson Centennial Prof. of Law, Univ. of Texas, Austin).

129. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 803 (D.C. Cir. 1984) (Bork, J., concurring).

130. While Texas adheres to the requirement that only "the immediate influence of sudden passion" will reduce a homicide offense from murder to manslaughter, TEX. PENAL CODE ANN. § 19.04(a) (Vernon 1974), that is not the end of the story. The accused will generally be entitled to an instruction that he had the right to carry arms "to the scene of the difficulty and seek an explanation." See *Ruiz v. State*, 747 S.W.2d 535, 538 (Tex. Ct. App. 1988); *Mathews v.*

If William Randolph Hearst and Teddy Roosevelt thought we should go down into some small Latin American or Caribbean country, avenge some insult, grab some territory, and further our theory of government, well, that was the way it was. But in today's world, we are all—to my regret, at times—living a little closer together and the armament is a little more powerful.¹³¹

In the wake of World War II, the dozens of newly independent nation-states asserted their rights to develop along their own lines, perhaps in ways that we have disapproved. They are reshaping not only domestic politics, but also the landscape of international law. The principles of international law are coming to dictate what common sense should have told us: The new age requires more, and not less, restraint in foreign and military policy. It requires more, and not less, attention to the principles of domestic and international law, which the Constitution makes the supreme law of the land. That is why we must pay renewed attention to the law and its enforcement. That is why the Reagan administration has failed America.

III. EUGENE V. ROSTOW

Let me start this talk by recalling what I regard as the most important and most profound sentence John Marshall ever wrote: "Let us never forget that it is a Constitution we are expounding."¹³² By that I think Marshall meant at least three things. First, the Con-

State, 708 S.W.2d 835, 837-38 (Tex. Crim. App. 1986); *Banks v. State*, 656 S.W.2d 446, 447 (Tex. Crim. App. 1983). Under the former Texas law, the grade of a homicide offense was reduced if the victim had insulted the accused's female relative. See *Pitts v. State*, 29 Tex. App. 374, 16 S.W. 189 (Tex. Ct. App. 1891); *Norman v. State*, 26 Tex. App. 221, 9 S.W. 606 (Tex. Ct. App. 1888); *Willis v. State*, 74 Tex. Crim. 16, 166 S.W. 1172 (Tex. Crim. App. 1914); *Thompson v. State*, 72 Tex. Crim. 659, 163 S.W. 973 (Tex. Crim. App. 1914); *Wright v. State*, 36 Tex. Crim. 427, 37 S.W. 732 (Tex. Crim. App. 1896); *Jones v. State*, 33 Tex. Crim. 492, 26 S.W. 1082 (Tex. Crim. App. 1894). If the insult was not made to the victim's face, but was reported to the defendant by another person, it would be enough to trigger this provision if the victim killed the victim when next they met. See *Mathews v. State*, 708 S.W.2d 835 (Tex. Crim. App. 1986); *Dyson v. State*, 672 S.W.2d 484 (Tex. Crim. App. 1984); *Banks v. State*, 656 S.W.2d 446 (Tex. Crim. App. 1983); *Tave v. State*, 620 S.W.2d 604 (Tex. Crim. App. 1981).

131. At the Symposium, where these thoughts were first expressed, Professor Rostow remarked to me during a break that "You do not understand anything about self-defense." I have read the recent literature expounding a right of self-defense that includes anticipatory invasion of the territorial integrity and sovereignty of other states. Nothing in the jurisprudence of any international tribunal, and nothing in the history of either the Security Council or the General Assembly, justifies such views. The only conceivable justification is an expansive conception of United States' security interests that is at war with the collective security obligations of the United Nations Charter, and cynical in light of our rejection of ICJ jurisdiction in *Nicaragua v. United States*. The United States cannot unilaterally define its rights by expanding its claims to dominance: A buffalo does not become a giraffe simply by sticking its neck out.

132. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

stitution is not a prolix code. Rather, it is a short, clear, general outline of the structure and principle of government, an outline every citizen can understand. He thought this dimension of the Constitution was an infinitely valuable resource for a society of free men and women, and a most appropriate starting place for the evolution of a body of law. Second, the Constitution leaves ample room for growth and adaptation as its general principles are applied to the necessities of governance in a constantly changing world. The third implication of Marshall's sentence is that the Constitution requires continuity—in values and broad policy, not in detail—as well as flexibility and adaptation to change. Marshall's jurisprudence is far too sophisticated to exaggerate the role of original intent among the forces which govern the growth of the law.

Article II is an excellent vehicle for examining the implications of Marshall's thesis. As Secretary Weinberger¹³³ and Mr. Cooper¹³⁴ pointed out, the Presidency is one of the principal creations of the Founding Fathers—a carefully considered response to the inadequacies of the government of the United States under the Continental Congress and the Articles of Confederation. A strong, unified, and independent Executive was a felt necessity at the time of the Convention. Hamilton said:

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic executive, it will only remain to inquire, what are the ingredients which constitute this energy? . . . The ingredients which constitute energy in the executive are unity; duration; an adequate provision for its support; and competent powers. . . . That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."¹³⁵

133. Due to prior publication commitments, Secretary Weinberger's remarks could not be included in this symposium.

134. See *supra* text accompanying notes 31-41.

135. THE FEDERALIST NO. 70, at 423-24 (A. Hamilton) (G. Carey & W. Kendall ed. 1966). Hamilton was even more emphatic on the Executive's capability of acting with energy, secrecy, and dispatch when he argued why the Executive, instead of the Congress, should be entrusted with the primary role in negotiating treaties and conducting foreign relations. Hamilton wrote:

Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and dispatch, are incompatible with the genius of a body so variable and so numerous.

THE FEDERALIST NO. 75, at 452 (A. Hamilton) (G. Carey & W. Kendall ed. 1966) (emphasis original). See also THE FEDERALIST NO. 64, at 392 (J. Jay) (G. Carey & W. Kendall ed. 1966)

The President was not to be elected by Congress; rather, he was to be elected by the people, through the electoral college.¹³⁶ Furthermore, in many of the most important aspects of his duty, he was not and is not responsible to Congress but, as Marshall said, is "accountable only to his country in his political character, and to his own conscience."¹³⁷

Marshall's observation is under severe attack today as Congress continues its relentless post-Vietnam drive for supremacy. I submit, however, that the President's prerogative powers will survive, and indeed prevail, if Presidents fight for them, because they correspond to the nature of things and the necessities of government in the United States. That phrase, "the nature of things," has a long history, and was a great favorite in the rational atmosphere of the eighteenth century. In the famous first paragraph of *The Spirit of the Laws*, Montesquieu said, "Laws, in their most general signification, are the necessary relations arising from the nature of things. The principle applies to the societies of man as it does to the physical universe."¹³⁸

What is the executive power vested in the President by article II? Mr. Cooper read you some passages from Locke.¹³⁹ There are other sources, however, that can be brought forward. Hamilton said that the executive power is all governmental power that is not judicial or legislative in character.¹⁴⁰ This definition is an odd but decidedly useful way to examine the problem, even though it is not fully adequate. In many instances, for example, the President may act, and in some instances he must act, even though Congress may also act but has not yet done so.

The case to which Mr. Cooper referred,¹⁴¹ that of Washington's neutrality proclamation of 1793, illustrates the interdependence of the executive and the legislative power. Washington issued the proclamation, although later Congress had to pass a neutrality act to implement and give the proclamation effect.¹⁴² By the way, some parts of

("It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite.") (emphasis original).

136. U.S. CONST. art. II, § 1, cls. 2-5.

137. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, at 166.

138. C. MONTESQUIEU, *supra* note 15, at 1.

139. See *supra* notes 6-13 and accompanying text.

140. *Pacificus No. I*, Gazette of the United States (Philadelphia) June 29, 1793, *reprinted in* 15 H. SYRETT, *supra* note 46, at 37-43.

141. See *supra* notes 42-67 and accompanying text.

142. Proclamation of Neutrality, No. 65, *ASP, Foreign Relations I*, 140, 3d Cong., 1st Sess. (1793), *reprinted in* 32 J. FITZPATRICK, *supra* note 45, at 430-31. Congress subsequently passed legislation making it unlawful to: (1) Serve or agree to serve a foreign state; (2) leave the United States for the purpose of enlisting in the service of a foreign state; (3) fit out a ship of war, or augment its force; (4) commit or aid in the commission of hostilities upon citizens of

that act are still on the books.¹⁴³

Sometimes, however, even when Congress has acted, a change in circumstance may justify a President's acting independently. Yesterday, a particular episode was discussed. I do not know whether the facts as presented are correct, but let us assume that they are. It was said that President Franklin Roosevelt informed the British of the location of the Bismarck during the Second World War, at a time when the United States was still neutral. The question presented to the speaker was whether the action by President Roosevelt was legal. The answer was that Roosevelt's conduct was illegal.

I believe that in an episode of this kind, the legal problem is far more complex than yesterday's brief discussion indicated. John Locke said that under exceptional circumstances the Executive could indeed ignore a statute in the exercise of his inherent powers.¹⁴⁴ The Supreme Court also addressed the issue in the important case of *Mississippi v. Johnson*.¹⁴⁵ I think it is a great mistake, and also a common one, to assume that Lincoln violated the Constitution in order to save the union. In my view, the emergency prerogative powers Lincoln exercised should be considered constitutional because they were necessary, in his judgment, under the circumstances. That is the profound teaching of Madison's Federalist Number 41.¹⁴⁶

foreign states; and (5) set on foot an expedition against a foreign state. The President was authorized to use military forces to enforce the law. Act of June 5, 1794, ch. 50, 1 Stat. 381 (1794), *repealed by* Act of April 20, 1818, ch. 88, 3 Stat. 450 (1818). Additionally, the Congress had previously authorized the President to lay embargoes on all ships and vessels in United States' ports, as he thought necessary. Act of June 4, 1794, ch. 41, 1 Stat. 372 (1794).

143. The current neutrality provisions are codified at 18 U.S.C. §§ 951-970 (1982 & Supp. IV 1986) (criminal penalties), and 22 U.S.C. §§ 401-465 (1982 & Supp. IV 1986) (war materials prohibitions (§§ 401-422), neutrality (§§ 441-457), and prevention of neutrality violations (§§ 461-465)). The carryover provisions are found at 18 U.S.C. §§ 958-968 (1982 & Supp. IV 1986).

144. 2 J. LOCKE, *supra* note 6, at 392-93.

145. *Mississippi v. Johnson*, 71 U.S. 475, 499 (1886) (President may not be restrained by injunction from executing act of Congress alleged to be unconstitutional; general principles "forbid judicial interference with the exercise of Executive discretion.").

146. THE FEDERALIST NO. 41, at 255-64 (J. Madison) (G. Carey & W. Kendall ed. 1966). Madison addressed the powers conferred on the federal government, arguing that the powers granted "were necessary means of attaining a necessary end." *Id.* at 255. Madison paid particular attention to the security powers conferred, noting that "security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union." *Id.* at 256. Disunion was an evil that would overshadow any potential for abuse of the powers conferred. Madison argued:

This picture of disunion cannot be too highly colored, or too often exhibited. Every man who loves peace, every man who loves his country, every man who loves liberty ought to have it ever before his eyes that he may cherish in his heart a due attachment to the Union of America and be able to set a due value on the means of preserving it.

I should like to begin, however, with the self-evident proposition that under international law, the United States has all the powers of sovereignty that other states possess, including the sovereign power to disobey and violate international law and suffer the international consequences.¹⁴⁷ The Constitution divides those powers between the President and Congress on the principle of functional necessity. All the executive power of the United States, subject to some exceptions, is vested in the President, and all the national legislative power of the United States belongs to Congress, subject also to some exceptions.

As Madison said, the principle of separation of powers does not really call for separation, but for intermingling and interdependence.¹⁴⁸ The executive power, according to Montesquieu, has two great categories—the executive power in respect to things dependent on the law of nations, and the executive power in regard to matters that depend on the civil law.¹⁴⁹ The essential fact about this division is that it cannot survive, as Professor Corwin wrote, unless each department can defend its characteristic functions against intrusion by either of the others.¹⁵⁰ This is our principal constitutional problem today, because as Madison warned, the framers were so preoccupied with the risks of executive tyranny that they seemed “never to have recollected the danger from legislative usurpations.”¹⁵¹

In characterizing the Presidency, I stand largely with Professor Corwin's conclusion. After reviewing the early history and the writings of the teachers of the framers, Corwin stated:

[T]he fact is that what the framers had in mind was not the cabinet system as yet nonexistent even in Great Britain, but the ‘balanced

Id. at 259.

Because unity was the essential goal of the Constitution, Lincoln's exercise of emergency prerogative powers was not merely necessary, but rather, it was a necessity.

147. See, e.g., *Perez v. Brownell*, 356 U.S. 44, 59 (1958) (Congress had authority to withdraw citizenship of United States citizens voting in foreign elections because the citizen's action might be construed to be a “reflection if not an expression” of United States policy, creating responsibility on the part of the United States.); *In re Neagle*, 135 U.S. 1, 64 (1890) (analogizing right of United States to appoint federal marshalls to protect Supreme Court justices to right of United States to threaten military action, without express congressional or treaty provision, to protect life and liberty of United States resident alien wrongfully detained abroad); *Ex parte Yarbrough*, 110 U.S. 651, 666 (1884) (The United States is “clothed with the principal attributes of political sovereignty.”) (quoting 1 J. KENT, COMMENTARIES ON AMERICAN LAW 201 (O.W. Holmes 12th ed. 1873)); *Diggs v. Shultz*, 470 F.2d 461, 465 (D.C. Cir.) (“Congress may nullify, in whole or in part, a treaty commitment.”), *cert. denied*, 411 U.S. 931 (1972); see also Rostow, “Once More Unto the Breach”: *The War Powers Resolution Revisited*, 21 VALPARAISO U.L. REV. 1, 12-15 (1986).

148. THE FEDERALIST NO. 48, at 308-13 (J. Madison) (G. Carey & W. Kendall ed. 1966).

149. C. MONTESQUIEU, *supra* note 15, at 151.

150. E. CORWIN, *supra* note 16, at 9.

151. THE FEDERALIST NO. 48, at 310 (J. Madison) (G. Carey & W. Kendall ed. 1966).

constitution' of Locke, Montesquieu, and Blackstone, which carried with it the idea of a divided initiative in the matter of legislation and a broad range of autonomous executive power or 'prerogative.' Sir Henry Maine's dictum that 'the American Constitution is the British Constitution with the monarchy left out' is, from the point of view of 1789 almost the exact reverse of the truth, for the presidency was designed in great measure to reproduce the monarchy of George III with the corruption left out, and also, of course, the hereditary feature.¹⁵²

Comparisons between the parliamentary system and the presidential system invariably fail for a variety of reasons. The President is not, and never can be, a Prime Minister. He is elected by a different constituency, serves for a fixed term, and, in many aspects of his duty, is not answerable to Congress. The fact that the Presidency was intended to be a strong independent office, and that he had a vaguely defined prerogative power carried over from the British Constitution, is undeniable. The exceptions to which I referred earlier in the allocation of legislative and executive authority, however, are genuinely important—that is, the participation of the Senate in the appointment of officers,¹⁵³ and the ratification, but not the negotiation of, treaties,¹⁵⁴ and the power of Congress to declare war.¹⁵⁵

The language of the two paragraphs of article I, section 8, dealing with the war powers is concerned with matters of international law: defining and punishing piracies and felonies committed on the high seas, and against the law of nations,¹⁵⁶ declaring war, granting letters of marque and reprisal, and making rules concerning captures on land and water.¹⁵⁷ These are all matters of international law, and the meaning of those words is their international law meaning. It should be remarked that the Founding Fathers were far more familiar with international law than most lawyers are today, because of the way the Founding Fathers were trained. I said recently that, with the possible exception of the provision of the Constitution requiring two Senators from each state, these two paragraphs are among the least ambiguous paragraphs in the Constitution.¹⁵⁸

The declaration of war provision does not mean what Professor Tigar said it means. It does not vest Congress with the supreme power over war, subject to a narrow exception for defense against sud-

152. E. CORWIN, *supra* note 16, at 14-15.

153. U.S. CONST. art. II, § 2.

154. *Id.*

155. U.S. CONST. art. I, § 8, cl. 11.

156. U.S. CONST. art. I, § 8, cl. 10.

157. U.S. CONST. art. I, § 8, cl. 11.

158. Rostow, *supra* note 147, at 6.

den attack. It vests in the President the power to decide when to use the national forces in all cases except those rare ones when general war is indicated—that is, general, rather than limited, war. In international law, the distinction between limited war and general war is the distinction that legitimizes the use of limited force during peace time in order to cure violent breaches of international law that violate the rights of states.

Mr. Cooper quoted remarks of Hamilton and Jefferson which treat the power of Congress to declare war as an exception to the general rule that instituting the use of the national forces is a matter for the President to determine.¹⁵⁹ Like all exceptions, it is to be strictly construed. Mr. Cooper, Hamilton, and Jefferson are surely right, although the rule is somewhat blurred because Presidents have prudently sought to obtain congressional support for their use of the national forces, particularly when the circumstances required an extended or a particularly bitter and divisive campaign.

Of course, there have been two schools of thought on this subject from the beginning, especially at the political level. This is certainly evident in the exchange between Hamilton and Madison to which Mr. Cooper referred,¹⁶⁰ and it has been true in the pattern of our history ever since.¹⁶¹ The pattern of constitutional practice, however, has been fairly clear cut in recognizing a distinct executive power to act in the field of foreign affairs. Those who cling to the notion of a congressional supremacy have attempted to ignore it for as long as they can. The history of the War Powers Resolution illustrates the paradox very well.

The draftsmen of the War Powers Resolution started out bravely with the premise of congressional supremacy.¹⁶² They felt that without the prior consent of Congress, the President could only use the national forces to repel sudden attacks.¹⁶³ After examining our constitutional history and the facts of life, however, they wound up with the present War Powers Resolution which recognizes that the President must have a great deal of discretion in using or threatening to use the national forces in many peacetime circumstances.¹⁶⁴ Of course, in

159. See *supra* notes 46-47, 49-58, 67 and accompanying text.

160. See *supra* notes 46-47, 49-58, 60-65 and accompanying text.

161. Compare Tigar, *supra* note 77 with Rostow, *supra* note 147, at 6. See Comment, *Congress, the President, and the Power to Commit Forces to Combat*, *supra* note 102.

162. H.R.J. Res. 542, 93d Cong., 1st Sess. (1973), 119 CONG. REC. 14,234 (1973).

163. See H.R. REP. NO. 287, 93d Cong., 1st Sess. 3-5, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2346, 2349; see also H.R. CONF. REP. NO. 547, 93d Cong., 1st Sess. 8, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2346, 2364 (Consultation provision indicating prior consultation will not always be possible.).

164. See 50 U.S.C. § 1542 (1982 & Supp. IV 1986) ("The President in every possible

the War Powers Resolution, Congress tried to limit the President's discretion to ninety days, in the name of the necessary and proper clause.¹⁶⁵ That, however, is constitutional nonsense.

The War Powers Resolution is profoundly unconstitutional, not simply because it violates *Immigration and Naturalization Service v. Chadha*,¹⁶⁶ but for much deeper separation of powers reasons as well. For example, many people say that the reporting requirement is an innocent sort of provision. After all, we want freedom of information, and we all have a right to know, don't we? Surely that is constitutional, isn't it? There are times, however, when the President should not report to Congress or, indeed, to anyone else. We heard Judge Webster talk about some of the provisions for congressional oversight of intelligence activities.¹⁶⁷ The President does not report to all the members of Congress in this context. Rather, he reports to a small number of members of Congress, the Gang of Eight as he said, or in some instances, an even smaller group, to satisfy the oversight requirement.¹⁶⁸

There are a lot of things that the President should not report. Perhaps the most important event in President Nixon's term of office was the nuclear warning that he gave to the Soviet Union. That warning was given in order to prevent a nuclear attack by the Soviet Union against China. In the "nature of things," such supremely important actions can be effective only if they are secret. Similarly, President Johnson gave nuclear hints to the Soviet Union to keep them out of the 1967 Middle East conflict, and, of course, Truman did the same thing in Korea. Everybody who participated in the drafting of the War Powers Resolution, and all those persons testifying, agreed that the use of nuclear weapons had to be left to the sole control of the President.¹⁶⁹ This seems to me to give away the entire issue, and to

instance shall consult with Congress before introducing United States Armed Forces into hostilities . . .").

165. War Powers Resolution, Pub. L. No. 93-148, § 2b, 87 Stat. 555, 555 (1973) (codified as amended at 50 U.S.C. § 1541(b) (1982 & Supp. IV 1986)) (purpose and policy). This section combines two Senate amendments to H.R.J. Res. 542 which sought to define the President's powers to commit armed forces to combat. See H.R. CONF. REP. NO. 547, 93d Cong., 1st Sess. 7, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2346, 2363-64.

166. 462 U.S. 919 (1983) (holding one House of Congress legislative veto provision, § 244(c)(2) of Immigration and Naturalization Act, 8 U.S.C. § 1254(c)(2), unconstitutional as violative of the bicameralism requirement, U.S. CONST., art. I, §§ 1, 7, and the presentment clauses, U.S. CONST., art. I, § 7, cls. 2, 3).

167. See Webster, *The Role of Intelligence in a Free Society*, 43 U. MIAMI L. REV. 155, 158-59 (1988).

168. *Id.* at 159.

169. See H.R. REP. NO. 287, 93d Cong., 1st Sess. 5-7, reprinted in 1973 U.S. CODE CONG. & ADMIN. NEWS 2346, 2349-51 (statement of intent and effect and section 2 analysis).

confirm what I said about the nature of the problem of presidential versus congressional discretion. Only the President can possibly control the use of nuclear weapons. Everyone agrees, therefore, that the President has to be allowed to use them.

The essence of the presidential prerogative that we have been talking about as part of the executive power was defined best by the practices of President Lincoln. What I emphasize today is that there is a reservoir of national powers defined by international law, that Congress and the President possess because we are a nation. The President possesses some of those powers that are executive in character because he is the Chief Executive. The presidential powers mentioned in article II—the power to pardon,¹⁷⁰ to call out the militia,¹⁷¹ the veto power,¹⁷² and so on—are instances of the executive power, not the whole of it. I recall to you the powerful opinion on this subject by Justice Miller in *Ex parte Yarbrough*,¹⁷³ one of my favorite cases, but one of the most neglected major opinions in the reports. It is rarely found in a case book. We should not regard the examples of Franklin Roosevelt, Lincoln, and Truman, in using the national force without prior congressional approval, as violations of law. They were helping to define the law because law is much more than a chronicle of what the courts say, or even what the courts decide.

I would submit that *Korematsu*¹⁷⁴ has already been overruled in fact, although the Supreme Court has never explicitly overruled it.

170. U.S. CONST. art. II, § 2.

171. *Id.*

172. U.S. CONST. art. I, § 7, cl. 2.

173. 110 U.S. 651 (1884) (denying the habeas corpus petition of eight individuals convicted of conspiracy to prevent black citizen from exercising right to vote for member of Congress). Mr. Justice Miller responded to the argument that, because there was no express constitutional grant of power to Congress to enforce the right to vote, the law under which the petitioner was convicted was null and void, as follows:

The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language [as the oft repeated textual basis argument]. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the Constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the Constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the Constitution.

Id. at 658.

174. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding order excluding Japanese-American citizens from coastal areas).

The case has been overruled in fact because of the criticism it has received, and I am very grateful to Judge Winter for recalling an article I regard as the best article I ever wrote.¹⁷⁵ Although the Supreme Court has not overruled the case, I do not think any practicing lawyer today would cite the decision in a brief. I think Chief Justice Marshall in *McCulloch*¹⁷⁶ meant that the law is not so much what has been said, but rather a pattern of behavior that society deems right. His remark in *McCulloch v. Maryland*¹⁷⁷ means that there are great abiding purposes and values in the Constitution that do survive and guide us. They are simple maxims about being a government of laws and not of men, about the separation of powers, and so on.

Of course there are limits to the power of the executive branch. I fully agree with Professor Tigar that the courts can, do, and should take cases that deal with defining these limits. *Reid v. Covert*¹⁷⁸ is an example of one kind of limit on executive power. *Korematsu*,¹⁷⁹ of course, is another.

We spend too much time trying to determine exactly how the Founding Fathers would have dealt with the Vietnam War or the nuclear weapon. It is an impossible exercise, and it diverts us from more germane analyses. As Mr. Cooper pointed out, Madison and Hamilton, who knew a great deal more about original intent than we are ever going to know, differed about the extent of the war power within a few years of the Convention.¹⁸⁰

The great overriding policy goals of the Constitution abide, but constitutional law, like any other law, is a living entity. Perhaps in this context it is appropriate to reflect on the wisdom of Holmes' famous comment: "[T]he life of the law has not been logic: it has been experience."¹⁸¹

IV. ORRIN HATCH

John Jay explained in *The Federalist Papers* why the President

175. Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

176. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

177. See *supra* note 132 and accompanying text.

178. 354 U.S. 1 (1957) (Congress could not confer authority on military courts to try United States military dependent civilians abroad, and protections of Bill of Rights apply to actions by the government against citizens abroad.).

179. *Korematsu v. United States*, 323 U.S. 214 (1944); see also *Bowles v. Willingham*, 321 U.S. 503, 521 (1944) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.") (citing *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934)).

180. See *supra* notes 46-67 and accompanying text.

181. O.W. HOLMES, *THE COMMON LAW* 1 (1881).

was selected to propose, initiate, and generally take the lead in foreign policy:

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there are doubtless many of both descriptions who would rely on the secrecy of the President, but who would not confide in the Senate, and still less in that of a large popular assembly.¹⁸²

I might underscore the above words of John Jay by saying I am one of those who would rely on the ability of the President to maintain secrecy, while placing little faith in the ability of the Congress to do so.

The language of the Constitution, rather than the President's ability to maintain secrecy, assigns the President the preeminent role in foreign affairs. The Constitution permits the President, via the appointment power, to place delegates—his ambassadors—in every land.¹⁸³ Thus, he is assured access to worldwide intelligence. Further, the President and his agents do not take occasional recesses; rather, they are perpetually on duty, ready for action. Moreover, the Constitution assigns the President the role of negotiating treaties,¹⁸⁴ receiving foreign delegations,¹⁸⁵ and generally proposing the shape of our foreign policy. Thus, the President can better articulate a clear and consistent policy. In short, the President is quite clearly assigned the position of leadership in United States foreign affairs.

This is not to say that Congress does not have a role in the foreign policy process. Congress cooperates in this process by reviewing, accepting, or rejecting those policies proposed by the President. The Congress accomplishes this by what I call its "checking function," which is evident in the Senate's role in advising and consenting on executive branch nominations¹⁸⁶ and treaties,¹⁸⁷ and in the Congress' power of the purse.¹⁸⁸ The power to check, however, is not the power to control. The checking function must never be allowed to

182. THE FEDERALIST NO. 64, at 392 (J. Jay) (G. Carey & W. Kendall ed. 1966) (emphasis in original).

183. U.S. CONST. art. II, § 2.

184. *Id.*

185. U.S. CONST. art II, § 3.

186. U.S. CONST. art. II, § 2.

187. *Id.*

188. U.S. CONST. art. I, § 9, cl. 7.

swallow the general foreign policy power of the President. We must not forget that the President is, to quote then Congressman John Marshall, "the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹⁸⁹

The Constitution contains no clear-cut principle that defines how these general grants of authority should interface. Similarly, because of political questions, standing, and other justiciability doctrines, sweeping cases concerning separation of powers, such as *United States v. Nixon*,¹⁹⁰ *Youngstown Sheet and Tube Co. v. Sawyer*,¹⁹¹ and *United States v. Curtiss-Wright Export Corp.*,¹⁹² have only rarely reached the courts. Thus, the Supreme Court has not articulated any explicit principle that reconciles the Congress' power with the President's own foreign policy prerogatives.

The closest attempt to articulate such a principle is Justice Jackson's observation in *Youngstown Sheet and Tube Co.* He said:

1. When the President acts pursuant to an expressed 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

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter¹⁹³

This does little more than state the obvious fact that many constitutional questions involving the respective powers of the legislative and executive branches are resolved by a pattern of construction and practice between these two political branches. Thus, it is likely to be left up to the Congress and the President, rather than relying upon the Court, to resolve and reconcile their respective foreign policy responsibilities.

189. 10 ANNALS OF CONGRESS 613 (J. Gales ed. 1800).

190. 418 U.S. 683 (1974) (holding that neither the doctrine of separation of powers, nor the generalized need for confidentiality of high-level communications, without more, can sustain an absolute unqualified presidential privilege of immunity from judicial process under all circumstances).

191. 343 U.S. 579 (1952).

192. 299 U.S. 304 (1936).

193. *Youngstown*, 343 U.S. at 635-38.

Although the Court is not likely to set explicit limits, there clearly are limits on Congress' ability to force compliance with its policies. The appropriation power provides a good example of this interplay. How do we reconcile the appropriations clause with the President's foreign policy power? The President is given the power to lead in foreign policy; the Congress has the power of the purse. Does this suggest that the Congress can control foreign policy by refusing to appropriate funds? I think it is clear that constitutional foreign policy functions may not be eliminated by a congressional refusal to appropriate funds. The Congress may not, for example, deny the President funding to receive ambassadors, negotiate treaties, or deliver foreign policy addresses. This point is implicit in the reasoning of *United States v. Curtiss-Wright Export Corp.*,¹⁹⁴ where the Court held that the President had broad discretion to carry out a congressional law that gave him authority to embargo arms.¹⁹⁵ How can the President exercise this discretion without the funding to either obtain information or act upon his determinations?

By the same token, it is clear that the President's foreign policy authority does not compel the Congress to appropriate funds exactly as the President desires. Congress is given discretion to appropriate funds as it sees fit, and the President participates in that process by wielding his veto power. In sum, the Constitution does not explicitly

194. 299 U.S. 304 (1936).

195. *Id.* (It is not an unconstitutional delegation of legislative powers for Congress to authorize President to determine whether (1) embargo should go into effect, (2) when it may be terminated, and (3) the enforcement limits and exceptions.). Mr. Justice Sutherland reasoned that the delegation here was permissible because:

[w]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.

Id. at 320.

articulate a principle governing the degree to which Congress can condition foreign policy appropriations.

Other examples of this interplay are found in the processes of treaty and government recognition. Although the President makes treaties with the advice and consent of the Senate, he alone negotiates them. Thus, the Senate can debate and express its approval or disapproval of an agreement the President has negotiated, but it cannot enter the field of negotiations itself. And although the President has the power to grant or deny recognition to other governments, the Congress can indicate its support or disapproval of this recognition by various means.

In my opinion, Congress oversteps its role when it undertakes to dictate the specific terms of international relations. This is a power granted specifically to the executive branch, which is equipped to acquire the information necessary for foreign policy creation. Thus, when the Congress enters into the process of creating new policies by, for example, permitting certain forms of humanitarian aid, but not others, it is venturing beyond its own constitutional mission and, in fact, attempting to formulate foreign policy.

What are some of the historical rebuttals to executive power? First, some might assert that history tends to give wide breadth to Congress' spending power in relation to the President's foreign policy role. Prior to 1787, the English Parliament used the spending power to wrench control from the King.¹⁹⁶ Moreover, colonial legislatures established similar superiority concerning funding questions over the colonial governors.¹⁹⁷ Some have argued that these precedents mean Congress may use the spending clause as a check on the fear that the President might tend to acquire kingly preeminence.¹⁹⁸

I think the response to this line of reasoning is direct. The 1787 Convention did not adopt a parliamentary system with unquestioned legislative dominance. Rather, it adopted a government consisting of three coequal branches, under which the Executive received, for the reasons mentioned before, the preeminent authority over foreign policy. Unlike parliamentary systems, the legislature in our system does not have automatic dominance over the other departments of the government. To the degree that it attempts to assert such dominance,

196. See, e.g., C. STEVENS, *SOURCES OF THE CONSTITUTION OF THE UNITED STATES* 86-116 (1894); see also *THE FEDERALIST* No. 58, at 359 (J. Madison) (G. Carey & W. Kendall ed. 1966).

197. See, e.g., O. DICKERSON, *AMERICAN COLONIAL GOVERNMENT 1696-1765*, at 158-79 (1912); A. KELLY & W. HARBISON, H. BELZ, *THE AMERICAN CONSTITUTION ITS ORIGINS AND DEVELOPMENT* 33-34 (1948).

198. See H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 411-12 (1987).

Congress misreads the balance of powers envisioned by the Constitution.

Second, many senators argue that the conduct of foreign policy is essentially a concurrent power. Congress has certain foreign policy duties, such as the earmarking of taxpayer dollars.¹⁹⁹ The President has certain other duties, such as the negotiation of treaties.²⁰⁰ Thus, the argument goes: Foreign affairs is a shared power, and the President cannot flaunt or ignore the role of Congress by disregarding directions contained, or implicit, in appropriations bills.

A reasonable response to that argument might be: Yes, the Constitution does envision some overlap of authority with respect to foreign affairs. This is healthy because it operates as a check and balance. Furthermore, the requirement of some concurrence between Congress and the executive branch ensures that a national consensus is formed if the nation is committed to new foreign policy directions. When Congress presumes to wrench from the President his role as chief articulator and sole organ of foreign policy leadership by dictating conditions and appropriations bills, however, it steps away from its role as a check on how tax dollars are, or should be, spent and steps into the role of usurper. In other words, Congress ignores its role as a check on the President and assumes a leadership role akin to negotiating a treaty—an activity clearly forbidden to Congress—when it dictates specific conditions for relations between foreign entities. Thus, although the Boland amendment²⁰¹ may not violate the legal limits of the Constitution, because the Constitution appears to set no defined limits, it is clear that the amendment does violate the spirit and general principles of the document.

Moreover, the Boland amendment is an example of congressional ineptitude, which demonstrates why the framers committed foreign policy preeminence to the Executive. This fact becomes even more clear when we trace the course of the amendment. First, is it really the Boland amendment, or is it the Boland amendments, or would you really let them rise to the dignity of amendments? For example, in year one aid is allowed as long as it is not used by the CIA to

199. U.S. CONST. art. I, § 9, cl. 7.

200. U.S. CONST. art. II, §§ 2, 3.

201. *See, e.g.*, Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982). A compilation of the Boland type amendments, and the accompanying legislative history, was done in the beginning of June, 1987 by the Congressional Research Service, at the request of Rep. Alexander. *See* 133 CONG. REC. H4584-4987 (daily ed. June 15, 1987); *see also* H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. 395-410, 489-99 (1987) (Chapter 26 of the majority report ("The Boland Amendments and the NSC Staff.") and Chapter 6 of the minority report ("The Boland Amendments.")).

overthrow the Sandinistas.²⁰² The next year, aid is permitted as long as the Department of Defense and the CIA do not engage in a list of specific activities.²⁰³ In year three, aid is allowed with few restrictions at all.²⁰⁴ The following year, aid, either direct or indirect, is forbidden.²⁰⁵ The next year aid is permitted again, but only if it is humanitarian.²⁰⁶ Finally, aid is resumed without conditions.²⁰⁷ Now this kind of consistency and clarity in foreign policy could only come from Congress. If all of our foreign affairs were conducted in this manner, we would probably provoke World War III in a short period of time, with the entire world fighting us.

In conclusion, the absence of a clear legal demarcation between congressional and executive authority in foreign affairs indicates that this constitutional issue will be decided by a lengthy pattern of practice between the branches. Our attempt to find a general principle that ought to govern, however, suggests that the President ought to be left to propose and initiate, and the Congress ought to be employed as a check on faulty policies. This is what Congress does best. When Congress presumes to lead and set conditions, however, it ventures to undertake a mission that it is ill-equipped to handle. Just as we criticize judges for presuming to legislate—a function that I think we all would agree they are generally ill-equipped to undertake—so should

202. Further Continuing Appropriations Act, 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865 (1982).

203. Continuing Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-107, § 101(c), 97 Stat. 735, 736; Department of Defense Appropriations Act for Fiscal Year 1984, Pub. L. No. 98-212, § 775, 97 Stat. 1421, 1452; Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475.

204. Continuing Appropriations for Fiscal Year 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935-37.

205. International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 722(d), 99 Stat. 190, 254; International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 722(e), 99 Stat. 190, 254; Supplemental Appropriations for the Fiscal Year Ending September 30, 1985, Pub. L. No. 99-88, § 102(b), 99 Stat. 293, 324-25.

206. Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, § 105, 99 Stat. 1002, 1003; Further Continuing Appropriations, 1985, Pub. L. No. 99-190, § 8050, 99 Stat. 1185, 1211; *see also* Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 1451, 99 Stat. 583, 760 (Sense of Congress that United States armed forces should not be introduced into or over Nicaragua.).

207. Continuing Appropriations for Fiscal Year 1987, Pub. L. No. 99-500, §§ 201-16, 99 Stat. 1783, 2078-81.

Since the delivery of these remarks, this back and forth pattern has continued. *See* Intelligence Authorization Act for Fiscal Year 1988, Pub. L. No. 100-178, § 104, 101 Stat. 1009, 1011 (terms and conditions for aid to Nicaraguan resistance); Department of Defense Authorization Act, Fiscal Year 1988 and 1989, Pub. L. No. 100-180, § 1405, 99 Stat. 1019, 1179 (Sense of Congress that United States Armed Forces should not be introduced into or over Nicaragua); Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, § 8144, 101 Stat. 1329, 1329-89 (prohibiting expenditure of funds by DOD or CIA to Nicaraguan resistance except in accordance with Pub. L. No. 100-178, § 104, 101 Stat. 1009, 1011).

we criticize the Congress when it attempts to formulate and execute foreign policy, a function it is not really equipped to formulate. The Boland amendments are classic examples of why the framers did not place foreign affairs into the hands of Congress.

Turning to the War Powers Resolution, similar constitutional and practical problems present themselves. The Constitution does not envision that we will stop and file a cloture petition in the Senate before returning fire, nor does it envision that we will stop and seek a time agreement for the Senate debate before protecting American lives and interests. Furthermore, the Constitution clearly does not envision that we consider a veto override before dodging a torpedo, or digging a fox hole. And these are only the practical problems. I agree with Gene Rostow that it is unconstitutional and something that Congress has politically foisted off on Presidents. Quite simply, the War Powers Resolution does not conform either to reality or to a plain reading of the Constitution. For constitutional and practical reasons, I simply do not think it can be upheld.

V. QUESTIONS AND ANSWERS

SPEAKER: Why did Judge Sofaer and the State Department, in trying to reinterpret correctly the ABM treaty,²⁰⁸ not really refer to what President Carter did with regard to the Taiwan Relations Act²⁰⁹ in 1979, where he decided that he did not want to abide by the treaty.

PROFESSOR ROSTOW: Since the time President Carter abrogated the security treaty with Taiwan,²¹⁰ I have objected to his action on constitutional grounds. I find it hard to imagine that a treaty ratified with the advice and consent of the Senate, part of the supreme law of the land, can be abrogated by a President on his own authority. For example, if a President should suddenly take us out of NATO, and when we woke up in the morning, we found three or four of our most fundamental security treaties abrogated without any congressional participation, I would feel that the President acted beyond his discretion. Some Presidents, nevertheless, have abrogated treaties

208. See remarks of Abraham D. Sofaer in Koh, Nowak, Rees & Sofaer, *The Treaty Power*, 43 U. MIAMI L. REV. 101, 101-06.

209. Pub. L. No. 96-8, 93 Stat. 14 (codified as amended at 22 U.S.C. §§ 3301-3316 (1982 & Supp. IV 1986)).

210. Mutual Defense Treaty Between the United States of America and the Republic of China, United States-Taiwan, December 2, 1954, 6 U.S.T. 433, T.I.A.S. No. 3178, 248 U.N.T.S. 213 (entered into force March 3, 1955), *terminated* January 1, 1980. Article X of the Treaty provided: "This Treaty shall remain in force indefinitely. Either party may terminate it one year after notice has been given to the other Party." Mutual Defense Treaty Between the United States of America and the Republic of China, December 2, 1954, United States-Taiwan, art. X, 6 U.S.T. 433, 437, T.I.A.S. No. 3178, at 5, 248 U.N.T.S. 213, at 216.

because they found that the other party already had abrogated and breached the treaty, and therefore, the treaty was in a condition of breach. This seems to be a permissible part of the President's power in conducting foreign relations. Also, treaties have been abrogated in order to recognize another country, which is what President Carter did in the Taiwan case, when he established diplomatic relations with the Peoples Republic of China. As an incident to that action, he also exercised the withdrawal clause of the security treaty with Taiwan. Constitutionally, that is a defensible position because the President has an absolute monopoly on the question of recognition.²¹¹

In 1933, when President Roosevelt established diplomatic relations with the Soviet Union, many agreements were made on the side. The Supreme Court said that those side agreements were, indeed, part of the supreme law of the land.²¹² It is important to note that some of those opinions have been criticized.

SENATOR HATCH: A perfect illustration is when a President operates on his own in foreign policy because he concludes that it is more advantageous to world politics and to our country to have relations with mainland China than it is to continue the treaty with Taiwan. I think, however, we could have maintained our relationship with Taiwan and still created good relations with mainland China.

With regard to the ABM treaty, I think Judge Sofaer makes an eloquent case that Sam Nunn is wrong. I also think President Reagan makes an eloquent case that Sam Nunn is wrong, because after watching the Russians violate the ABM treaty for years, I now argue for careful interpretations. It is incongruous that Senator Nunn puts us into a debatable posture when, literally, we are in the midst of negotiations with the Soviets, who themselves violate all canons of careful interpretation.

After we recognized mainland China, we experienced a decrease in good feelings between our country and China. It was only after Senator Henry Jackson went to China that the Chinese signaled they

211. *Goldwater v. Carter*, 481 F. Supp. 949 (D.D.C.) (The mutual defense treaty with Taiwan could not be terminated without advice and consent of Senate or approval of both Houses of Congress.), *rev'd*, 617 F.2d 697 (D.C. Cir.) (Because the President has full constitutional authority to recognize governments, the President did not exceed authority in terminating the mutual defense treaty in accordance with termination clause.), *vacated and remanded*, 444 U.S. 996 (1979) (mem.) (district court directed to dismiss).

212. *United States v. Belmont*, 301 U.S. 324 (1937). The Supreme Court held that the Executive had the authority to speak as the "sole organ of government" in negotiating an agreement settling claims and counterclaims between the United States and Soviet citizens and entities. *Id.* at 330. The Court further held that the agreement had the same effect as a treaty, although it did not require art. II, § 2 advice and consent, so that state policy could not prevail over the agreement. *Id.* at 330-32.

were ready to resume better relations with us. They met with Senator Jackson, Senator Zorinsky, and myself, as the Republican counterpart to Jackson, and treated us royally while we were in China. You are, however, looking at a Senator who amended Carter's Taiwan Relations Act against the President's will.²¹³ He fought the amendment to provide elements of protection for the Republic of China. This is another instance where Congress had to adapt itself politically to the President's will in foreign policy. We did not adapt completely, however, because we provided some continuing protection for our long-standing relationship with the Republic of China, which irritated the People's Republic. I think it also showed that we did not need the Taiwan Relations Act. What was needed was for the President to stand up and express a desire for good relations with mainland China, in harmony with our long-term relationship with Taiwan. I think the Chinese would have accepted that accommodation.

PROFESSOR TIGAR: It is hard to get over the fact that the Constitution divides the treaty-making process between the Senate and the President. What is being argued here is that the Senate agreed to the text of the treaty, and yet, apparently was not aware of the meaning that is now being ascribed to it.

Such an argument, which is legitimate, has to rest either on an interpretation of the text of the Constitution that I really do not see here, or Senator Hatch's view that somehow the President is more competent to do this. I would remind the Senator that while the Boland amendments were being debated and enacted, across town at 1600 Pennsylvania, the North-Pointexter show was being played out, which was hardly a model of consistency in the executive branch.

SENATOR HATCH: It was a lot more consistent than Congress, I will tell you that.

PROFESSOR ROSTOW: I did not answer your question about the application of the Taiwan example to the controversy over the ABM Treaty. It cannot be advanced seriously that the interpretation of a treaty, which is an international instrument of contract between

213. See Amend. No. 98 and U.P. Amend. No. 44 to S. 245. 96th Cong., 1st Sess., 125 CONG. REC. 4611-16, 4836-37 (1979). Amend. No. 98 was withdrawn, 125 CONG. REC. 4616, but U.P. Amend. No. 44 was approved. 125 CONG. REC. 4836. Senator Hatch's amendments (1) permitted Taiwan to retain all of its consular offices in the United States, instead of requiring a substantial reduction, and (2) stated that embargo threats against Taiwan would be considered of grave threat to the security of the United States. Both were approved on voice votes. Ultimately, H.R. 2479 was passed in lieu of S. 245. See 1979 U.S. CODE CONG. & ADMIN. NEWS 36. The House bill, however, incorporated most of the Senate provisions. H.R. CONF. REP. NO. 96-71, 96th Cong., 1st Sess., reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 36, 95-104. U.P. Amend. No. 44's provisions are codified at 22 U.S.C. § 3309(b)(c) (1982 & Supp. IV 1986).

countries, is decisively determined by what was said, or not said, in the murky debates on obscure side issues in 1972 on the ratification of the ABM Treaty.

I think Judge Sofaer is entirely correct on this aspect of the controversy. The interpretation of treaties is the subject of vast volumes, and it is like the interpretation of other contracts—a matter of what the parties have decided. If the ratification process is perfunctory, it is still, nonetheless, a treaty, and the treaty has to be interpreted in accordance with the normal rules. These rules are that the later interpretation of the treaties should govern over the former. The President, in the first instance, is surely the person to interpret the treaty, just as he must interpret any other law when he enforces it. Congress can always overrule that construction by passing a statute inconsistent with the President's interpretation. According to our law, the later statement of the legislative intent prevails.

In the controversy about the ABM Treaty, there really is no doubt about the facts. In the negotiations, the Russians would not agree that the treaty should cover future technologies. They said: "You do not know what the new technologies are going to do, and we do not know what they are going to do. So let us agree to leave them out." That is what they thought they were doing in Agreed Statement D.²¹⁴ The other interpretation, the so-called "narrow" interpretation, is a perfectly plausible legal theory, except that it does not correspond to the facts of the negotiations, and it does not explain why Agreed Statement D is there at all.

SPEAKER: In light of the President's responsibility to faithfully execute the laws, what is the proper and responsible way for the President to initiate a challenge to the War Powers Resolution, or any act that he feels is unconstitutional?

MR. COOPER: Well, the restrictions on justiciability make that a very difficult question to answer. The President cannot file a lawsuit against Congress to determine his rights under the War Powers Resolution. Obviously, on the other hand, he cannot fail to perform his constitutional obligations to the American people as the Chief Executive, the Commander-in-Chief, and the chief organ of our relations with foreign countries. It is really a very difficult position for any President. Any time there is a statute on the books that usurps the President's authorities, he simply cannot be bound by it.

PROFESSOR ROSTOW: Let me save the Assistant Attorney General from barratry and maintenance. He cannot admit to engag-

214. Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-USSR, Agreed Interpretation D, 23 U.S.T. 3435, 3456, T.I.A.S. No. 7503, at 21.

ing in any such practices, but of course, he can and should organize a test suit, a practice used since the beginning of time. The President, however, should not make the mistake that Andrew Johnson made in testing the constitutionality of the Tenure of Office Act, which was the basis of his impeachment.²¹⁵ That was a terrible mistake. Luckily for him and for the Constitution, he prevailed.

The President has to disobey the Act in order to present a justiciable case, or he can follow the strange reasoning of *Sierra Club v. Morton*,²¹⁶ or *Board of Education v. Allen*.²¹⁷ Because the Supreme Court was so sympathetic to the law students who brought the *Sierra* litigation, I suggest that some of you go out and start a little litigation on that subject.

SPEAKER: But that is a passive response, where he has to defend. I am talking about—

PROFESSOR ROSTOW: Well, he doesn't have to defend the constitutionality in that case.

SPEAKER: But that subjects him to the possibility of the Tenure of Office Act and impeachment if the political tensions get—

PROFESSOR ROSTOW: I suggest powerful maintenance, that is all.

SENATOR HATCH: It is a political problem for the President. No one would fail to recognize that. He knows that if the climate is not right in this country for his refusal to comply with the War Powers Resolution, then he is going to pay a heavy political price for it. He also knows that generally—especially in the years since the Vietnam War—it is very difficult to get involved in any form of conflict without having whole segments of our society up in arms over it.

The only practical way that he can test it is to refuse to comply. The President is basically refusing to comply with it in the Persian Gulf matter, but Congress really has not tested him that much on it. I suspect that he would be sued at that point in a very important test

215. See generally D. DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1903) (discussion of the circumstances leading to the Tenure of Office Act, President Andrew Johnson's veto and later refusal to comply with the provisions of the act, and his subsequent impeachment).

216. 405 U.S. 727 (1972). The Supreme Court held that a non-economic injury confers standing to challenge an agency action under 5 U.S.C. § 702, but that the mere allegation of a "special interest" in the action is insufficient. *Sierra Club*, 405 U.S. at 739-40. A plaintiff must allege facts showing injury to himself before arguing the public interest in support of his claim. *Id.* at 735.

217. 392 U.S. 236 (1968) (A penalty of expulsion from the board or reduction in state funding of a school district provided a personal stake sufficient for local school board members to challenge, on first amendment grounds, a statute permitting the free provision of textbooks to parochial students.).

case. I am not sure, however, that the Supreme Court is going to resolve it in the end.

MR. COOPER: It is not accurate to say the President has failed to comply with the War Powers Resolution with respect to Persian Gulf matters. In every incident that might even arguably have required a report, a report satisfying those requirements has been filed. By the same token, however, he obviously is continuing to pursue a policy that he believes, in his capacity as the Chief Executive, Commander-in-Chief, and principal organ for foreign relations in this country, is in the best interest of the American people.

SPEAKER: The reason I asked the question is because I am inviting the Congress, and all the scholars and lawyers, to be open to the possibility of creating some sort of injunctive relief, or having legislation that will be able to test this, that the President initiate some sort of affirmative move so he is not caught in this tension where he—

MR. COOPER: There is another problem with what we are suggesting here and that is—

SPEAKER: —because I think ignoring the law is not—

PROFESSOR TIGAR: Assistant Attorney General Cooper is in a difficult position. He is like the old boy who said, “Well, I don’t know about that issue. I haven’t been retained yet.” No one on this panel believes that the President acts in a rule freeway, right? That is to say, we are all talking about how you enforce the rules. While I yield to no one in my belief that the courts have the power to resolve disputes that involve private and even public rights, I would like to suggest something else that comes out of twenty years of being a trial lawyer. If the President and the Congress get to fussing with each other about it, they could settle it short of litigation. There is nothing wrong with that, and the constitutional system ought to provide for that. Indeed, it is a preferred way in the law life of the nation, as it is in the private relations of individuals.

A preemptive suit of the kind you are talking, however, obviously raises all of the justiciability difficulties trumped or doubled because the event has not yet happened. The particular way that the President regards his conduct as unreasonably restrained has not been spelled out by what he did.

Maybe you are back to *Marbury v. Madison*?²¹⁸ Judge Marbury, in essence, said, “You know, Adams told me I could be a judge, and the son of a gun won’t give me my commission!” Chief Justice Marshall, while he said that the statute is unconstitutional, also went out

218. 5 U.S. (1 Cranch) 137 (1804).

of his way to tell Thomas Jefferson that he ought to have shaped up.²¹⁹ That is the original intent answer to your question.

PROFESSOR ROSTOW: What Professor Tigar says is perfectly correct, of course, except that at the present moment, we have an opportunity where there could be a live plaintiff with a real case. For example, the mother or widow of a soldier or sailor who was killed could bring an action as an executor.

MR. COOPER: That assumes that the political question doctrine does not apply to the questions that must be litigated.

SPEAKER: I would like to ask Senator Hatch if he feels that the views he expressed are going to get a fair play in the pending committee report which is due out soon?²²⁰

SENATOR HATCH: I have read most of the report on both sides, the majority and the minority. The majority does try to justify the Boland amendments.²²¹ The minority, I think, rips them to shreds,²²² but you will have to make up your own mind. I happen to have been a subscriber to the minority report, and I felt that the majority report was biased in its approach. It misstated and distorted some of the facts. It was too political, and frankly, some of the conclusions they reached were not very good. Even from a slanted perspective, however, the majority report admits there was no venality in this affair.²²³ There is a real question whether there was real criminal intent to violate any statutes.

219. *Id.* at 154-61 (describing the appointment power of the President, and at what point executive discretion ends and ministerial duty begins).

220. H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. (1987) (reported November 13, 1987, ordered to be printed November 17, 1987).

221. *See id.* at 395-407.

222. *See id.* at 489-500.

223. *See id.* at 7, 331-59, 417-20.