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The Nixon Theory of the War Power: A Critique

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On March 11, 1966, the Legal Adviser of the State Department, Leonard Meeker, submitted to the Senate Committee on Foreign Relations a memorandum that, despite its brevity, proved to be the fullest statement ever made of the legal case for the initiation of war in Vietnam by President Johnson.¹ He offered several arguments. The framers of the Constitution had qualified the war clause. They intended that the President be free to repel sudden attacks upon the United States without Congressional authorization; with the shrinking of the globe this exception had grown into a power to repel an attack on any country, even one halfway around the earth, if he considered this necessary to safeguard American interests. One hundred twenty-five historic cases of unauthorized executive use of military force supplied validating precedents for Johnson's action. The Tonkin Gulf Resolution authorized the President to make war at will in Southeast Asia. The SEATO Treaty authorized him to defend Southeast Asia against Communism. And, finally, by passing appropriation acts, the Congress had endorsed the war.

President Nixon, even while withdrawing troops from Vietnam, has continued to commit more troops in smaller numbers. Similarly, he has withdrawn some of the legal justifications adduced by Meeker but has advanced others to replace the arguments that have been re-

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1. Meeker, *The Legality of United States Participation in the Defense of Vietnam*, 54 DEP'T STATE BULL. 474 (1966).

tired from the battlefield. The Nixon administration, for instance, does not rely on the SEATO Treaty. This is wise. The treaty did not itself purport to authorize war but left this action to be taken, if the occasion should arise, by "constitutional processes"²—that is, by Congress. In any case, the President and the Senate cannot exercise the war power by treaty, since this is committed by the Constitution to the full Congress.³ President Nixon likewise discarded the Tonkin Gulf Resolution⁴ when he signed the repealer on January 12, 1971.⁵

On the other hand, apologists for the Nixon policy continue the attempt begun by Meeker to squeeze a presidential power to initiate war into the words, "The Congress shall have power . . . to declare war"⁶ For the most part, however, the Nixon administration has relied on the commander-in-chief clause. Meeker's 125 precedents for executive action, which have now grown to 155 or more, are subsumed under this heading; in addition, the President's command over the troops and his duty to protect them have been exploited to justify the continuance of the war.

The Nixon administration has contended that the grant of executive power to the President authorizes him to initiate war. Furthermore, since the Tonkin Gulf Resolution is gone, the administration has placed emphasis on the theory of ratification by appropriation, as well as on the doctrine of political question. And, finally, Secretary of State Rogers⁷ and other Nixon spokesmen have developed a political theory that was first advanced by Under Secretary of State Katzenbach⁸ during the Johnson administration. If one shakes out the weasel-words, it comes to something like this. Distinction between the power of Congress and that of the President is invidious. The United States is strongest when Congress and the President act together; therefore the Congress should loyally support the President. On his part, he should keep the Congress informed of his decisions and should

2. Southeast Asia Collective Defense Treaty, Sept. 8, 1954, art. IV, [1955] 6 U.S.T. 81, 83, T.I.A.S. No. 3170. It was never suggested, from the negotiation of the treaty in 1954 until the Meeker memorandum in 1966, that the treaty conferred upon the President any power except that of consulting with the other signatories.

3. See Wormuth, *The Vietnam War: The President Versus the Constitution*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 711, 767-77 (R.A. Falk, ed. 1969) [hereinafter cited as Falk].

4. Act of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

5. Act of Jan. 12, 1971, Pub. L. No. 91-672, 84 Stat. 2053.

6. U.S. CONST., art. I, § 8, cl. 11.

7. Rogers, *Congress, The President, and the War Powers*, 59 CALIF. L. REV. 1194, 1207-12 (1971).

8. *Hearings on U.S. Commitments to Foreign Powers Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 108, 140-54 (1967) [hereinafter cited as *Senate Hearings*].

exert himself to maintain their support. Earlier and more candid advocates of this approach called it the *Fuehrerprinzip*.

So far as these are legal arguments, this Article undertakes to show that none of them justifies the Nixon administration's involvement in Vietnam. Only an explicit congressional resolution can authorize the initiation of hostilities; yet Congress has acquiesced in the usurpation of this power. The Supreme Court, as yet unwilling even to pass on the question, must face the responsibility of limiting the President's power to initiate war.

I

THE WAR CLAUSE

It is familiar that the framers of the Constitution, in adopting the war clause, changed the assignment to Congress of the power "to make war" to a power "to declare war" for fear that the first phrase might not permit the President "to repel sudden attacks."⁹ The contrast is between the initiation of war, which belongs to Congress,¹⁰ and defense against a war initiated by the sudden attack of another state, which the President may undertake. But the Constitution's word "war" is not restricted to general war. Early in our history the Supreme Court held that it was for Congress to make both general and limited war and to specify the dimensions of the war;¹¹ the President must observe the limitations placed upon him by Congress.¹²

The very question raised by the Vietnam War, whether the President may independently authorize hostilities, was decided by a circuit court as early as 1806.¹³ Col. William S. Smith was alleged to have assisted a General Miranda to outfit an expedition in New York against the Spanish province of Caracas and was indicted under a statute that forbade setting on foot a military expedition against a nation with which the United States was at peace.¹⁴ Smith subpoenaed the Secretary of State, the Secretary of the Navy, and two other officers; they re-

9. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. Doc. No. 398, 69th Cong., 1st Sess. 561-62 (C.C. Tansill ed. 1927) [hereinafter cited as Tansill]. See *The Prize Cases*, 67 U.S. (2 Black) 635 (1862).

10. For the equivalence of "declare" and "make," see 5 COMYNS' DIGEST 292 (A. Hammond ed. 1822): "To the king alone it belongs to make peace and war"; 7 *id.* 46: "[T]he king has the sole authority to declare war or peace."

11. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

12. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). See also *Murray v. The Schooner Charming Betsey*, 6 U.S. (2 Cranch) 64 (1804).

13. *United States v. Smith*, 27 F. Cas. 1192 (No. 16342) (C.C.D.N.Y. 1806). Smith was acquitted by the jury. *United States v. Smith*, 27 F. Cas. 1233, 1245 (No. 16342a) (C.C.D.N.Y. 1806).

14. Act of June 5, 1794, ch. 50, § 5, 1 Stat. 384.

fused to appear on the ground that the President had specifically told them that he could not dispense with their services at that time. Smith moved for an attachment to compel them to attend, making affidavit that he hoped to prove by the testimony of these witnesses that the expedition "was begun, prepared, and set on foot with the knowledge and approbation of the president of the United States, and with the knowledge and approbation of the secretary of state of the United States."¹⁵ Justice Paterson, sitting on circuit in New York, ruled for himself and District Judge Tallmadge that the trial should proceed without these witnesses because the testimony sought would be irrelevant.

Supposing then that every syllable of the affidavit is true, of what avail can it be to the defendant on the present occasion? . . . Does it speak by way of justification? The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. . . . Does he possess the power of making war? That power is exclusively vested in Congress. . . .

. . . There is a manifest distinction between our going to war with a nation at peace, and a war made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of Congress to change a state of peace into a state of war.¹⁶

The words of the Constitution are clear, and the courts have given them their obvious meaning; but champions of presidential aggrandizement have offered a series of substitute meanings. Defending President Truman's unauthorized entry into the Korean War, Senator Paul Douglas undertook to overrule the court decisions by asserting that the Constitution permitted Congress to authorize only general wars. Therefore, he contended, the initiation of all hostilities short of general war belonged to the President.

There is indeed a good reason, besides the need for speed, why the President should have been permitted to use force in these cases without a formal declaration of war by Congress. That is because international situations frequently call for the retail use of force in localized situations which are not sufficiently serious to justify the wholesale and widespread use of force which a formal declaration of war would require.

In other words, it may be desirable to create a situation which is half-way between complete peace, or the absence of all force, and outright war marked by the exercise of tremendous force on a wholesale scale. This is most notably the case when big powers

15. 27 F. Cas. 1192, 1196-97.

16. *Id.* at 1230.

deal with small countries, and in situations where only a relatively temporary application of force is needed to restore order and to remove the threat of aggression. It would be below the dignity of the United States to declare war on a pigmy state, but it might be necessary to apply force in such a case in order to prevent attacks on American lives and property.¹⁷

This, he said, was apparently the case in Korea. Senator Douglas was as bad a prophet as a lawyer.

John Norton Moore has suggested that "[a]s a dividing line for presidential authority in the use of the military abroad, one test might be to require congressional authorization in all cases where regular combat units are committed to sustained hostilities."¹⁸ He makes no application, but the formula would justify President Kennedy's action, unsanctioned by Congress, in assigning auxiliary "advisors" to South Vietnamese military units and pilots to purportedly South Vietnamese planes. Perhaps it would also excuse the use of Special Forces units and saboteurs. But the organizational niceties under which American troops are committed to combat do not alter the hard fact of war.

Secretary of State Rogers has suggested that unauthorized executive coercion of small countries might be validated by their defenselessness: "[T]here being no risk of major war, one could argue there was no violation of Congress' power to declare war."¹⁹ This is hardly tenable. The Constitution does not say that Congress shall have the power "to declare major wars." The power of initiating all hostilities belongs to the policymaking branch, the Congress. On Secretary Rogers' principles, the President might on his own initiative destroy the state of Israel by nuclear rockets because it has no powerful friends to resent the action.

Usually these implausible improvisations are accompanied by the plea of emergency. Senator Douglas also defended Truman's entry into the Korean War on the ground that there was not time to consult Congress; furthermore, there might have been a filibuster.²⁰ It is a dangerous doctrine that the President may legislate on any topic he considers urgent because he fears a filibuster.

Secretary Rogers is more ingenious. The President is authorized to repel sudden attacks upon the United States.

In 1787, this was the one situation in which it was evident that emergency action was required. But the rationale behind the concept is broader—that is, in emergency situations, the President has the power

17. 96 CONG. REC. 9648 (1950).

18. Moore, *The National Executive and the Use of the Armed Forces Abroad*, in 2 FALK 814.

19. Rogers, *supra* note 7, at 1200.

20. 96 CONG. REC. 9648 (1950).

and responsibility to use the armed forces to protect the nation's security.²¹

This misrepresents our whole constitutional structure. The framers knew that an attack upon the United States imperiled national security. They left to Congress the right to decide when other events imperil national security. In addition, it is simply not true that there is always an obvious right answer to the problem of safeguarding the national security, so that a President acting in an emergency merely anticipates what Congress would do if there were an opportunity. There are other ways of promoting national security besides war. Moreover, in any real case there are other considerations that must be taken into account besides national security.

Consider a very likely case. Suppose war explodes between Egypt and Israel and the President decides that national security requires him to intervene without waiting for Congress to make a decision, as President Johnson intervened in the Dominican Republic. If he intervenes on the side of Israel, Secretary Rogers and the other champions of emergency power must hold this action legal. If he intervenes on the side of Egypt, Secretary Rogers and the other champions of emergency power must likewise hold this action legal. In other words, the country has no enemy, and no real danger of attack, until the President decides who our enemy will be.

Of course, the Constitution was framed in contemplation of emergencies. For example, the war clause provides that Congress may initiate hostilities when it determines this is necessary. But it is true that it established a government of limited and divided powers that does not afford instant decision on every question that anyone, or even a large number of people, may believe to require immediate specific action. The price we pay for renouncing autocracy is the absence of autocracy.

If we are to have a government of law rather than one of unfettered Executive discretion, there are bound to arise cases in which it is illegal for the Executive to take action that he considers imperative. As Chief Justice Hughes put it, "Extraordinary conditions do not create or enlarge constitutional power."²² Dicey said of this problem under the parliamentary system: "There are times of tumult or invasion when for the sake of legality itself the rules must be broken. The course which the government must then take is clear. The ministry must break the law and trust for protection to an act of immunity."²³

21. Rogers, *supra* note 7, at 1197.

22. *Schechter Corp. v. United States*, 295 U.S. 495, 528 (1935).

23. A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 413-14 (10th ed. 1959).

An example of this occurred when, at the outbreak of the Civil War, President Lincoln took certain extraordinary actions and on July 4, 1861 asked Congress to ratify them, "whether strictly legal or not";²⁴ on August 6, Congress provided that the steps he had taken "are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States."²⁵ Similarly limited acts of immunity were passed during and after the Civil War.²⁶ An act of immunity of the Philippine Legislature exculpating the Governor General of the Islands for an illegal action was upheld by the Supreme Court in 1913.²⁷

Unfortunately, there is another course. The President, for reasons he considers compelling, may take illegal action, but be unwilling to risk an evaluation of his judgment and motives by Congress. Instead of seeking ratification, he claims an emergency power to act for the good of the nation and claims the exclusive right to determine what is good for the nation. The whole executive branch of the government, with its prestige, its resources, and its command of publicity, defends his claims. His partisans in Congress assert that his action is legal. If he has put the nation in a posture of antagonism, patriotic sentiment will endorse his position. His act of usurpation then becomes a precedent, and future Presidents use it as a justification for further illegalities, exactly as the Truman, Johnson, and Nixon administrations have done. This is the road we are traveling.

II

THE COMMANDER-IN-CHIEF CLAUSE

In recent years the term Commander in Chief has come to be

24. 5 J.D. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1908, at 3225 (1911) [hereinafter cited as RICHARDSON].

25. Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326.

26. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755; Act of May 11, 1866, ch. 80, 14 Stat. 46; Act of Mar. 2, 1867, ch. 155, 14 Stat. 432. The first two acts were upheld in *Cutler v. Kouns*, 110 U.S. 720 (1884); *Mitchell v. Clark*, 110 U.S. 633 (1884); *Beard v. Burts*, 95 U.S. 434 (1877); *McCall v. McDowell*, 15 F. Cas. 1235 (No. 8673) (C.C.D. Cal. 1867); *cf. Mayor & Aldermen v. Cooper*, 73 U.S. (6 Wall.) 247 (1868). On the third act, see *Beckwith v. Bean*, 98 U.S. 266 (1879); *Bean v. Beckwith*, 85 U.S. (18 Wall.) 515 (1874); *In re Murphy*, 17 F. Cas. 1030 (No. 9947) (C.C.D. Mo. 1867). *Contra*, *Clark v. Mitchell*, 64 Mo. 564 (1877), *rev'd*, *Mitchell v. Clark*, *supra*; *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159 (1867); *Sheehan v. Jones*, 44 Ill. 167 (1867); *Carver v. Jones*, 45 Ill. 334 (1867); *Griffin v. Wilcox*, 21 Ind. 370 (1863); *Jones v. Seward*, 40 Barb. 563 (1863). The position of *Johnson v. Jones*, *supra*, that if government relieves a defendant of an obligation previously valid it must indemnify the plaintiff, seems correct.

27. *Tiaco v. Forbes*, 228 U.S. 549 (1913).

used cabalistically: it is a name of power, like Sabbathai and Shabni. Senator Barry Goldwater has wondered at it:

Finally, Mr. Chairman, we come to the President's power as Commander in Chief of the Armed Forces. . . .

Just why the founding fathers saw fit to confer this title on him and to invest him with these powers, I've never quite been able to understand; but I have a growing feeling that with the recognized and infinite wisdom of the founding fathers, they realized that a single man with these powers who would not be disturbed by the politics of the moment would use them more wisely than a Congress which is constantly looking toward the political results. . . .

Would it not be proper to assume, therefore, that the founding fathers in their wisdom foresaw the day when this situation might come about, and realizing that a Congress divided amongst different minority interests would be loath to give proper direction to a single American course, thought the power of war and peace might better be vested in a single man where the probability of minority weight might not have this effect?

Mr. Chairman, I may be terribly wrong in this surmise, and, of course, I hope I am; but I believe it would offer an explanation of a means by which our forefathers and we ourselves were meant to become a single people with a single purpose.²⁸

Ein Volk, ein Reich, ein Fuehrer.

The office of commander in chief has never carried the power of war and peace, nor was it invented by the framers of the Constitution. It was a century and a half old when the Constitution was adopted. Charles I introduced the term in 1639 when he appointed the Earl of Arundel to the command of the army he sent to meet the Scots in the First Bishops' War.²⁹ During the Civil Wars both Parliament and the King appointed commanders in chief over particular armies. In 1645, Parliament appointed Sir Thomas Fairfax commander in chief of all its forces, "subject to such orders and directions as he shall receive from both Houses or from the Committee of Both Kingdoms."³⁰ The title has since been in common use in British government, ordinarily in the plural. The troops in each theater of action, as well as every fleet, have had a commander in chief. Thus, in 1755, General Edward Braddock was appointed commander in chief of the King's forces in North America, and this office endured until 1781.³¹

28. 117 CONG. REC. S5640 (daily ed. April 26, 1971).

29. 1 C.M. CLODE, *THE MILITARY FORCE OF THE CROWN* 425-29 (1869). I owe this and succeeding historical citations to William H. Barnhart.

30. *CALENDAR OF STATE PAPERS, DOMESTIC, 1644-1645*, at 24, 478 (H.M.S.O. 1890).

31. Carter, *The Office of Commander in Chief: A Phase of Imperial Unity on*

Apparently, it was also in the 18th century that the British began the practice of appointing the governor of a colony or possession commander in chief of the forces stationed there. In the royal colonies in America the governor bore the titles of commander in chief and vice admiral.³²

On June 15, 1776, the Continental Congress unanimously chose George Washington as "general."³³ His commission, approved on June 17, appointed him "General and Commander in chief, of the army of the United Colonies."³⁴ It instructed him to maintain strict discipline and to follow the Articles of War that were to be enacted to govern the forces, "and punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies, or committee of Congress." On June 30, the Congress adopted the Articles of War.³⁵

Later, when Congress initiated a naval war with France, it seemed prudent to prepare for an invasion. On July 2, 1798, President Adams again nominated "George Washington, of Mount Vernon, to be Lieutenant General and Commander in Chief of all the armies raised, or to be raised, in the United States,"³⁶ and on July 3 the Senate unanimously confirmed the appointment.³⁷ Since Adams was the constitutional commander in chief of both the army and the navy, Washington was his subordinate; but Adams promised Washington his support on the only question of policy that arose.³⁸

The use of the title "commander in chief" was not originally limited to the single person in charge of all armed forces in the land.³⁹

the Eve of the Revolution, in *THE ERA OF THE AMERICAN REVOLUTION 170-213* (R.B. Morris ed. 1939).

32. E.B. GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 105 (1966).

33. 2 *JOURNALS OF THE CONTINENTAL CONGRESS* 89 (1905) [hereinafter cited as *JOURNALS*].

34. *Id.* at 96.

35. *Id.* at 111-12.

36. 1 *SENATE EXEC. J.* 284 (1828).

37. *Id.*

38. 5 *WORKS OF JOHN ADAMS* 600-01 (C.F. Adams ed. 1852).

39. Some of the early state constitutions made the governor the commander in chief, or captain general and commander in chief, of the state militia. 1 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS*, H.R. DOC. NO. 357, 59th Cong., 2d Sess. 564 (F.N. Thorpe ed. 1909); 2 *id.* at 782; 3 *id.* at 1901; 4 *id.* at 2463; 5 *id.* at 2596, 2791, 3088; 6 *id.* at 3247, 3249, 3745, 3756 [hereinafter cited as Thorpe]. The Northwest Ordinance provided that "The governor, for the time being, shall be commander in chief of the militia. . . ." 2 *id.* at 959. Subsequent organic acts for the organization of territories made the governor the local commander in chief. In the Northwest Territory, however, the titles came to be separated. Arthur St. Clair was appointed governor of the Northwest Territory in 1789 [1 *SENATE EXEC. J.* 18 (1828)], and in 1791 was made Major General of the Army. He resigned his

"An Act for the Government of the Navy of the United States,"⁴⁰ passed on March 2, 1799, contemplated that each fleet or squadron would have a commander in chief, and of course that is the practice to the present day. In 1815, the Supreme Court of New York spoke of the officer in command of a military detachment at Burlington, Vermont as "commander in chief of a division of the army."⁴¹

We have no report of debate on the commander-in-chief clause in the Constitutional Convention. It is quite possible that Charles Pinckney proposed the title in his speech on May 29, 1787, but we cannot be sure.⁴²

The plan that William Paterson of New Jersey proposed on June 15 contemplated a plural executive. Three versions of the plan survive; the other two⁴³ agree closely with that in the Brearley papers:

That the executive, besides a general authority to execute the federal acts, ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided, that none of the persons composing the federal executive shall, on any occasion, take

military commission in 1792, and Anthony Wayne was appointed Major General "vice Arthur St. Clair, resigned" [1 *id.* 117, 119], and was given command of the army in the West. St. Clair continued as civil governor. There is no evidence of Wayne's having been formally named commander in chief but he was so known, and his tombstone bears that title. J. Armstrong, *Life of Anthony Wayne*, in 4 LIBRARY OF AM. BIOGRAPHY 80 (J. Sparks ed. 1846). At Wayne's death in 1796 the office of Major General was not filled. Brigadier General James Wilkinson was given the command in the West. We have no record of his having been given another military title, but in 1806 and 1807 in executing affidavits he described himself as "Brigadier General and commander in chief of the army of the United States." 4 Cranch 455, 459. In the case of both Wayne and Wilkinson the designation "commander in chief" seems to have been a descriptive appellation rather than a legal title.

40. Act of Mar. 2, 1799, ch. 24, §§ 1, 6, 1 Stat. 709, 714, 715.

41. *McConnell v. Hampton*, 12 Johns. 234, 238 (N.Y. 1815).

42. When, in 1819, Pinckney supplied to John Quincy Adams a draft of his plan to be published in the Journal of the Convention, he said it was one of four or five papers in his hands and might not be the right one. That draft did contain the sentence: "He shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states." 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 148 (J. Elliot ed. 1881) [hereinafter cited as Elliot]. But the draft cannot have been Pinckney's plan; it is a version of the report of the committee of detail in which Pinckney had made changes. Jameson, *Studies in the History of the Federal Convention of 1787*, 1 ANN. REP. AMER. HIST. ASS'N, 1902, at 125 (1903). But Jameson believed a document found in the Wilson papers to be a report of the Pinckney plan, and it reads: "He shall, by Virtue of his Office, be Commander in Chief of the Land Forces of the U.S. and Admiral of their Navy." *Id.* at 130. See also Jameson, *Portions of Charles Pinckney's Plan for a Constitution*, 1787, 8 AMER. HIST. REV. 509 (1903); *Sketch of Pinckney's Plan for a Constitution*, 1787, 9 *id.* 735 (1904). Pinckney came from South Carolina and must have been familiar with the 1776 constitution of that state, which provided for a "president and commander-in-chief" [6 Thorpe 3243], and that of 1778, which provided for a "governor and commander-in-chief" [*id.* at 3249].

43. Tansill, *supra* note 9, at 968, 976.

command of any troops, so as personally to conduct any military enterprise as general, or in any other capacity.⁴⁴

It does not appear that, in reading his plan to the Convention on June 18, Alexander Hamilton used the title "Commander in Chief." Hamilton read and approved Madison's notes reporting his speech and his plan;⁴⁵ the relevant passage in Madison merely gives "[t]he supreme Executive authority . . . to have the direction of war when authorized or begun. . . ."⁴⁶ Two delegates, Robert Yates of New York and another who must have been David Brearley of New Jersey,⁴⁷ appear to have made verbatim copies of the paper from which Hamilton read. They both read: "to have the entire direction of war, when authorized or begun."⁴⁸ The notes taken down by George Read of Delaware read: "the direction of war, when declared."⁴⁹ But the version of the plan in the Hamilton papers reads: "The Governor . . . is to be the Commander-in-Chief of the land and naval forces and of the militia of the United States—to have the entire direction of War when authorized or begun."⁵⁰ This draft is identical with the versions of Yates and Brearley except that it contains seven phrases or brief passages that they lack.⁵¹ Either the plan that Hamilton presented to the Convention was a slightly reduced version of that found in his papers, or the latter was a slightly expanded version of the draft read to the Convention.

On July 24 a committee of detail of five members was created, and the resolutions previously agreed to by the Convention, the Pinckney plan, and the Paterson plan were all referred to it. On August 6 the committee reported a draft of a constitution that provided for a President and said that "he shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states."⁵² The revised draft reported by the committee of revision on September 12 used language that survived into the final version: "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States."⁵³

There must have been some discussion of the title commander in

44. Tansill 972; 1 Elliot 176.

45. Tansill 225 n.61.

46. *Id.* at 224.

47. 1 Elliot 123.

48. *Id.* at 179; Tansill 983, 987.

49. Tansill 985.

50. *Id.* at 981.

51. There is an important difference in the eighth paragraph.

52. 1 Elliot 228.

53. *Id.* at 303.

chief at the Convention, for Luther Martin, in a report on the Convention to the Maryland Legislature, wrote:

Objections were made to that part of this article by which the President is appointed commander-in-chief of the army and navy of the United States, and of the militia of the several states; and it was wished to be so far restrained, that he should not command in person; but this could not be obtained.⁵⁴

Neither friends nor foes of the Constitution considered that the office of Commander in Chief carried with it a legal power to make political decisions. All the political powers remained with Congress, as under the Articles of Confederation. Two changes were made from earlier practice: there was a permanent Commander in Chief, for peacetime as well as wartime; and there was now an officer to call out the militia under authority of Congress, either for defense against invasion or to execute the laws or to suppress domestic violence. In No. 69 of the *Federalist Papers*, Alexander Hamilton explained that the title was innocuous:

[T]he President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British kings extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the Legislature.⁵⁵

In the North Carolina ratifying convention, James Iredell, who became an Associate Justice of the Supreme Court, gave the same assurance:

I believe most of the governors of the different states have powers similar to those of the President. In almost every country, the executive has command of the military forces. From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person. The President, therefore, is to command the military forces of the United States, and this power I think a proper one; at the same time it will be found to be sufficiently guarded. A very material difference may be observed between this power, and the authority of the king of Great Britain under similar circumstances. The king of Great Britain is not only the commander-in-chief of the land and naval forces, but has power, in time of war, to raise fleets and armies. He also has the power to declare war. The President has not the

54. *Id.* at 378.

55. THE FEDERALIST No. 69, at 464, 465 (J.E. Cooke ed. 1961) (A. Hamilton).

power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands. The power of declaring war is expressly given to Congress, that is, to the two branches of the legislature. . . . They have also expressly delegated to them the powers of raising and supporting armies, and of providing and maintaining a navy.⁵⁶

And Richard Spaight, who had been a delegate to the Convention, said that Congress could control the Commander in Chief because it alone had the power to raise and support armies.⁵⁷

Those who criticized the clause were not alarmed by the legal powers it conferred but by the possibility of illegal military overthrow of the civil government. George Mason, who had also been a delegate, said in the Virginia ratifying convention that

[h]e admitted the propriety of his being commander-in-chief, so far as to give orders and have a general superintendency; but he thought it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. He was, then, clearly of opinion that the consent of a majority of both houses of Congress should be required before he could take command in person.⁵⁸

Patrick Henry predicted that "the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke."⁵⁹ James Monroe feared that a President could escape punishment because he commanded the army.⁶⁰

The meaning of the term was that settled by a century and a half of usage: it designated the officer who stood at the apex of a military hierarchy. In British practice there were several such hierarchies, each with a separate commander in chief directly accountable to the Secretary at War. In the constitutional scheme there was a single hierarchy with a single commander in chief. But in all cases the commander in chief was under the direction of a political superior, a king or the Continental Congress or the national Congress. The term carried absolutely no overtones of any independent political authority.

This was well understood until 1941. According to Edward S. Corwin,⁶¹ it was Lincoln who made unprecedented claims to power as Commander in Chief; but at least Lincoln's excesses occurred during a war he did not initiate, and they were all related to the prosecution of the war. The peacetime actions of President Franklin D. Roosevelt

56. 4 Elliot 107-08.

57. *Id.* at 114.

58. 3 *id.* at 496.

59. *Id.* at 59.

60. *Id.* at 220.

61. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 229 (1957).

in stationing troops in Iceland, Greenland, and Dutch Guiana and in convoying British ships, all under the commander-in-chief clause, first gave the title political significance. President Truman entered the Korean War, not only without legal authorization but in defiance of the United Nations Participation Act.⁶² The State Department justified this in language that would permit the President to make war anywhere at any time. The United States, it said, has an interest in international peace and security.

These interests are interests which the Commander in Chief can protect by the employment of the Armed Forces of the United States without a declaration of war. It was they which the President's order of June 27 did protect. This order was within his authority as Commander in Chief.⁶³

In 1966 the State Department made the same claim in justification of President's Johnson's entry into war in Vietnam:

There can be no question in present circumstances of the President's authority to commit United States forces to the defense of South Viet-Nam. The grant of authority to the President in Article II of the Constitution extends to the actions of the United States currently undertaken in Viet-Nam. . . .

Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of the United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.⁶⁴

These statements are no doubt the source of Senator Goldwater's claim that "the power of war and peace . . . [is] vested in a single man. . . ."⁶⁵ Not only does this assertion completely ignore the text

62. The Act provides that the President shall supply troops to the United Nations only pursuant to an agreement negotiated with the Security Council and approved by Congress. 22 U.S.C. § 287d (1970). No such agreement has ever been negotiated.

Nevertheless, President Truman also claimed authority from a Security Council vote. Senator Robert A. Taft said of this claim:

The State Department itself admits that the action of the Security Council in the Korean case was only a recommendation under Article 39. If the President can carry out every recommendation of the Security Council or the General Assembly supported by the vote of the American representative whom he can direct, then he has almost unlimited power to do anything in the world in the use of either troops or money.

R. TAFT, *A FOREIGN POLICY FOR AMERICANS* 33 (1951).

63. U.S. Dep't of State, *Authority of the President to Repel the Attack in Korea*, 23 DEP'T STATE BULL. 177 (1950).

64. Meeker, *supra* note 1, at 484.

65. See text accompanying note 28 *supra*.

of the Constitution; it finds no support in our legal history. There have been many judicial decisions on the commander-in-chief clause; there have been numerous opinions of Attorneys General; and there is a large body of statutory practice. These agree that it is for Congress and not the Commander in Chief to initiate war, to raise and support armies, to provide and maintain a navy, and to make rules for the government of the land and naval forces.⁶⁶ The President only has constitutional power to use the instrumentalities Congress has placed at his disposal to repel a sudden attack upon the United States,⁶⁷ and when Congress has authorized war he may only prosecute it up to the limits fixed by Congress.⁶⁸

Yet some have supposed that the President has certain independent powers of command. William Howard Taft said:

When we come to the power of the President as Commander-in-Chief it seems perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another.⁶⁹

More recently, Justice Jackson intruded an irrelevant dictum into his opinion in *Johnson v. Eisentrager*.⁷⁰ "Certainly it is not the function of the Judiciary to entertain private litigation which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."

On the other hand, there are publicists who agree with David Dudley Field:

To command an army is to give it its orders; but that means only that whatever orders are given must come through the commander, not that he may give any order he pleases. All orders to our army are to be issued by the President or his subordinates. To do what? That, and that only, which the laws allow; and the laws are made, not by him but by Congress. His function is executive. The laws must of course be such as the Legislature is, by the Constitution, authorized to enact; but the power to make them can not, in the nature of things, be subject to the power to command the troops, for that would make the latter the superior of the two; in other words, would render the military the superior of the civil gov-

66. U.S. CONST. art. I, § 8, cls. 11-14.

67. See note 9 *supra* and accompanying text.

68. See note 12 *supra* and accompanying text.

69. Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916). In his concurring opinion in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), Chief Justice Chase said: "Congress cannot direct the conduct of campaigns" [*id.* at 139].

70. 339 U.S. 763, 789 (1950). It sounds as though Jackson is raising either the issue of standing or that of political question, but it can be neither. The case was ultimately decided as a question of the law of habeas corpus.

ernment, a conclusion, the absurdity of which in this country demonstrates the folly of the premises.⁷¹

The position of Taft and Jackson would be more persuasive if Alexander Hamilton had prevailed at the Constitutional Convention and the President had been authorized "to have the entire direction of war, when declared or begun." But the Convention rejected this language and instead merely provided that the President should be "Commander in Chief of the army and navy."

In many respects the institutional arrangements of the Constitution derive from earlier practice. During the Revolution there was a Congress which possessed the war power, and there was a commander in chief. One supposes that the framers of the Constitution intended the Commander in Chief to bear the same relation to the Congress as in earlier practice. This earlier practice subordinated the commander in chief completely to Congress.

George Washington was named to the latter position on June 17, 1775.⁷² On June 20 the Congress ordered him to repair to Massachusetts Bay and take command of the army of the United Colonies. His orders concluded:

And whereas all particulars cannot be foreseen, nor positive instructions for such emergencies so before hand given but that many things must be left to your prudent and discreet management, as occurrences may arise upon the place, or from time to time fall out, you are therefore upon all such accidents or any occasions that may happen, to use your best circumspection and (advising with your council of war) to order and dispose of the said Army under your command as may be most advantageous for the obtaining the end for which these forces have been raised, making it your special care in discharge of the great trust committed unto you, that the liberties of America receive no detriment.⁷³

The Congress did not hesitate to issue directions to the commander in chief on matters large and small. On October 5, 1775, it ordered General Washington to intercept two British vessels.⁷⁴ On November 10, 1775, he was "directed in case he should judge it practicable and expedient" to send a force into Nova Scotia.⁷⁵ On June 17, 1776, Congress ordered him to send General Gates to take command in Canada,⁷⁶ and to send to Canada "such small brass or iron field

71. Field, *The President's Relations to the Army*, in 2 *SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 167 (A. Sprague ed. 1884). I owe this reference to Frederick L. Glover.

72. 2 *JOURNALS*, *supra* note 33, at 97.

73. *Id.* at 101.

74. 3 *id.* at 278 (1905).

75. *Id.* at 348.

76. 5 *id.* at 448 (1906).

pieces as he can spare."⁷⁷ The Congress also issued orders directly to Washington's subordinates without consulting him.⁷⁸

Statutory practice under the Constitution has perpetuated the subordination of the Commander in Chief to Congress. The President's power to use the troops internally has always been considered to depend upon statute and not to extend beyond the affirmative grants of the statutes.⁷⁹ He must, in addition, comply with all the conditions of the statutes.⁸⁰

Congress has occasionally forbidden the use of troops for a particular purpose. In 1862, Congress passed an additional Article of War that forbade the use of military or naval personnel to return fugitive slaves to their owners.⁸¹ In 1865, it forbade any military or naval officer to bring troops or armed men to the place where any general or special election was being held except to repel invasion or to keep the peace at the polls.⁸² In 1878, the army appropriation act forbade the use of any part of the Army "as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress."⁸³

77. *Id.* at 451.

78. On June 27, 1775, General Schuyler was sent to Ticonderoga and Crown Point; if it were practicable, he was to invade Canada. 2 *id.* at 109-10. On June 14, 1776, Schuyler was ordered to fortify Fort Stanwix. 5 *id.* at 442. On July 17, 1775, General Wooster was ordered to send 1,000 men to Albany. 2 *id.* at 186. On December 11, 1776, General Putnam was ordered to send harassing parties into New Jersey. 6 *id.* at 1023 (1906).

79. Attorney General Daugherty advised the President that he might not use the Navy to enforce the National Prohibition Act because there was no statute authorizing the employment of the Navy for this purpose. 33 OP. ATT'Y GEN. 562, 566 (1923). He rejected the suggestion that such power was conferred upon the President "by virtue of his combined constitutional powers, as Commander in Chief of the Army, Navy, and Militia, when in the service of the United States, and the duty that rests upon him to see that the laws are enforced" [*id.* at 567].

In *Bates v. Clark*, 95 U.S. 204 (1877), two army officers were held personally liable for seizing whiskey in obedience to superior orders when the statute permitted seizure only "in Indian country," and Indian title to the land on which the seizure occurred had in fact been extinguished.

80. Act of May 2, 1792, ch. 28, § 2, 1 Stat. 264 provided that the President might employ the militia to suppress insurrection when an Associate Justice or the district judge notified him that the execution of the laws was obstructed "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings. . . ." President Washington received such notification before acting to suppress the Whiskey Rebellion. Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424 removed the requirement of judicial notification but retained from the 1792 act the requirement that the President by proclamation require the insurgents to disperse peaceably before employing military force. This is still the law. 10 U.S.C. § 334 (1970). See also Act of Mar. 3, 1807, ch. 39, 2 Stat. 443.

81. Act of Mar. 13, 1862, ch. 40, § 1, 12 Stat. 354.

82. Act of Feb. 25, 1865, ch. 52, § 1, 13 Stat. 437.

83. Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145. No money appropriated

President Theodore Roosevelt suffered a congressional countermand when he took the marines from naval ships and stationed them on shore. In 1909, Congress attached a clause to the appropriation act providing that no part of the appropriations made for the Marine Corps could be expended unless marine officers and enlisted men served on board navy vessels.⁸⁴ Attorney General Wickersham commented on this clause:

Inasmuch as Congress has power to create or not to create, as it shall deem expedient, a marine corps, it has power to create a marine corps, make appropriation for its pay, but provide that such appropriation shall not be available unless the marine corps be employed in some designated way, and I therefore am of opinion that the provision of the statute to which I direct my attention is constitutional.⁸⁵

More recently, in enacting the Selective Training and Service Act of 1940,⁸⁶ Congress provided that no man inducted under the act should be employed outside the western hemisphere except in the territories and possessions of the United States.⁸⁷ The Department of Defense Appropriation Act of 1970 forbade the use of any of the funds appropriated to finance the introduction of American ground combat troops into Laos or Thailand,⁸⁸ and this prohibition was repeated in the Defense Appropriation Acts of 1971⁸⁹ and 1972.⁹⁰ In the Special Foreign Assistance Act of 1971,⁹¹ Congress prohibited the use of any of the funds appropriated to introduce ground troops or advisers into Cambodia.

In amending the Selective Service Act of 1967 by the Act of September 28, 1971,⁹² Congress declared that it was "the sense of Congress that the United States terminate at the earliest practicable date all military operations of the United States in Indochina," and described a series of steps the President should take toward this end. When this measure proved ineffective, Congress incorporated a stronger statement in the National Procurement Authorization Act of November 17, 1971:

It is hereby declared to be the policy of the United States to

by the act might be used in violation of this prohibition, and violation of the section was made a misdemeanor. This worked a repeal of Rev. Stat. §§ 1984-85 (1874).

84. Act of Mar. 3, 1909, ch. 255, 35 Stat. 753, 773-74.

85. 27 OP. ATT'Y GEN. 259, 260-61 (1909).

86. Act of Sept. 16, 1940, ch. 720, 54 Stat. 885.

87. *Id.* at 885, 886.

88. Act of Dec. 29, 1969, ch. 643, 83 Stat. 469, 487.

89. Act of Jan. 11, 1971, Pub. L. No. 91-668, § 843, 84 Stat. 2020.

90. Act of Dec. 18, 1971, Pub. L. No. 92-204, § 742, 85 Stat. 716.

91. Act of Jan. 8, 1971, Pub. L. 91-652, § 7(a), 84 Stat. 1942.

92. Act of Sept. 28, 1971, ch. 40, § 401, 85 Stat. 348.

terminate at the earliest practicable date all military operations of the United States in Indochina, and to provide for the prompt and orderly withdrawal of all United States military forces at a date certain, subject to the release of all American prisoners of war held by the Government of North Vietnam and forces allied with such Government and an accounting for Americans missing in action who have been held by or known to such Government or such forces.⁹³

Congress spelled out the steps which it urged and requested the President to take to implement this policy: to establish a final date for withdrawal of all military forces, contingent upon the release of all prisoners; to negotiate an immediate cease-fire; to negotiate an agreement for phased and rapid withdrawals of military forces in exchange for a corresponding series of phased releases of prisoners.⁹⁴ Upon signing the bill, President Nixon made a formal statement that the policy announced by Congress "does not represent the policies of this Administration"⁹⁵ and that he intended to ignore the congressional policy.

The fact seems to be that the nonstatutory powers which the President possesses as Commander in Chief derive, not from the Constitution, but from the common law of war. This is a branch of international law, which of course is incorporated in the law of the United States.⁹⁶ Early in our history, some persons—John Quincy Adams, for example⁹⁷—believed that international law bound Congress as well as the Executive. This position was untenable and has been abandoned. International law may be deprived of its status as municipal law by an act of Congress, although not by the Executive.⁹⁸

93. Act of Nov. 17, 1971, § 601(a), 85 Stat. 423 (1971). On at least two occasions, the two Houses have been obliged to go to conference over riders to appropriation bills that limited the use of military force. In 1855, the House abandoned its attempt to forbid the use of any part of the military force of the United States to enforce enactments of "the body claiming to be the Territorial Legislature of Kansas." Act of Mar. 3, 1855, ch. 169, 10 Stat. 635. See Field, *supra* note 71, at 150. In 1877 the House undertook to forbid the use of any of the army appropriation for troops to support either of two rival governments in Louisiana "until such government shall have been duly recognized by Congress." Three conference committees failed to agree, but on November 21, the bill was finally passed without the rider. Act of Nov. 21, 1877, ch. 1, 20 Stat. 1; Field 154.

94. Act of Nov. 17, 1971, § 601(a)(1)(2)(3), 85 Stat. 423 (1971).

95. 29 CONG. Q. WEEKLY REPORT, No. 47, at 2371 (Nov. 20, 1971).

96. The Paquete Habana, 175 U.S. 677, 700-01 (1900).

97. J.Q. ADAMS, THE JUBILEE OF THE CONSTITUTION 70-72 (1839).

98. The Pedro, 175 U.S. 354 (1899). Criminal violations of the common law of war have been made punishable by the Articles of War and subsequently by the Uniform Code of Military Justice, both enacted by Congress. Without a statute, no violation of international law can be criminal under United States law, and an action cannot be made criminal by treaty. The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822).

When the United States is engaged in a war authorized by Congress, the President has certain powers under the common law of war; but since these derive from international law they are subject to limitation by Congress. Even without such limitation, his powers do not embrace all the rights of a belligerent. During the War of 1812, the Supreme Court held that, although a state at war might confiscate enemy property within its borders, the President might not do so; this power belonged to Congress.⁹⁹

Aside from his powers under the common law of war, the President is entirely dependent for authority upon affirmative statutory grant. He may not create a new office.¹⁰⁰ Nor may he raise armies without statutory authorization.¹⁰¹ The duties of members of the armed forces are fixed by statute and cannot be varied by the President.¹⁰²

In *Gratiot v. United States*,¹⁰³ the Court held that the President might not require an army officer to perform duties other than those attached to his office by statute. If he employed an officer for non-statutory duties, it must be by contract giving the officer extra compensation; and of course the power to make such contracts depended on statutory authorization.¹⁰⁴ The compensation of military personnel

99. *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814). See also *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421, 427-28 (1814); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

100. *United States v. Maurice*, 26 F. Cas. 1211 (No. 15747) (C.C.D. Va., 1823). Similarly, Attorney General Bates advised President Lincoln that he might not create a bureau to deal with the militia because such action was legislative in nature. 10 OP. ATT'Y GEN. 11 (1861).

101. The Supreme Court made it clear that the legality of Abraham Lincoln's enrollment of volunteers at the outbreak of the Civil War was dependent upon the subsequent ratification in the Act of August 6, 1861. *United States v. Hosmer*, 76 U.S. (9 Wall.) 432 (1870).

102. In 1855, Attorney General Caleb Cushing advised the President that "[n]o act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President." 7 OP. ATT'Y GEN. 453, 465 (1855). But in fact this has been done. In 1867, during its dispute with President Johnson, Congress passed an act providing that "all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the Army" and exempting the General from removal without the consent of the Senate. Act of Mar. 2, 1867, ch. 170, § 2, 14 Stat. 485, 486-87, *repealed*, Act of July 15, 1870, ch. 294, § 15, 16 Stat. 315, 319.

103. 40 U.S. (15 Pet.) 371 (1841). The duties in this case proved to be statutory. *Gratiot v. United States*, 45 U.S. (4 How.) 80 (1846).

104. See also *Orloff v. Willoughby*, 345 U.S. 83 (1953), in which the Supreme Court held that when a statute provides for the conscription of persons—such as doctors—because of their possession of special professional skills, they must be assigned for duty "within the categories which rendered them liable to induction." *Id.* at 88. In 1835, Attorney General B.F. Butler advised the Secretary of War that the President might assign officers of the regular army to command the militia when called into the service of the United States. 2 OP. ATT'Y GEN. 711, 712 (1835). But this

is also governed by statute.¹⁰⁵

It even appears to be true that Congress controls the President in assigning the command of forces. By passing the Articles of War, which required obedience to the lawful orders of a superior officer, Congress in effect made the highest ranking officer in a unit the commanding officer. When President Lincoln wished to change commanders, he was obliged to obtain from Congress a joint resolution providing that "whenever military operations may require the presence of two or more officers of the same grade in the same field or department, the President may assign the command of the forces in such field or department without regard to seniority of rank."¹⁰⁶ Thus, the resolution relaxed the Articles of War by allowing the President to disregard seniority between two officers of equal rank. President Lincoln availed himself of the resolution on November 5, 1862, when he displaced Major General George B. McClellan by his junior, Major General Ambrose E. Burnside, and Major General Fitz-John Porter by his junior, Major General Joseph Hooker.¹⁰⁷ In the same year, the Attorney General advised the Secretary of the Navy that the President as Commander in Chief had no power to fix the relative ranks of line and staff officers in the navy without the authorization of Congress, to whom it belonged to make rules and regulations for the government of the land and naval forces.¹⁰⁸

Indeed, throughout our history Congress has provided rules and regulations for the army and navy. For example, in 1866, Congress enacted that no officer in the military or naval service was to be dismissed except pursuant to the sentence of a court martial or in commutation of such a sentence.¹⁰⁹ When a cadet engineer was discharged because there was no vacancy for him to fill, the Supreme Court upheld the statute and ruled that he was entitled to salary.¹¹⁰

fell within their statutory duties, since the militia became a part of the armed forces of the United States. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820).

A subsequent Attorney General's ruling found that a Navy regulation that permitted staff officers of the Marine Corps to be detached from headquarters and given other duties contravened the governing statutes and was therefore illegal. 30 OP. ATT'Y GEN. 234 (1913).

105. In *United States v. Symonds*, 120 U.S. 46 (1887), the Supreme Court held that the Secretary of the Navy, acting alone or by direction of the President, had no power to order that a naval lieutenant who was in fact performing sea service should be paid at the rate fixed for shore service. *Glavey v. United States*, 182 U.S. 595 (1901), reached the same result for a civilian employee.

106. Act of Apr. 4, 1862, 12 Stat. 617. See also Act of Dec. 21, 1861, ch. 1, § 4, 12 Stat. 329.

107. 5 RICHARDSON, *supra* note 24, at 3325.

108. 10 OP. ATT'Y GEN. 413 (1862); accord, 13 OP. ATT'Y GEN. 9 (1869); 21 OP. ATT'Y GEN. 46 (1894).

109. Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92.

110. *United States v. Perkins*, 116 U.S. 483 (1886). The Act was not intended to

Justice Black observed in *Reid v. Covert*:¹¹¹

Moreover, it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war.¹¹²

And it is true that sometimes the Court, after finding that Congress has authorized the President to establish a court martial or military commission, has said that it was not called on to decide whether he might do so without statutory authorization.¹¹³ But Chief Justice Marshall, sitting on circuit in 1823, attributed the legality of the army regulations solely to statute:

A legislative recognition of the actually existing regulations of the army must be understood as giving to those regulations the sanction of the law; and the subsequent words of the sentence authorize the secretary of war to alter those regulations with the approbation of the president.¹¹⁴

In 1853, President Pierce issued a "System of Orders and Instructions" for the Navy. Attorney General Caleb Cushing replied to an inquiry from the Secretary of the Navy as to the legality of these rules.

On the letter and theory of the Constitution the President has no separate legislative powers. The Constitution has carefully distinguished the two powers, the executive or administrative, and legislative, one from the other. The President, whether as Executive of the United States, or as commander-in-chief of the Army and Navy, has no legislative power of himself alone, except in his peculiar relation to, and conjunction with, the two Houses of Congress. But the "System of Orders and Instructions" is, in my judgment, an act in its nature essentially and emphatically legislative, not executive, and, therefore, can have no legality, unless or until sanctioned by Congress, either by previous authorization, or by subsequent enactment, neither of which grounds of legality does it possess. . . .

In the views thus presented, it is not intended to say that the President, as commander-in-chief of the land and naval forces, has not some power to issue directions and orders. So has a commander in command of a squadron, or a general in the field. But such

limit the power of the President and the Senate to remove an officer by the nomination and approval of a replacement. *Blake v. United States*, 103 U.S. 227, 236 (1880).

111. 354 U.S. 1 (1957).

112. *Id.* at 78.

113. *E.g.*, *Ex parte Quirin*, 317 U.S. 1, 29 (1942); *Swaim v. United States*, 165 U.S. 553, 558 (1897). *See also* *Kurtz v. Moffitt*, 115 U.S. 487, 503 (1885); *McElrath v. United States*, 102 U.S. 426, 437 (1880). *But see* *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1858); 21 OP. ATT'Y GEN. 430, 441-42 (1896).

114. *United States v. Maurice*, 26 F. Cas. 1211, 1215 (No. 15747) (C.C.D.C. Va. 1823).

orders and directions, when issued by the President, must be within the range of purely executive or administrative action.¹¹⁵

The practice was for Congress to adopt by statute such rules of the Secretary of the Navy as it wished to give the force of law.¹¹⁶ But in 1862 it enacted:

That the orders, regulations, and instructions heretofore issued by the Secretary of the Navy be, and they are hereby, recognized as the regulations of the Navy Department, subject, however, to such alterations as the Secretary of the Navy may adopt, with the approbation of the President of the United States.¹¹⁷

In 1886, the Supreme Court attributed the validity of the navy regulations to their adoption by Congress.¹¹⁸ In 1949, the Court held invalid a navy regulation that extended court martial jurisdiction beyond the term of enlistment in which the offense occurred because it conflicted with the governing statute.¹¹⁹

It is sometimes said that President Lincoln adopted army regulations on his sole authority when he promulgated General Orders 100, the Lieber Code.¹²⁰ But this was merely a codification of the international law of war and possessed only the authority of expert opinion.¹²¹

In the actual conduct of war, Congress has for the most part left to the President the authority conferred upon a commander by the common law of war. These powers and their limitations have been spelled out in a number of Supreme Court decisions. A declaration of war puts the President in the position of a military commander in a legitimate state of war.

His duty and power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States.¹²²

But the Commander in Chief may not annex conquered territory¹²³ and may only confiscate enemy property out of military necessity—

115. 6 OP. ATT'Y GEN. 10, 14-26 (1853).

116. *E.g.*, Act of Aug. 5, 1854, ch. 268, § 4, 10 Stat. 583, 587; Act of Mar. 3, 1859, ch. 75, § 2, 11 Stat. 407.

117. Act of July 14, 1862, ch. 164, § 5, 12 Stat. 561, 565.

118. *Smith v. Whitney*, 116 U.S. 167 (1886).

119. *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949).

120. 6 RICHARDSON 44 (1897 ed.).

121. Freidel, *General Orders 100 and Military Government*, 32 MISS. VALLEY HIST. REV. 541 (1946).

122. *Fleming v. Page*, 50 U.S. (9 How.) 603, 614-15 (1850).

123. Goods imported from Tampico during the Mexican War were required to pay duty upon entering the United States in 1847. *Id.*

not for gain.¹²⁴ True, he may institute martial law in the conquered territory and may try the conquered by court martial.¹²⁵ Indeed, as long as the military government persists, he may try American civilians who have accompanied the armed forces by court martial.¹²⁶ The military commander may impose import duties.¹²⁷ He may institute a provisional government and may enact law to be administered by the provisional government.¹²⁸ He may establish courts and the judgments of those courts are conclusive.¹²⁹ Apparently the provisional government has legal standing until Congress replaces it.¹³⁰

But the commander's power does not extend beyond the necessity of the situation.¹³¹ For instance, a prize court is not necessary to successful occupation; therefore, if the commander attempts to establish a prize court, its judgments are null.¹³² In domestic territory, a military commander may exercise the powers of civil government only in a theater of war or in conquered rebellious territory.¹³³ When the President or his delegate has suspended the writ of habeas corpus, this has been upheld only when specifically authorized by statute.¹³⁴ Ci-

124. *United States v. Alexander*, 69 U.S. (2 Wall.) 417 (1864).

125. *In re Yamashita*, 327 U.S. 1 (1946); cf. *In re Egan*, 8 F. Cas. 367 (No. 4303) (C.C.N.D.N.Y. 1866).

126. *Madsen v. Kinsella*, 343 U.S. 341 (1952). By the time of *Reid v. Covert*, 354 U.S. 1 (1957), the military government of Germany had ended.

127. *Dooley v. United States*, 182 U.S. 222 (1901); *Cross v. Harrison*, 57 U.S. (16 How.) 164 (1853).

128. *United States v. Diekelman*, 92 U.S. 520 (1875); *Leitensdorfer v. Webb*, 61 U.S. 176 (1858).

129. *Mechanics' and Traders Bank v. Union Bank*, 87 U.S. (22 Wall.) 276 (1875); *Lewis v. Cocks*, 90 U.S. (23 Wall.) 466 (1874); *New Orleans v. New York Mail S.S. Co.*, 87 U.S. (20 Wall.) 387 (1874); *Burke v. Miltenberger*, 86 U.S. (19 Wall.) 519 (1874); *The Grapeshot v. Wallerstein*, 76 U.S. (9 Wall.) 129 (1870). However, the personnel of the occupying army are not subject to the jurisdiction of the provisional court civilly [*Dow v. Johnson*, 100 U.S. 158 (1880)] or criminally [*Coleman v. Tennessee*, 97 U.S. 509 (1879)].

130. *Santiago v. Nogueras*, 214 U.S. 260 (1909); *Rose v. McNamara*, 375 F.2d 924 (D.C. Cir.), cert. denied, 389 U.S. 856 (1967).

131. *Raymond v. Thomas*, 91 U.S. 712 (1876).

132. *Jecker v. Montgomery*, 54 U.S. (13 How.) 498 (1851).

133. *Johnson v. Duncan*, 3 Martin (O.S.) 530 (La. 1815) (declaration of martial law in New Orleans by General Andrew Jackson held illegal). During the same war, the Supreme Court of New York ruled that three arrests of civilians by the military were illegal. An attachment against the commanding general was issued in *Matter of Stacy*, 10 Johns. 127 (N.Y. 1813); and damage suits against the officers responsible for detention were upheld in *McConnell v. Hampton*, 12 Johns. 234 (N.Y. 1815) and *Smith v. Shaw*, 12 Johns. 257 (N.Y. 1814).

134. During the Civil War, President Lincoln undertook to suspend the writ of habeas corpus. 5 RICHARDSON 3219-3480. Every court that passed on executive suspension of the writ of habeas corpus held it illegal. *In re Kemp*, 16 Wis. 382 (1863); *Ex parte Field*, 9 F. Cas. 1 (No. 4761) (C.C.D. Vt. 1862); *Ex parte Benedict*, 3 F. Cas. 159 (No. 1292) (D.C.N.D.N.Y. 1862); *Ex parte Merryman*, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861). See also *Ex parte Orozco*, 201 F. 106 (D.C.W.D.

vilians may not be subjected to military trial in friendly territory in which the civil courts are open and able to function.¹³⁵

By the common law of war, a military commander has certain powers with regard to property. He may destroy friendly property in order to prevent it from falling into the hands of the enemy if it will be of military assistance to him, and it is not necessary to pay compensation to the owner.¹³⁶ In case of immediate necessity, a military commander in the field may appropriate friendly property in order to put it to beneficial use; but if he acts without reasonable grounds to believe that there is a pressing emergency he is personally liable in damages.¹³⁷ Thus, only "an immediate and impending danger from the public enemy, or an urgent necessity for the public service can justify the taking of private property to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public."¹³⁸

If, however, the property is taken for use in a genuine emergency, the commander has acted lawfully and the United States is liable for the value of the property under the eminent domain clause.¹³⁹ On several occasions during the Civil War, an assistant quartermaster commandeered steamboats for a brief period. The Court of Claims found that there had been "imperative military necessity" and awarded com-

Tex. 1912). Congress was thus forced to pass an act authorizing the suspension of the writ "in any case," the suspension to endure as long as the rebellion and to incorporate certain safeguards. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755. Presidential suspensions of the writ under the authority of this statute were upheld. *In re Fagan*, 8 F. Cas. 947 (No. 4604) (D.C.D. Mass. 1863); *In re Dunn*, 8 F. Cas. 83 (No. 4171) (D.C.S.D.N.Y. 1863); *In re Oliver*, 17 Wis. 703 (1864).

135. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

On December 7, 1941, acting under the Organic Act for the government of Hawaii and with the approval of the President, the Governor of Hawaii suspended the writ of habeas corpus and placed the territory under martial law. The majority of the Supreme Court held that when the Organic Act authorized martial law it implicitly incorporated the open court doctrine; therefore, the trial of civilians by courts martial was illegal. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). But see *Ex parte Quirin*, 317 U.S. 1 (1942), where the Court upheld the trial by military commission within the United States of the seven "Nazi saboteurs." They were said to be unlawful enemy belligerents because they had passed through the defense lines of the country and had discarded their uniforms. As such, they were made subject to trial by a military tribunal under the law of war by the Articles of War. Their guilt or innocence of the offense of planning to commit sabotage was for the military commission to decide and was not triable by habeas corpus. *Accord*, *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). The decision seems wrong; see Wolfe Tone's Case, 27 How. St. Tr. 614 (1798).

136. *United States v. Caltex*, 344 U.S. 149 (1952). See also *National Bd. of Y.M.C.A. v. United States*, 395 U.S. 85 (1969).

137. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1852).

138. *Id.* at 134.

139. U.S. CONST. amend. V.

pensation; the Supreme Court affirmed in *United States v. Russell*.¹⁴⁰

Extraordinary and unforeseen occasion[s] arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized, or appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably, such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defenses for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war or clothing . . . where the necessity for such reinforcement or supplies is extreme and imperative . . . provided it appears that other means of transportation could not be obtained, and that the transports impressed were imperatively required for such an immediate use.¹⁴¹

This rule of immediate necessity confines only the military and not Congress. Congress has provided for the taking of private property in time of war and the payment of just compensation, and all that is needed to justify the action is that the taking bear a relation to a legitimate objective.¹⁴²

As we have seen, President Truman entered the Korean War on the theory that his title of Commander in Chief authorized him to do so. During the steel strike of 1952, he seized the steel mills on the theory that the same title authorized him to produce steel to support his war. In *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁴³ the district court granted the steel owners an injunction on the ground that the seizure of property required legislative authorization. The court of appeals struck down the injunction, stating that irreparable harm was not threatened.¹⁴⁴ So inappropriate were the decisions on seizure in the midst of military operations that in the Supreme Court the commander-in-chief clause was ignored.¹⁴⁵ The case went off on the separation of powers, with six Justices holding that legislative authority controlled and three Justices offering a theory of inherent executive power.

Occasionally one encounters a rash overstatement that seems to

140. 80 U.S. (13 Wall.) 623 (1871).

141. *Id.* at 627, 628.

142. See, e.g., *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

143. 103 F. Supp. 569 (D.D.C.), *aff'd*, 343 U.S. 579 (1952).

144. 197 F.2d 582 (D.C. Cir. 1952).

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

say that the Commander in Chief is emancipated from law, but on inspection the intimation proves to be entirely unfounded. Such a case is *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*¹⁴⁶ By the Civil Aeronautics Act,¹⁴⁷ decisions of the Civil Aeronautics Board on foreign air routes were subject to approval, denial, or alteration by the President but were then reviewable by a court of appeals. However, orders granting certificates of convenience and necessity to foreign carriers that had been approved by the President were exempt from judicial review. The Court of Appeals for the Fifth Circuit interpreted the statute to permit it to review an order for a foreign route approved by the President¹⁴⁸—which in this case meant Presidential Assistant Edwin Locke, Jr.¹⁴⁹—because it was granted to a citizen carrier. The Supreme Court reversed, holding that all orders dealing with foreign routes were exempt from judicial review, whether granted to a citizen carrier or an alien carrier. It rested this interpretation of the statute on considerations of policy. Four other Justices concurred in an opinion by Justice Jackson:

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. . . . But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.¹⁵⁰

Yet the decision to license or not to license was confided to the President by statute, not by the Constitution. Clearly, the President has no power to grant or withhold permission to engage in foreign commerce without legislative authorization. Indeed, in the absence of statute, neither the Civil Aeronautics Board, the President, nor the courts might restrict international air traffic. This emerges clearly in *United States v. Western Union Telegraph Co.*,¹⁵¹ in which District Judge Augustus Hand held that the Commander in Chief had no power to enjoin the landing of a cable from Barbados at Miami without statutory authorization.

Throughout our history, the power of the President to direct troops has been dependent upon legislative authorization. But let us

146. 333 U.S. 103 (1948).

147. Civil Aeronautics Act of 1938, ch. 601, § 1006, 52 Stat. 973.

148. *Waterman S.S. Corp. v. Civil Aeronautics Bd.*, 159 F.2d 828 (5th Cir. 1947).

149. COMMITTEE ON PUBLIC ADMINISTRATION CASES, *THE LATIN AMERICAN PROCEEDING* 90 (1949).

150. *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).

151. 272 F. 311 (S.D.N.Y. 1921), *rev'd on stipulation*, 260 U.S. 754 (1922).

suppose that Alexander Hamilton's proposal had been adopted and the President had "the entire direction of war, when declared or begun."¹⁵² Such a constitutional grant would still not authorize him to declare or begin a war.

President Nixon, to be sure, did not begin the war in South Vietnam. He certainly might have withdrawn the troops and might have defended them while withdrawing them. Instead, he has spent three years in withdrawing troops and has promised South Vietnamese President Thieu that "Vietnamization" will not be carried to a point that "endangers the right of self-determination for the people of South Vietnam."¹⁵³ The commander-in-chief clause gives no authority to use troops to guarantee another government. That could not be done even by treaty.

Aside from this, President Nixon initiated another war on his own. By the test laid down by Chief Justice Marshall in *The Exchange v. McFaddon*,¹⁵⁴ the invasion of Cambodia in April 1970, was, to use the language currently popular, the "functional equivalent"¹⁵⁵ of an act of war:

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war; and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful prettexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power is never understood to extend to a military force; and an army marching into the dominions of another sovereign may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privilege by its irregular and improper conduct. It may, however, well be questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.¹⁵⁶

152. See text accompanying notes 45-50 *supra*.

153. 5 Weekly Comp. of Pres. Doc. No. 24, at 821 (June 16, 1969).

154. 11 U.S. (7 Cranch) 116 (1812).

155. Under Secretary Katzenbach called the Tonkin Gulf Resolution "the functional equivalent of a declaration of war." *Senate Hearings, supra* note 8, at 82.

156. 11 U.S. (7 Cranch) 140-41 (1812). John R. Stevenson, Legal Adviser of the State Department, has attempted to effect a confusion between international and municipal law. He quotes publicists who say that there are circumstances in which it is lawful at international law for a state to enter the territory of a neutral power and implies that the President may do anything the United States may do. *Hearings on*

When he announced the Cambodian invasion on April 30, 1970, President Nixon asserted that this was by invitation. "Cambodia, as a result of this, has sent out a call to the United States, to a number of other nations, for assistance."¹⁵⁷ But the Cambodian Government denied that it had requested or consented to the invasion.¹⁵⁸ Assistant Attorney General Rehnquist said, "Whatever protest may have been uttered by the Cambodian government was obviously the most perfunctory, formal sort of declaration."¹⁵⁹ Did he expect Cambodia to declare war on the United States? Did he suppose that Cambodia really welcomed the foreseeable disasters that would result from moving the war to her soil?

But we are not concerned with the grievances of Cambodia; we are concerned with the significance of the action for American constitutional law. Rehnquist asserted that the invasion was legal at municipal law: "The President's determination to authorize incursion into these Cambodian border areas is precisely the sort of tactical decision confided to the Commander-in-Chief in armed conflict."¹⁶⁰ Does this mean that strategic decisions belong to Congress and tactical decisions to the Commander in Chief?

Faced with a substantial troop commitment to such hostilities made by the previous Chief Executive, and approved by successive Congresses, President Nixon had an obligation as Commander-in-Chief of the country's armed forces to take what steps he deemed necessary to assure their safety in the field.¹⁶¹

If President Nixon should decide to bomb China and the Soviet Union as a tactical measure to protect American soldiers in South Vietnam, presumably this would fall within his power as Commander in Chief as defined by Rehnquist.

The framers of the Constitution could not have been so aware as we are of the danger of entrusting the power to commit acts of war to a single man; but they were sufficiently aware. They left the Commander in Chief free to repel sudden attacks on the United States; all other war power they entrusted to Congress.

If we are to summarize what can be learned of the meaning of the

Congress, the President, and the War Powers Before the Subcomm. on Nat'l Security Policy and Scientific Developments of the House Comm. on Foreign Affairs, 91st Cong., 2d Sess. 547-48 (1970) [hereinafter cited as *House Hearings*]. International law permits the United States to make war, but the Constitution reserves the war power to Congress. See note 99 *supra*. See also Rogers, *The Constitutionality of the Cambodian Invasion*, *House Hearings* 497.

157. 6 Weekly Comp. of Pres. Doc. No. 18, at 597 (May 4, 1970).

158. See the collection of statements in *House Hearings* at 546 n.8.

159. *Id.* at 544.

160. *Id.*

161. *Id.*

commander-in-chief clause from history, from judicial decisions, from opinions of the Attorneys General and from statutes, we come to a very simple formula: The Constitution gives the Commander in Chief no authority save response to sudden attack. He possesses certain powers under the common law of war, but these may be withdrawn by statute. In all other respects his power is dependent upon affirmative statutory authorization. And both he and Congress are subject to the Constitution.

This is not to say that the framers intended the office of Commander in Chief to be entirely empty. They made provision for calling it into play in its appropriate realm: "The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, *or in any department or office thereof.*"¹⁶² The situation of the Commander in Chief under article II may be compared with that of the courts under article III. The courts possess judicial power by virtue of the Constitution, but except for the original jurisdiction of the Supreme Court, their jurisdiction is entirely statutory.¹⁶³ Congress must affirmatively grant jurisdiction in order to call their judicial power into play. Similarly, Chief Justice Stone stated:

The Constitution thus invests the President as Commander in Chief with power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.¹⁶⁴

III

LISTS OF WARS

Invariably, those who contend that the commander-in-chief clause authorizes the President to initiate military action rest their argument, not on the historic meaning of the term or on case law, but on purported executive precedents.¹⁶⁵ The State Department memorandum

162. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

163. *Ex parte McCordle*, 73 U.S. (6 Wall.) 318 (1867).

164. *Ex parte Quirin*, 317 U.S. 1, 26 (1942).

165. The first such list, published in 1912, accompanied a memorandum by the Solicitor of the State Department, J. Reuben Clark, and noted 41 cases of American intervention abroad between 1812 and 1910. J. CLARK, *RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES* (3d ed. 1934).

In 1934, the State Department issued a revised edition that added to the appendix cases or clusters of cases under the names of 11 countries in which intervention, by one definition or another, had occurred. Most of these actions were actually or ostensibly for the protection of citizens.

justifying President Johnson's entry into the Vietnam War did not offer a list of precedents, but it asserted that "[s]ince the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the 'undeclared war' with France (1798-1800)."¹⁶⁶ In 1967, the State Department brought out a new list of 137 *Armed Actions Taken by the United States without a Declaration of War, 1798-1967*.¹⁶⁷ In 1970, the Library of Congress prepared for the Subcommittee on National Security Policy and Scientific Developments of the House Committee on Foreign Affairs a list of "Instances of Use of United States Armed Forces Abroad, 1798-1970."¹⁶⁸ This list is a conflation of an earlier list by former Assistant Secretary of State James Grafton Rogers¹⁶⁹ and the 1967 State Department list; it runs to 165 cases.

On April 26, 1971, Senator Barry Goldwater published in the *Congressional Record* a list of what he called five declared wars and 153 "military actions."¹⁷⁰ This too is based on the Rogers list; it is supplemented principally from the 1967 State Department list. How-

In M. OFFUTT, *THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES* (1928), the author listed 76 cases of hostile action abroad between 1813 and 1926. On July 10, 1941, Senator Connally, defending President Roosevelt's occupation of Iceland, cited 85 cases of the use of armed force abroad. 87 CONG. REC. 5930-31 (1941). These cases were taken from the 1934 revision of Solicitor General Clark's list, *supra*. In 1945, James Grafton Rogers, a former Assistant Secretary of State, itemized 149 cases of American intervention abroad between 1798 and 1941. In no more than a dozen or two of these had Congress authorized "the employment of guns and men." J. ROGERS, *WORLD POLICING AND THE CONSTITUTION* (1945). In 1950, the State Department supported its argument that the Commander in Chief had possessed the right to enter the Korean War by republishing Senator Connally's earlier list of 85 cases. U.S. DEP'T of State, *Authority of the President to Repel the Attack in Korea*, 23 DEP'T STATE BULL. 173, 177-78 (1950). And in 1956, the Library of Congress prepared for John W. McCormack, Majority Leader of the House of Representatives, a list of actions undertaken by the President as Commander in Chief. LIBRARY OF CONGRESS, *THE POWERS OF THE PRESIDENT AS COMMANDER IN CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES*, H.R. DOC. NO. 443, 84th Cong., 2d Sess. (1956). A majority of the cases were domestic actions authorized by statute.

166. Meeker, *supra* note 1, at 484. This "undeclared war" was the naval war with France (1798-1801), which the Supreme Court called an imperfect or limited war because the war-making authority, Congress, had authorized only limited hostilities. See text accompanying notes 367-69 *infra*. Apparently, the figure "at least 125" was determined by subtracting from James Grafton Rogers' 149 cases [see note 165 *supra*] the "dozen or two" cases in which Congress had authorized hostilities.

167. U.S. DEP'T of State, Research Project No. 806A (August 1967). Some of Rogers' 149 cases [see note 165 *supra*] were eliminated and others were subdivided.

168. HOUSE COMM. ON FOREIGN AFFAIRS, 91ST CONG., 2D SESS., *BACKGROUND INFORMATION ON THE USE OF UNITED STATES ARMED FORCES IN FOREIGN COUNTRIES* 50-57 (Comm. Print 1970).

169. See note 165 *supra*.

170. 117 CONG. REC. S5640-46 (daily ed. Apr. 26, 1971).

ever, the Senator's list was followed by a helpful analysis that reduced to 56 the cases of "hostile operations involving actual gunfire or imminent threat of war" and that segregated out of the 153 "sixty-three military operations arguably initiated under prior legislative authority."¹⁷¹ On August 28 the Senator characterized his 153 hostile operations as 150 "wars."¹⁷² On December 18 he asserted that by continuing study he had learned that there had been "at least 192 military actions undertaken by U. S. forces without a declaration of war, eighty-one of which involved actual combat or ultimatums tantamount to the use of force."¹⁷³ Without supplying a list, Solicitor General Erwin N. Griswold gave a new count in a speech inserted in the *Congressional Record* on August 3, 1971, by Senator Goldwater.

Indeed, if the record is closely examined, one can count one hundred sixty-one separate instances in which this nation was engaged in hostilities against a foreign power, between 1798 and 1945, including the Civil War; and only six of these involved a formal declaration of war.¹⁷⁴

For purposes of analysis, the latest official list, that prepared by the State Department in 1967, is used here. The proportions of cases in the different categories remain fairly constant through all the lists. Sometimes a case might properly fall under more than one heading, but it is placed here under what seems the most appropriate title. The cases in the State Department list can be categorized thus.

TYPE OF ACTION	NUMBER OF CASES
1. Individual actions specifically authorized by Congress	7
2. Naval self-defense	1
3. Enforcement of law against piracy, no trespass	1
4. Enforcement of law against piracy, technical trespass	7
5. Landing to protect citizens before 1862	13
6. Landing to protect citizens, 1862-1893	16
7. Landing to protect citizens, 1893 to present	40
8. Invasion of foreign or disputed territory, no statute, no combat	10
9. Invasion of foreign or disputed territory, no statute, combat	10
10. Reprisals against aborigines	9
11. Other reprisals not authorized by statute	4
12. Minatory demonstrations without combat	6
13. Intervention in Panama	1

171. *Id.* at S5646-47.

172. 54 SATURDAY REV., Aug. 28, 1971, at 17.

173. 54 SATURDAY REV., Dec. 18, 1971, at 28.

174. 117 CONG. REC. S12968 (daily ed. Aug. 3, 1971).

14. Protracted occupation of Caribbean states	6
15. Actions anticipating World War II	1
16. Bombing of Laos	1
17. Korean and Vietnamese Wars	2
18. Miscellaneous	2
	<hr/>
	137 Total

The first category in this table includes the congressionally authorized wars with France,¹⁷⁵ Tripoli,¹⁷⁶ and Algiers,¹⁷⁷ two expeditions into Florida pursuant to statute,¹⁷⁸ a naval expedition authorized by Congress to demand the satisfaction of claims by Paraguay in 1858,¹⁷⁹ and the ratification by Congress of President Wilson's seizure of Vera Cruz as an act of reprisal.¹⁸⁰ As for the second category, naval vessels have a right of self-defense under international and municipal law.

The lists of military actions abroad show a gradual broadening of activity. The first federal criminal act was passed in 1790. It made piracy against American ships, citizens, and property in American waters and on the high seas a crime and was authority for naval protection to American shipping on the high seas.¹⁸¹ The problem of piracy had become acute by 1819; boats from Cuba or other Spanish islands regularly raided American shipping and fled to safety ashore. On March 3, 1819, Congress passed an act by which the President was authorized and requested "to employ so many of the public armed vessels as, in his judgment, the services may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations."¹⁸² On December 20, 1822, Congress appropriated \$160,000 for the suppression of piracy and to afford "effectual protection to the citizens and commerce of the United States."¹⁸³ On December 22, 1822, David Porter was appointed to the command of the West India squadron and ordered to suppress piracy, enforce the laws concerning the slave trade, and afford "effectual protection to the citizens and commerce of the United States."¹⁸⁴ If the crews of vessels that he

175. See text accompanying notes 371-72 *infra*.

176. See text accompanying note 362 *infra*.

177. See text accompanying note 363 *infra*.

178. See text accompanying notes 373-74 *infra*.

179. See text accompanying note 376 *infra*.

180. See text accompanying note 379 *infra*. Wilson requested the joint resolution but acted when it had passed only one house because he wished to prevent a German vessel from landing arms.

181. Act of Apr. 30, 1790, ch. 9, §§ 8-10, 1 Stat. 112, 113-14.

182. Act of Mar. 3, 1819, ch. 77, 3 Stat. 510.

183. Act of Dec. 20, 1822, ch. 1, 3 Stat. 720.

184. *American State Papers*, 2 NAV. AFFAIRS 652 (1860).

had just cause to suspect of piracy should retire into the settled parts of the islands, Porter should enter a port and even land to capture them, giving notice of his purpose to the local authorities and only acting in aid of and cooperation with them. If the pirates should retreat into unsettled parts of the islands, Porter might pursue them unless forbidden by the local government. Prisoners so taken should be delivered to the local authorities, but if these should refuse to prosecute he might bring his prisoners to his ships and then communicate with the Navy Department. The rather desperate justification for these orders offered by the Secretary of the Navy was that such action was not an invasion because pirates were the enemies of the whole human race.¹⁸⁵

This legal theory apparently did not satisfy President Monroe, for in his annual message to Congress in 1824 he described the Cuban problem: "Whether those robbers should be pursued on the land, the local authorities be made responsible for these atrocities, or any other measure be resorted to to suppress them, is submitted to the consideration of Congress."¹⁸⁶ Congress took no action, although as early as January 1822, naval officers had landed in Cuba and burned boats and villages. This practice was continued through 1825 and ended land-based piracy in the Caribbean.

The protection of citizens from piracy grew into the broader practice of landing sailors, marines, or troops to rescue or protect citizens and their property, under categories 5, 6, and 7. The protection of citizens abroad was considered permissible at international law in the 18th century. In other states, the power to make war was in the same hands as the function of diplomatic intercession, and the question whether the protection of citizens involved an act of war had no significance for municipal law. But under the Constitution of the United States, the power to authorize acts of war belonged to Congress. The President was confined to diplomatic intercession for the protection of citizens. When, in his proclamation of neutrality in 1794, President Washington threatened to withdraw protection from citizens who did not observe neutrality, he undoubtedly meant that he would not extend diplomatic protection.¹⁸⁷

Chief Justice Marshall said of the protection of citizens in foreign lands:

The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protec-

185. *Id.*

186. 2 RICHARDSON, *supra* note 24, at 258.

187. 1 RICHARDSON 156.

tion of his own government; and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American government in his favor would be considered as a justifiable interposition.¹⁸⁸

Two later Supreme Court dicta¹⁸⁹ also speak of protection abroad as a right of citizenship.

A citizen may be threatened abroad in two ways. In the case put by Chief Justice Marshall above, a foreign government treats him oppressively. In the second case, he is threatened by politically unorganized aborigines or by the private actions of riotous or rebellious citizens in a foreign state, or is imperiled during civil war. In his *Right to Protect Citizens in Foreign Countries by Landing Forces*,¹⁹⁰ the germinal study from which all the lists emerged, J. Reuben Clark adopted John Bassett Moore's distinction between political and nonpolitical intervention. The former is "an intervention by one power in the local political affairs of another government."¹⁹¹ Nonpolitical intervention Clark calls "interposition," which has for its sole object

the protection of citizens or subjects either from the acts of government itself or from the acts of persons or bodies of persons resident within the jurisdiction of a government which finds itself unable to afford the requisite protection, until the government concerned is willing or able itself to afford the protection.¹⁹²

Clark applies this distinction to municipal law, suggesting that political intervention is an act of war and requires the approval of Congress.¹⁹³ Since his first example of political intervention is that "for the purpose of preserving a particular form of government," it is clear that Clark himself would have considered the intervention in Vietnam to lie beyond the power of the President.

However, it will be observed that Clark's definition of interposition, an action purportedly nonpolitical, includes "the protection of citizens . . . from the actions of the government itself"¹⁹⁴ as well as their protection from lawless or rebellious citizens of the foreign country. Clearly, military action against a foreign government in defense of citizens is an act of war, and Clark concedes "that such acts may lead to a state of war if resistance is encountered."¹⁹⁵ Our wars with

188. *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 120 (1804).

189. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872); *In re Neagle*, 135 U.S. 1, 64 (1889).

190. J. CLARK, *supra* note 165.

191. J. CLARK, *supra* note 165, at 24.

192. *Id.* at 25.

193. *Id.* at 24.

194. *Id.* at 25.

195. *Id.* at 40.

Tripoli¹⁹⁶ and Algiers¹⁹⁷ were authorized by Congress precisely for the protection of citizens against foreign governments. In 1827, Secretary of State Henry Clay advised that the navy might not use force to liberate American seamen unjustly imprisoned in a foreign port: "The employment of force is justifiable in resisting aggressions before they are complete. But when they are consummated, the intervention of the authority of government becomes necessary if redress is refused by the aggressor."¹⁹⁸ Congress undertook to deal with the problem for the first time in 1868 when it provided that if a citizen should be "unjustly deprived of his liberty by or under the authority of any foreign government" the President should attempt to secure his release by means "not amounting to acts of war."¹⁹⁹ Undeniably, there have been executive attacks on foreign governments for the protection of citizens and their property by acts amounting to acts of war. But such actions can be given legal standing only by act of Congress.

Yet an early circuit court opinion seems to deny this. In 1854, two rival companies in the business of conducting travelers over the Isthmus of Panama were seated at the mouth of the San Juan River in Nicaragua.²⁰⁰ One enjoyed British sponsorship and called itself the sovereign state of Greytown; the other, the Accessory Transit Co., was chartered by Nicaragua and enjoyed American patronage. Because of an insult to the American minister and alleged depredations against the Accessory Transit Co., the Secretary of the Navy dispatched Captain Hollins in the U.S.S. *Cyane* with orders to teach the people of Greytown that the United States would not tolerate these outrages, if possible without violence or destruction of life or property. Upon his arrival, Hollins demanded an indemnity of \$24,000; when Greytown failed to comply, he shelled the town. It had been evacuated and there was no loss of life, but the property damage was complete. One Durand, an American citizen whose property was destroyed in Greytown, sued Captain Hollins for damages. On circuit, Justice Nelson upheld the action as "an interposition of the executive abroad, for the protection of the lives or property of the citizen,"²⁰¹ which must rest in the discretion of the President because of the need for prompt and decided action.

It would be hard to find an opinion farther from the mark. The property purportedly protected was not American but that of a Nicaraguan corporation; Hollins' action, however, had destroyed American

196. See text accompanying note 362 *infra*.

197. See text accompanying note 363 *infra*.

198. 7 J. MOORE, DIGEST OF INTERNATIONAL LAW 163 (1906).

199. Act of July 27, 1868, ch. 249, § 3, 15 Stat. 223.

200. For a fuller narrative see Wormuth, *supra* note 3, at 743-46.

201. *Durand v. Hollins*, 8 F. Cas. 111, 112 (No. 4186) (C.C.S.D.N.Y. 1860).

property, that of the plaintiff. There was no feature of urgency, for Hollins received his orders in Washington, D.C. Finally, what occurred was not interposition to protect citizens or their property from impending harm, but reprisal for past misconduct. The two problems are distinct. Justice Nelson was a strongly partisan Democrat, and the action in question was that of Democratic President Pierce. Later, in a dissenting opinion in *The Prize Cases*,²⁰² Nelson was to assert that it was illegal for President Lincoln to impose a blockade against states in insurrection.

Another episode in the Pierce administration is often cited. In 1853, Martin Koszta, a Hungarian subject who had declared his intention of acquiring American citizenship but had not yet done so, was arrested in Smyrna and carried aboard the Austrian vessel *Hussar*. Captain Ingraham of the American sloop of war *St. Louis* learned of this, trained his guns on the *Hussar*, and demanded the release of Koszta. After a period of stalemate the two commanders accepted the arbitration of the French consul, who awarded Koszta to Ingraham. In the ensuing correspondence with the Austro-Hungarian government, Secretary of State Marcy conceded that Koszta was not a citizen but asserted that at international law the United States had the right to protect a domiciled alien.²⁰³ In his annual message to Congress on December 5, 1853, President Pierce justified the action as the defense of a citizen,²⁰⁴ and Congress eventually voted Captain Ingraham a gold medal.²⁰⁵ Thirty-seven years after the event, the Supreme Court in dictum said that the case illustrated the President's power to protect citizens.²⁰⁶ But Captain Ingraham acted without orders from the President or the Secretary of the Navy. It seems clear that his action was illegal when he undertook it but was ratified by Congress.

It is possible that the captains who made landings to rescue citizens before 1862 had orders from the Secretary of the Navy authorizing such action, as Commodore Porter had orders authorizing him to land in pursuit of pirates; but in neither case did the Secretary of the Navy have authority to issue such orders. As we have seen,²⁰⁷ the Secretary of the Navy did not acquire rulemaking power until 1862, when Congress adopted his earlier rules and gave him authority to make alterations with the approval of the President. A rule authorizing the highest naval officer on the spot, the commander in chief of a squadron or vessel, to make a landing to protect citizens appears in the printed

202. 67 U.S. (2 Black) 635, 682 (1862).

203. CONG. GLOBE, 33d Cong., 1st Sess. 80, 82 (1854).

204. 5 RICHARDSON 210.

205. Act of Aug. 4, 1854, 10 Stat. 594.

206. *In re Neagle*, 135 U.S. 1, 64 (1890).

207. See text accompanying note 117 *supra*.

naval regulations of 1893.²⁰⁸ The three relevant articles read:

On occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, he shall consult with the diplomatic representative or consul of the United States, and take such steps as the gravity of the case demands, reporting immediately to the Secretary of the Navy all the facts. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof.

The use of force against a foreign and friendly state, or against any one within the territories thereof, is illegal. The right of self-preservation, however, is a right which belongs to states as well as to individuals, and in the case of states it includes the protection of the state, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the state or its citizens may suffer irreparable injury. The conditions calling for the application of the right of self-preservation can not be defined beforehand, but must be left to the sound judgment of responsible officers, who are to perform their duties in this respect with all possible care and forbearance. In no case shall force be exercised in time of peace otherwise than as an application of the right of self-preservation as above defined. It can never be exercised with a view to inflicting punishment for acts already committed. It must be used only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required.

Whenever in the application of the above-mentioned principles it shall become necessary to land an armed force in foreign territory on occasions of political disturbance where the local authorities are unable to give adequate protection to life and property, the assent of such authorities, or of some one of them, shall first be obtained, if it can be done without prejudice to the interests involved.

These sections have been preserved in substantially the same form until the present day.²⁰⁹ It follows that the 40 landings in item 7 in the table above were undertaken under statutory authorization and cannot be called precedents for Executive action. What of the 16 landings between 1862 and 1893? It is quite possible—indeed, it seems probable—that the individual orders of captains contained instructions to rescue citizens; as item 5 shows, such action had already been carried out 13 times before the Secretary of the Navy was empowered to authorize it.

208. U.S. DEP'T OF THE NAVY, REGULATIONS FOR THE GOVERNMENT OF THE NAVY OF THE UNITED STATES, arts. 284-86 (1893) [hereinafter cited as 1893 REGULATIONS]. I owe this reference to Captain Francis P. Butler.

209. U.S. DEP'T OF THE NAVY, UNITED STATES NAVY REGULATIONS, arts. 0613-0615 (1948) [hereinafter cited as 1948 REGULATIONS]. I owe this reference to Commander Gerald H. Kaffer, Jr.

On the other hand, the rules of the Secretary of the Navy do not authorize the President to act, nor do they authorize the use of the army. President Buchanan confessed his legal incapacity "to enter the territories of Nicaragua even to prevent the destruction of the transit and to protect the lives and property of our own citizens on their passage"; nevertheless, he said, "on a sudden emergency of this character" any President would act.²¹⁰ This is the position endorsed by Dicey²¹¹ and seems the proper one.

Categories 10 and 11 contain 13 acts of reprisal²¹² not authorized by Congress and, in most cases, not authorized by the President or the Secretary of the Navy. In 1793, Thomas Jefferson as Secretary of State ruled that reprisal is an act of war and requires the approval of Congress.²¹³ In 1824, Commodore Porter was court-martialed for carrying out a reprisal against Fajardo, Puerto Rico; he was convicted, and suspended for six months, whereupon he resigned.²¹⁴ In 1835, the Senate unanimously adopted Henry Clay's view that the power to make reprisals was a branch of the war power and could not

210. 4 RICHARDSON 3047.

211. See note 23 *supra* and accompanying text.

212. Reprisal is "[a]n act of retaliation for some injury or attack; *spec.* in warfare, the infliction of similar or severer injury or punishment on the enemy; e.g. by execution of prisoners taken from them." 8 OXFORD ENG. DICTIONARY 485 (1961). At classical international law, reprisal was under some circumstances a lawful act that the victim had no right to resent, but it was a single measured response rather than a continuous program. Not included in the table is President Johnson's bombing on August 4, 1964, of the North Vietnamese bases of torpedo boats alleged to have attacked American vessels; the Tonkin Gulf Resolution [*supra* note 4] ratified this supposed reprisal.

On February 7, 1965, President Johnson introduced a new conception, "sustained reprisal." A "Phase II" operation against North Vietnam, to consist of a "continuous program of progressively more serious air strikes possibly running from two to six months" [3 THE PENTAGON PAPERS 289 (M. Gravel ed. 1971)], had been under discussion for some months, and gradually the policy of launching it when a plausible pretext could be found won agreement. *Id.* at 287-318. The White House statement of February 7 announced that "retaliatory attacks" had been carried out against North Vietnam in reprisal for attacks by South Vietnamese guerrillas on "two South Vietnamese airfields, two U.S. barracks areas, several villages and one town in South Vietnam." North Vietnam was held responsible because "Hanoi has ordered a more aggressive course of action" and "the attacks were only made possible by the continuing infiltration of personnel and equipment from North Vietnam." N.Y. Times, Feb. 8, 1965, at 14, col. 3. On February 8, the Joint Chiefs of Staff predicted: "As this program continues the realistic need for precise event association in this reprisal context will progressively diminish. A wide range of activities are within the scope of what may be stated to be provocations justifying reprisal." 3 THE PENTAGON PAPERS 319. This proved to be true. There ensued a campaign of bombing which, with some interruptions, has lasted seven years, and has far surpassed in magnitude anything the world had ever seen. Of course "sustained reprisal" is not what international law knew as reprisal but what it knew as war.

213. 7 J. MOORE, *supra* note 198, at 123.

214. J. ROGERS, *supra* note 165, at 97.

be delegated to the President.²¹⁵ The Navy Regulations expressly deny the right to make reprisals to naval commanders.²¹⁶

With respect to the remaining categories in the table, certain of the interventions are said to have been authorized by treaty. The only explicit authorization of this sort was a treaty with Cuba in 1903:

The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.²¹⁷

Under this provision, known as the "Platt amendment," President Theodore Roosevelt occupied Cuba from 1906 to 1909. The other treaty most commonly adduced as a justification for intervention was that of 1846 with New Granada, later Colombia. By article 35 of this treaty, New Granada guaranteed that transit across the Isthmus of Panama would be "open and free to the government and citizens of the United States."²¹⁸ In return, the United States guaranteed "the perfect neutrality of the before mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists,"²¹⁹ and guaranteed also "the rights of sovereignty and property which New Granada has and possesses over the said territory."²²⁰

No such political treaty can be self-executing in the sense that the President may enforce it as law without legislative implementation. Nor does either treaty purport to vest powers or obligations in the President; both refer to the United States rather than the President. Nor could any treaty alter the Constitution so as to authorize the President to carry out a military occupation without the consent of Congress. Finally, the terms of the 1846 treaty support none of the interventions that occurred. The guarantee of free transit was merely a pledge that New Granada would practice no discrimination against American travelers. For many years the United States itself gave the guarantee of neutrality its obvious meaning: it was assurance against interference with the isthmus by a foreign power.²²¹ But the treaty

215. 7 J. MOORE, *supra* note 198, at 126-27.

216. 1893 REGULATIONS, art. 285; 1948 REGULATIONS, art. 0614.

217. Treaty with Cuba, May 22, 1903, art. III, 33 Stat. 2248, 2251.

218. Treaty with New Granada, Dec. 12, 1846, 9 Stat. 881, 897.

219. *Id.* at 898-99.

220. *Id.* at 899.

221. R.W. Russell, *The United States Congress and the Power to use Military Force Abroad*, Apr. 15, 1967, at 244-61 (unpublished doctoral thesis in Fletcher School of Law and Diplomacy Library).

came to be cited to justify the landing of marines in every case of civil war, riot, or disorder. In 1903, this treaty by which the United States guaranteed the sovereignty of New Granada over the isthmus was the pretext under which Theodore Roosevelt shielded Panamanian revolutionaries from the Colombian authorities and enabled them to overthrow the sovereignty of Colombia over the isthmus.

To summarize, of the State Department's 137 cases, 48 unquestionably had congressional authorization; one was a case of self-defense; six were merely minatory demonstrations. Some others involved only technical trespass. An undetermined number of cases were spontaneous actions by naval or military officers unsanctioned by the President, the Secretary of the Navy, or the Secretary of War; if these are valid precedents, they establish, not that the power to initiate hostilities belongs to the President, but that it belongs to every commissioned officer. Finally, a number of cases, such as the six occupations of Caribbean states in category 14, were unconstitutional actions by the President of great magnitude.

In 1912, in his monograph on *The Right to Protect Citizens in Foreign Countries* (the first serious discussion of the problem), J. Reuben Clark, the Solicitor of the State Department, opined that, with the exception of our political interventions in Cuba and Samoa, all the earlier cases could be regarded as nonpolitical interposition for the protection of citizens.²²² He suggested that they might fall within the President's constitutional power, but this opinion was "with no thought or pretense of more than a cursory consideration. It is entirely possible that a more detailed and careful study would lead to other or modified conclusions."²²³ His tentative argument turned on the fact that the President possessed executive power. Citizens were entitled to protection abroad at international law. International law is part of the law of the United States, and the President might therefore execute international law. It was an executive rather than a legislative act to carry out nonpolitical interposition.²²⁴ The weakness of the argument, of course, is that citizens of the United States have no rights whatever at international law. Foreign states owe duties to the United States and not to its citizens. The vindication of the rights of the United States at international law has been entrusted by the Constitution to Congress and not to the President.

Clark made no reference whatever to the commander-in-chief clause. It was not suggested that Clark's list of executive actions supported any action of the Commander in Chief until Senator Connally

222. J. CLARK, *supra* note 165, at 33.

223. *Id.* at 48.

224. *Id.* at 38-48.

in 1941 defended President Franklin Roosevelt's action in sending troops to Iceland as an exercise of an alleged power of the Commander in Chief to give orders to the armed forces, and cited Clark's list as evidence of that power.²²⁵ As we have seen, there was an immediate wedding of the commander-in-chief clause and the supposed precedents. The outcome has been the claim that the Commander in Chief possesses the war power, a claim put into effect in Korea and Indochina. None of the precedents was founded on such a claim. No valid precedent supports it.

IV

THE PRESIDENT AS UNIVERSAL PROVIDENCE

The executive power is a power and a duty to execute the laws; the President is dependent upon Congress for means to execute the laws. Only Congress may create subordinate executive offices; it may fix the duties of the officers, and the President may not alter the assignment of functions by Congress.²²⁶ This question arose in 1818 in *Gelston v. Hoyt*.²²⁷ President Monroe ordered the defendants, the collector and the surveyor of customs of New York, to seize a vessel for alleged violation of the Neutrality Act of 1794. But the statute allowed him to act only through the land and naval forces; therefore the Supreme Court held the defendants liable in tort. When, in 1918, the President seized the railroads under a statute that provided that this be done by the Secretary of War but gave the practical direction of the operation to the Secretary of the Treasury, a district court suggested that this was illegal; however, it did not find it necessary to decide the question.²²⁸

When the law prescribes a duty to an officer, the President cannot prevent his performing it:

To contend that the obligation imposed on the President to see that laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.²²⁹

In *Ex parte Hennen*,²³⁰ which held that when Congress vested the

225. See note 165 *supra*.

226. See text accompanying notes 100-04 *supra*.

227. 16 U.S. (3 Wheat.) 245, 330-32 (1818). See also *Hendricks v. Gonzalez*, 67 F. 351 (2d Cir. 1895).

228. *Muir v. Louisville & N.R.R.*, 247 F. 888, 894 (W.D. Ky. 1918). For a ruling that statutorily defined duties may not be shifted from one office to another, see 29 OP. ATT'Y GEN. 247 (1911).

229. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838); accord, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 171 (1803).

230. 38 U.S. (13 Pet.) 230 (1839).

power of appointment of an inferior officer in the head of a department the latter had an implied right to remove, the Supreme Court observed: "The President has certainly no power to remove."²³¹

The use of special instrumentalities or forces for the execution of the laws is also dependent upon affirmative action of Congress. It was under statutory authorization that President Washington called militia into the federal service to suppress the Whiskey Rebellion.²³² Later statutes enlarged his authority to employ the militia in cases of domestic disorder, and other acts have authorized him to use the army and navy for the same purpose.²³³ But the availability of these forces derives entirely from act of Congress.

Indeed, the very idea of the rule of law is the proposition that the executive is subject to law. At the time of the Revolution and in the early days of the Republic, it was thought that republican government differed from the monarchies of Europe precisely in this respect. This idea still dominates our jurisprudence. But in recent years it has been challenged by another idea, as yet inchoate, which intimates that the grant of executive power to the President carries with it a right to adopt initiatives that can only be called legislative. Those who advance it use language so cloudy as to render the idea unfit to solve any concrete problem. Nevertheless, the term "executive power," like the term "commander in chief," is cast into discussion in the expectation that it will emanate an aura of authority that will silence criticism. For example, Solicitor General Erwin N. Griswold has said:

Specifically, the Constitution provides explicitly that "The Executive power shall be vested in a President of the United States of America." Obviously this means something; and it is not merely a passive grant. The grant of Executive power is broad and general. It is made more concrete by the further provision that "The President shall be Commander-in-Chief of the Army and Navy of the United States," and the provision that "he shall take care that the laws be faithfully exercised." Our President is not, and never has been thought to be, from the time of Washington on to the present, a mere automaton, doing only what he is told; nor is he a mere moderator, standing by to carry out the directives of other officers and branches of the government. Of course, the President acts under the law. He is subject to numerous checks and balances. He can be widely controlled by Congress, through the appropriation power and otherwise and like all other officers, he is subject to impeachment. But as President, he has great powers—great Executive power because he is the Chief Executive—and we would not want to have it

231. *Id.* at 261.

232. Act of May 2, 1792, ch. 28, 1 Stat. 264.

233. H. CUMMINGS & C. MCFARLAND, *FEDERAL JUSTICE* 547 (1937).

otherwise. Any political organism needs a spokesman, someone with the capacity to lead, and marshal its forces, someone to meet emergencies, someone with the capacity to act, someone to speak, and in proper situations, to make decisions. That is what we mean by Executive power; and the Constitution expressly grants "The Executive power" to the President.²³⁴

This rhetoric is straight out of the dissenting opinion of Chief Justice Vinson in the *Steel Seizure Case*, which denied that the framers created "an automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake"; rather, he asserted, they established "an office of power and independence."²³⁵ Vinson used this notion to justify unauthorized executive seizure of property; Griswold uses it to defend unauthorized entry into war.

It is possible to recognize the integrity of executive power without subscribing to such a theory of inherent power. In *Meyers v. United States*,²³⁶ Chief Justice Taft held that the President's power to execute the laws implied a power to remove those subordinates whom he appointed; an act of Congress giving either or both houses a voice in removal was unconstitutional. The judiciary is similarly protected against legislative invasion of judicial power.²³⁷ Neither of these principles is analogous to Griswold's proposition that the Executive has some undefined power to invade the legislative domain. Nevertheless, three decisions of the Supreme Court are frequently offered as precedents by those who argue that there are circumstances under which the President may improvise a rule of law.

*In re Neagle*²³⁸ was decided in 1890. The Attorney General, whose actions were imputable to the President, authorized the United States marshal in San Francisco to give special protection to Justice Field when he went to California to sit on circuit because of threats made against him by two disappointed litigants, David S. Terry and his wife. Deputy Marshal Neagle was assigned to accompany Field, and when they encountered Terry in a railroad station, Neagle shot him. A justice of the peace issued a warrant for the arrest of Neagle and Field, but only Neagle was taken. A petition for a writ of habeas corpus was presented on his behalf to the United States circuit judge. The sheriff produced Neagle but demurred to the petition, so that the only evidence considered was the affidavits in support of the petition.

234. 117 CONG. REC. S12968 (daily ed. Aug. 3, 1971).

235. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 682 (1952) (Vinson, C.J., dissenting).

236. 272 U.S. 52 (1926).

237. *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry.*, 266 U.S. 42, 65-66 (1924).

238. 135 U.S. 1 (1890).

These established justifiable homicide. But the writ could not issue unless Neagle was "in custody for an act done or omitted in pursuance of a law of the United States. . . ." It was therefore necessary to show that Neagle was performing a duty imposed by national law when he shot Terry, or Neagle, and perhaps Field, would have to stand trial for murder in a California court. Justice Miller said, in effect, that national law required Justice Field to go on circuit, and this implied a law that he might be protected while performing this national function. Statutes were not the only laws; federal laws might arise in connection with federal legal relations without explicit enactment.

But if the obligation to protect Supreme Court Justices on circuit was a law of the United States, why should a deputy marshal need the President's authorization to execute it? Executing this law would fall within his appointed duties; in fact, a command of the President that he not execute it would be void. Yet Justice Miller rested his entire argument concerning executive power on the special instructions of the Attorney General: "The correspondence . . . is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defense of Mr. Justice Field."²³⁹ This seems to imply that the President created the law that Neagle executed.

But Miller went on to argue that there was also statutory authorization for the killing. A federal act gave a United States marshal the same authority as a sheriff in the state in which he acted. A sheriff might keep the peace; and "there is a peace of the United States"²⁴⁰ that a marshal may enforce. This is not persuasive. The sheriff kept the peace of California by enforcing California laws; a marshal would keep the peace of the United States by enforcing federal laws. But there was no federal law against killing Supreme Court Justices. This can be seen if one asks in what court Terry would have been tried if he had shot Field; obviously he could not have been tried in a federal court but only in a California court for violation of a California law. Nor is there a federal law against murder by public officers. The upshot of the decision was that the guilt of Neagle could not be canvassed in either a state or a federal court after this ex parte proceeding in the federal circuit court. Justice Lamar wrote a vigorous dissenting opinion in which Chief Justice Fuller joined.²⁴¹ The President was not authorized to make laws; that would be to invade the domain of Con-

239. *Id.* at 67-68.

240. The statute read: "The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof." Act of July 29, 1861, ch. 14, § 788, Rev. Stat. 147 (1874).

241. 135 U.S. at 76.

gress. Nor did the "peace of the United States" include the enforcement of the laws of California.

More frequently than is wholesome, the Supreme Court oversteps the limits in hard cases and makes bad law. No doubt the other Justices wished an esteemed colleague to be protected; and they can hardly have failed to have put themselves in his place. Moreover, the spectacle of Field on trial for murder in a California court would have been scandalous and would have had disturbing implications for federalism. But these good motives produced a decision that is now used for quite different purposes, to support an assumed penumbra of executive power.

*In re Debs*²⁴² is another such case. The Pullman strike of 1894 was aimed at all trains drawing Pullman cars. Eager for a showdown with the American Railway Union, the railroads operating out of Chicago attached Pullman cars to as many trains as possible, and these too were struck. There was a certain amount of violence; the grave episode in Chicago was provoked by the action of President Cleveland in sending troops to Chicago over the violent protest of Governor Altgeld. Attorney General Richard Olney, who in private practice had been a prominent railroad lawyer, sought an injunction in the federal circuit court against Eugene V. Debs and other leaders of the union. The circuit court awarded the injunction on the theory that the Sherman Act was being violated;²⁴³ and for defiance of the injunction the defendants were committed for contempt. Unwilling to review this decision on the merits (and indeed it seems clear that the defendants were not attempting to secure unto themselves "the entire control of the interstate, industrial, and commercial business in which the population of Chicago and of the other communities along the lines of said roads"²⁴⁴ were engaged, as the complaint alleged), the Supreme Court denied the petition for a writ of error.²⁴⁵ It did, however, entertain a petition for a writ of habeas corpus. The Court said that it ignored the Sherman Act question, not because it differed from the circuit court, but simply because "we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."²⁴⁶ The petition was denied.

The Court rested on two broad grounds. Justice Brewer argued at length what no one would deny, that "the nation" and "the na-

242. 158 U.S. 564 (1895).

243. *United States v. Debs*, 64 F. 724 (N.D. Ill. 1894).

244. 158 U.S. at 567.

245. *Ex parte Debs*, 159 U.S. 251 (1895).

246. 158 U.S. at 600.

tional government" had the power to protect interstate commerce and the mails from obstruction. He pointed out that Congress had regulated the railroads, indicating that it approved of railroads, and that it had established a post office and had a possessory right in the mails. The Attorney General had standing to institute a suit to protect these interests. But Brewer referred to no act of Congress that forbade private obstruction of interstate rail traffic or of the mail. In his lengthy argument about equity, he ignored the critical maxim: "Equity follows the law." Would the strike have afforded ground for a damage suit by the railroads against the workers for failing to operate trains, or by the federal government for failure to move the mails? Certainly not as a matter of national law. Brewer's argument was in effect that the President may create a law governing interstate commerce and the mails that is enforceable in an injunction proceeding but nowhere else.

If the President may seek to promote the flow of interstate commerce and the movement of the mail without statutory authorization merely because Congress has the power and inclination to promote the flow of interstate commerce and to carry mail, he may choose one means as well as another. Cleveland might have sought an injunction against the railroads to forbid them to haul Pullman cars; this would have concluded the whole matter expeditiously and without violence. Commerce and the mails would have moved. But the President has no such roving commission to inhibit private action, even though the private action injures an interest for which Congress in some other connection has shown esteem.

Like Justice Miller in the *Neagle* case, Justice Brewer supplemented his argument about executive power with an unpersuasive claim that, after all, there was statutory authority for the injunction. He contended that since the obstruction of highways is a nuisance, the government may enjoin such an action.²⁴⁷ The second Justice Harlan, in a much later case, reduced *Debs* to this simple proposition, and pointed out that the law of nuisance is state law.²⁴⁸ But the President's executive power is a power to execute national laws; he may execute state laws only when the state legislature, or the governor if the legislature cannot be convened, requests protection against domestic violence.²⁴⁹ This request was notoriously absent in the *Debs* case. And the protection the Constitution contemplates is, of course, physical intervention, not an injunction. Unfortunately, a nonlegal ingredient in the *Debs* case, hysteria, was the true basis for the decision. The Pullman strike appeared to the well-to-do to be the harbinger of red revolution. The judiciary was swept away in the general panic.

247. *Id.* at 591-93.

248. *United States v. Guest*, 383 U.S. 745, 769 (1966).

249. U.S. CONST. art. IV, § 4.

The third case commonly cited to support the idea of an innovative executive power is *United States v. Midwest Oil Co.*,²⁵⁰ decided in 1915. Yet it held nothing of the sort. An act of 1897 allowed private persons, upon the payment of a nominal fee, to make locations on public lands containing or thought to contain oil. In 1909 the Secretary of the Interior warned President Taft that the publicly owned supply of oil would soon be exhausted and the United States would be obliged to repurchase what had been its own oil for the navy at great cost. Two days later the President by proclamation withdrew described areas in California and Wyoming from private appropriation, and in 1910 Congress passed prospective legislation authorizing the President to make withdrawals of public lands from occupancy. After the issuance of the proclamation and before the passage of the act, the defendant's assignors filed a location certificate on land withdrawn by the proclamation. The United States filed a bill in equity to recover the land and to obtain an accounting for oil already extracted. It is true that the government did claim a constitutional power for the President:

On the part of the government it is urged that the President, as Commander in Chief of the Army and Navy, had power to make the order for the purpose of retaining and preserving a source of supply of fuel for the Navy, instead of allowing the oil land to be taken up for a nominal sum, the government being then obliged to purchase at a great cost what it had previously owned. It is argued that the President, charged with the care of the public domain, could, by virtue of the executive power vested in him by the Constitution (art.2 §1), and also in conformity with the tacit consent of Congress, withdraw, in the public interest, any public land from entry or location by private parties.²⁵¹

But Justice Lamar, writing the opinion for the Court, rested his decision entirely on statutory grounds. The practice of making withdrawals went back to the early days of the nation. At least 252 executive orders of this sort had been issued. Congress had been fully aware of the practice and had tacitly approved it. "Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress."²⁵²

This is not the best formulation of the argument. Today, if it wished to uphold the action, the Court would say that in passing the statute in question in 1897 Congress had acted with full knowledge of past administrative construction of the law and had tacitly adopted this

250. 236 U.S. 459 (1915).

251. *Id.* at 468.

252. *Id.* at 481.

construction.²⁵³ Three Justices, finding no statutory authorization for the President's action, dissented.

A very able district court opinion²⁵⁴ on the question of inherent power should be noticed. Without statutory authority, the Attorney General brought suit to enjoin the Western Union Telegraph Co. from landing a cable from Barbados at Miami. District Judge Augustus N. Hand said that this could be done only if there were enabling legislation. He distinguished *Neagle* and *Debs* by saying that in those cases the President was enforcing federal laws,²⁵⁵ as the Supreme Court had said in each case. In *Midwest Oil*, the long-continued Executive practice with the knowledge of Congress implied consent. Judge Hand observed:

The implications of the power contended for by the government are very great. If the President has the right, without any legislative sanction, to prevent the landing of cables, why has he not a right to prevent the importation of opium on the ground that it is a deleterious drug, or the importation of silk or steel because such importation may tend to reduce wages in this country and injure the national welfare? In the same way, why does not the President, in the absence of any act of Congress, have the right to refuse to admit foreigners to our shores, and to deport those aliens whose presence he regards as a public menace?²⁵⁶

Two subsequent decisions of the Supreme Court, the *Steel Seizure Case*²⁵⁷ and the recent *New York Times v. United States*,²⁵⁸ seem to have sapped whatever vitality *Neagle* and *Debs* may have given to the idea that the grant of executive power carries with it legislative power.

In 1952, a strike interrupted the production of steel. On April 8 President Truman, acting "by virtue of the authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the armed forces of the United States,"²⁵⁹ ordered the Secretary of Commerce to take possession of the plants in order to maintain production. Despite the reference to the laws of the United States, Truman acted without statutory authority. On April 18 the President held a press conference for the members of the American Society of Newspaper Editors. He was asked:

253. *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 95 (1936); *McFeely v. Commissioner of Internal Revenue*, 296 U.S. 102, 108 (1935); *United States v. Dakota-Montana Oil Co.*, 288 U.S. 459, 466 (1933); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691 (1832).

254. *United States v. Western Union Tel. Co.*, 272 F. 311 (S.D.N.Y. 1921), *rev'd on stipulation*, 260 U.S. 754 (1922).

255. 272 F. at 314.

256. *Id.* at 315.

257. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952).

258. 403 U.S. 713 (1971).

259. 343 U.S. at 591, *quoting* Executive Order No. 10340, 16 Fed. Reg. 3503.

If it is proper under your inherent powers to seize the steel mills, can you, in your opinion, seize the newspapers and the radio stations?

Mr. Truman replied that under similar circumstances the President had to do whatever he believed was best for the country.

The President refused to elaborate. But White House sources said that the President's point was that he had power in an emergency, to take over "any portion of the business community acting to jeopardize all the people."²⁶⁰

When the Youngstown Sheet & Tube Co.'s suit for an injunction against the Secretary of Commerce reached the Supreme Court, only two other Justices concurred in Chief Justice Vinson's dissenting opinion upholding the President's action.²⁶¹ Vinson pointed out that Congress had adopted a number of policies: the Truman Doctrine, the Marshall Plan, and the Mutual Security Act of 1951; it had made large appropriations for defense and had renewed the draft; the Senate had approved the United Nations Charter, the North Atlantic Treaty, and other security treaties; the President had engaged in war in Korea. "The President has the duty to execute the foregoing legislative programs. Their successful execution depends upon continued production of steel and stabilized prices for steel."²⁶² Consequently he might seize and operate the steel mills. The argument resembles that of *Neagle* and *Debs*. Since the opinion in *Midwest Oil* gave him no help, Vinson quoted extensively from the government's brief in that case;²⁶³ the brief did indeed advance a theory of inherent executive power.

What Chief Justice Vinson did was to invent a second necessary and proper clause. According to the Constitution, Congress may pass all laws necessary and proper for carrying into effect its delegated powers;²⁶⁴ according to Vinson, the President may pass all laws necessary and proper for carrying into effect policies endorsed by Congress. Vinson attempted to disguise the magnitude of this claim by saying that President Truman had acted in an emergency and had then referred the question to Congress. But Congress, which alone had the power to pass emergency legislation, had not acted and did not act. What Vinson called an emergency was simply the failure of Congress to share President Truman's opinion as to the need for and the propriety of plant seizure.

The six Justices who constituted a majority rejected Vinson's theory. Justice Black wrote:

260. N.Y. Times, Apr. 18, 1952, at 13, col. 4. See also PUBLIC PAPERS OF THE PRESIDENTS: HARRY S. TRUMAN, 1952-53, at 273 (1966).

261. 343 U.S. at 667.

262. *Id.* at 672.

263. *Id.* at 689-93.

264. U.S. CONST. art. I, § 8, cl. 18.

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. 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 laws which the President is to execute.²⁶⁵

Justice Frankfurter's is the most perplexing opinion. He argued strongly for the separation of powers, on political as well as legal grounds, and announced his adhesion to the formulation of Justice Holmes: "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 sees fit to leave within his power."²⁶⁶ But history writes a gloss on legal terms. In *Midwest Oil*, a long-continued executive practice had been recognized as law. Frankfurter probably should not have introduced this analogy, because *Midwest Oil* involved a statute, and Congress had passed it with knowledge of the earlier practice of withdrawal. But the *Steel Seizure Case* involved the language of the Constitution, not a statute. It could hardly be said that the framers, in using the phrase "executive power," approved and incorporated subsequent uses or abuses of the phrase.

In any case, Justice Frankfurter found no gloss that supported the government's argument. Unauthorized executive seizures had been rare. When Congress had authorized seizure, it had carefully limited executive action. In passing the Taft-Hartley Act,²⁶⁷ Congress had considered and rejected plant seizure; this was in effect a statutory prohibition on executive seizure.²⁶⁸

Justice Douglas believed that there had been an emergency, but "the fact that it was necessary that measures be taken to keep steel in production does not mean that the President, rather than Congress, had the constitutional authority to act."²⁶⁹ Justice Jackson said:

The Solicitor General lastly grounds support of the seizure upon nebulous, inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations. The plea is for a resulting power to deal with a crisis or emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law.²⁷⁰

265. 343 U.S. at 587.

266. *Myers v. United States*, 272 U.S. 52, 177 (1926).

267. Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 *et seq.* (1965).

268. 343 U.S. at 602.

269. *Id.* at 629.

270. *Id.* at 646.

But the framers had not granted emergency powers to the Executive. They may have suspected that emergency powers tend to kindle emergencies. Justice Jackson saw in recent history a suggestion that control over emergency powers must be elsewhere than in the Executive in order to safeguard free government, and he therefore rejected the inherent powers formula.²⁷¹

Justice Burton argued that the Constitution conferred the right to deal with national emergency strikes upon Congress. Congress had established two procedures for dealing with such emergencies, but neither provided for seizure. Congress had reserved to itself the power to authorize seizure in particular cases.²⁷²

This brings us to a further crucial question. Does the President, in such a situation, have inherent constitutional power to seize private property which makes congressional action in relation thereto unnecessary? We find no such power available to him under the present circumstances. The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations. Nor is it claimed that the current seizure is in the nature of a military command addressed by the President, as Commander-in-Chief, to a mobilized nation waging, or imminently threatened with, total war.²⁷³

This passage raises the possibility that in the context of modern war the rule of "imperative military necessity" in *Mitchell v. Harmony*²⁷⁴ and *United States v. Russell*²⁷⁵ may apply nationwide; but Justice Burton took no position on the question.

Justice Clark concurred in the *Steel Seizure Case* on a theory shared by no other Justice. He argued that Congress had power to deal with emergencies, but in the absence of legislation "the President's independent power to act depends upon the gravity of the situation confronting this nation."²⁷⁶ It was unnecessary for him to determine the gravity of the present situation, for Congress had exercised its power. At best, the President might claim a concurrent power, and Congress had pre-empted the field.

*New York Times v. United States*²⁷⁷ involved suits for injunctions initiated by the Department of Justice to restrain the *Times* and the *Washington Post* from publishing classified documents, the so-called

271. *Id.* at 652.

272. *Id.* at 657.

273. *Id.* at 659.

274. 54 U.S. (13 How.) 115 (1851). See text accompanying note 137 *supra*.

275. 80 U.S. (13 Wall.) 623 (1871). See text accompanying note 140 *supra*.

276. 343 U.S. at 662.

277. 403 U.S. 713 (1971).

Pentagon Papers. Principal interest in the case attached to the first amendment question, but the first issue to be resolved was that of the inherent power of the President. No act of Congress forbade the publication of the papers, and indeed Congress had twice refused to authorize censorship; but the Executive sought to enjoin publication on the ground that it would work serious damage to national interests. The case thus presents much the same problem as *Debs*. Six Justices denied the right of the government to maintain the suit. The three dissenters thought it premature to resolve any of the issues raised by the case.

In oral argument, Solicitor General Griswold asserted that "there are other parts of the Constitution that grant power and responsibilities to the Executive and . . . the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States."²⁷⁸ Justice Black said in reply to this:

The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. . . . To find that the President has "inherent power" to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make "secure."²⁷⁹

Mr. Justice Douglas concurred in this opinion and wrote one of his own, Justice Black concurring, in which he pointed out that no statute barred publication of the material sought to be used by the newspapers.²⁸⁰

Mr. Justice Stewart wrote an opinion in which Justice White joined. The Executive had the right, and the constitutional duty, "as a matter of sovereign prerogative and not as a matter of law as the courts know law," to protect its secrets by making executive regulations governing its own personnel.²⁸¹ If a crime defined by Congress should be committed, a prosecution could be instituted. If Congress should pass a law authorizing the Executive to institute civil proceedings, the courts could pass on the constitutionality and applicability of the law.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, in-

278. *Id.* at 718.

279. *Id.* at 718-19.

280. *Id.* at 720.

281. *Id.* at 729-30.

stead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.²⁸²

The test of "direct, immediate, and irreparable damage" might overcome the obstacle of the first amendment, but one cannot see how it could authorize the courts to act without a law to enforce.

Mr. Justice White wrote an opinion in which Justice Stewart joined:

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the "grave and irreparable danger" standard suggested by the United States. . . . To sustain the Government in these cases would start the courts down a long road and hazardous road that I am not willing to travel at least without congressional guidance and control. . . .

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. Cf. *Youngstown Sheet and Tube Co. v. Sawyer*. . . . It has not, however, authorized the injunctive remedy against threatened publication.²⁸³

Mr. Justice Marshall concurred. There was no doubt as to the power of the President to discipline employees who disclose information or to attempt to prevent leaks, in the interest of national security.²⁸⁴

The problem here is whether in this particular case the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. See *In re Debs*. . . . The Government argues that in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander-in-Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of course, it

282. *Id.* at 730.

283. *Id.* at 732-40.

284. *Id.* at 741.

is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander-in-Chief. . . . And in some situations it may be that under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander-in-Chief there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

It would, however, be utterly inconsistent with the concept of separation of power for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. . . . The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret law. See *Youngstown Sheet & Tube Co. v. Sawyer*. . . . It did not provide for government by injunction in which the courts and the Executive can "make law" without regard to the action of Congress.²⁸⁵

Mr. Chief Justice Burger wrote a dissenting opinion in which Justices Harlan and Blackmun concurred. They did not differ from the majority on the merits, for the case had been disposed of so hastily that there had been no time to consider the merits; they felt that the cases should be remanded for further consideration. There were seven unresolved questions: the first of these was "[w]hether the Attorney General is authorized to bring these suits in the name of the United States. Compare *In re Debs* . . . with *Youngstown Sheet & Tube Co. v. Sawyer*. . . ."²⁸⁶

Justice Clark's theory of concurrent power in the *Steel Seizure Case*²⁸⁷ and Mr. Justice Marshall's reliance in *New York Times* upon the fact that Congress had rejected censorship²⁸⁸ raise an unfortunate possibility. They suggest that there are situations in which the President may legislate if Congress has not affirmatively preempted the field or closed the door by considering and rejecting a given course of action. Such a position lends itself to Theodore Roosevelt's "stewardship theory":

I declined to adopt this view that what was imperatively necessary for the Nation could not be done by the President, unless he could find some specific authorization to do it. . . . I did not usurp power but I did greatly broaden the use of executive power. In other words, I acted for the common well being of all our people whenever and in whatever measure was necessary, unless prevented by direct

285. *Id.* at 741-42.

286. *Id.* at 753-54.

287. See text accompanying note 276 *supra*.

288. 403 U.S. at 743. See text accompanying note 285 *supra*.

constitutional or legislative prohibition.²⁸⁹

William Howard Taft summed up this view, and the whole theory of inherent executive power, quite accurately:

The mainspring of such a view is that the Executive is charged with responsibility for the welfare of all the people in a general way, that he is to play the part of a Universal Providence and set all things right, and that anything that in his judgment will help the people he ought to do, unless he is expressly forbidden to do it.²⁹⁰

Theodore Roosevelt's theory means that the President is free to undertake any folly, provided only it is so gross that it has not occurred to Congress to forbid it, and provided he supposes that the action he undertakes is in the national interest. Fortunately, the courts have not yet agreed that the President is chosen as a Universal Providence.

V

THE DOCTRINE OF POLITICAL QUESTIONS

Secretary Rogers has said:

There are relatively few judicial decisions concerning the relationship between the Congress and the President in the exercise of their respective war powers under the Constitution. The courts have usually regarded the subject as a political question and refused jurisdiction.²⁹¹

In fact, there have been a very large number of decisions concerning the war powers of the national government, and these have settled "the relationship of Congress and the President in the exercise of their respective war powers under the Constitution." In keeping with the intentions of the framers, the Court has held that the President may repel a sudden attack, whether by invasion or by insurrection, that Congress may institute either general or limited war, and that the President in waging war may not exceed his statutory authority.²⁹² The rank, status, duties, and discipline of members of the armed forces are fixed by Congress.²⁹³ The recruitment of the armed forces,²⁹⁴ the draft,²⁹⁵ the confiscation of enemy property,²⁹⁶ the appropriation of factories,²⁹⁷ the suspension of the writ of habeas corpus²⁹⁸—

289. W.H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 144 (1925), *quoting* Theodore Roosevelt, Notes for a Possible Autobiography.

290. *Id.*

291. Rogers, *supra* note 7, at 1203-04.

292. See text accompanying notes 9-13 *supra*.

293. See text accompanying notes 79-85, 100-04, 108-21 *supra*.

294. *United States v. Hosiner*, 76 U.S. (9 Wall.) 432 (1870).

295. *United States v. Nugent*, 346 U.S. 1 (1953); *Selective Draft Law Cases*, 245 U.S. 366 (1918).

296. See text accompanying note 99 *supra*.

297. See text accompanying notes 142, 145 *supra*.

298. See text accompanying note 135 *supra*.

all these and other topics have been adjudicated and held to belong to Congress.

What does it mean to say that a question is political? When he introduced judicial review in *Marbury v. Madison*,²⁹⁹ Chief Justice Marshall said that the appointment of Marbury by President Adams was discretionary and not susceptible to judicial inquiry, but that once the appointment was made, Marbury's right vested and the issue was justiciable:

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.³⁰⁰

In his notable opinion in *Baker v. Carr*,³⁰¹ Mr. Justice Brennan said that there were six alternative tests for identifying political questions. The first is that there be a "textually demonstrable constitutional commitment of the issue to a coordinate political department."³⁰² Problems of three sorts can arise when an issue has been committed by the Constitution to the Executive or the Legislature. If the appropriate political branch is clearly determined and has already decided the question, or decides it while the litigation is in course, the courts defer to that decision. For example, a Congressional statement as to the date on which a war began is binding on the courts.³⁰³ In the second class of cases, the political branch has not decided the question. In *Coleman v. Miller*³⁰⁴ in 1939, the Court disposed of the case in such a way as to preserve to Congress the opportunity to make a different decision if it wished; but certainly there can arise situations in which action by the political branch is not possible. In this case denial of judicial relief means that the suitor is without remedy. In the third class of cases, the court is called upon to decide whether the decision of a political question belongs to the President or to Congress. Such an issue is clearly justiciable, for the court need only determine whether the textual commitment is to one department or the other. It decides questions of this order whenever it holds that one department has invaded the domain of the other. Indeed, it is the obligation of the court to decide the question in order to preserve the right of determination in the department to which the Constitution has made a textual commitment.

Faced with illegal military detention of civilians, Chief Justice Mar-

299. 5 U.S. (1 Cranch) 137 (1803).

300. *Id.* at 170.

301. 369 U.S. 186 (1962).

302. *Id.* at 217.

303. *The Pedro*, 175 U.S. 354 (1899).

304. 307 U.S. 433 (1939).

shall said of the act of Congress authorizing the issuance of the writ of habeas corpus:

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.

That question depends on political considerations on which the legislature is to decide. Until the legislature [*sic*] will be expressed, this Court can only see its duty, and must obey the laws.³⁰⁵

As with the suspension of the writ of habeas corpus, so with war. If the war power belongs to Congress, and the President employs it, the court must affirm the power of Congress in any case or controversy that arises. This is the teaching of the political question doctrine.

But a political agency to which a political question is committed must remain within the limits of its authority, and the courts must enforce these limits. The House of Representatives is made by the Constitution the judge of the qualifications of its members.³⁰⁶ But those qualifications are specified in the Constitution and the House has no power to add others. In *Powell v. McCormack*³⁰⁷ the Supreme Court held that the House must seat a member who concededly met the constitutional qualifications. Similarly, Congress possesses the war power, but it may not delegate this power to the President in defiance of the constitutional prohibition on delegation.

In short, the textual commitment of an issue to the President or the Congress seldom makes a suit involving that issue nonjusticiable. If it falls in our first or third class of cases, the suit must be decided. The textual commitment is a part of the law that the court must apply. In the case of the Vietnam War, the courts must follow the explicit textual commitment of the war power to Congress and must hold invalid any exercise of the war power that does not result from the decision of Congress itself.

Mr. Justice Brennan's second test is "a lack of judicially discoverable and manageable standards"³⁰⁸ for resolving an issue. There are no standards for going to war, and therefore the war power was given to Congress. No suitor may complain because Congress has declared war;³⁰⁹ and the courts may not take an action that resembles an act of war.³¹⁰ But the standards to determine whether Congress has exercised

305. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807). In 1807 the grand jury in New Orleans made a presentment against General Wilkinson for his conduct. See the dissenting opinion of Justice Woodbury in *Luther v. Borden*, 48 U.S. (7 How.) 1, 81 (1849).

306. U.S. CONST. art. I, § 5.

307. 395 U.S. 486 (1969).

308. 369 U.S. at 217.

309. *Norman v. Baltimore & O.R.R.*, 294 U.S. 240, 305 (1935).

310. *The Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812). And see *Dallas*' argument, *id.* at 126.

its war power are simple and easy to apply. Similarly, in *Marbury v. Madison* Chief Justice Marshall said that deciding whom to appoint was a political question, but whether an appointment had been made was a justiciable question.³¹¹ The legality of the Vietnam War is a justiciable question.

Breiman's third test is "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."³¹² It is not clear what cases Justice Brennan had in mind. Certainly the courts may not make an initial policy determination to go to war, for this is nonjudicial. But deciding whether the appropriate political agency has made that policy determination is clearly justiciable.

Breiman's fourth test is "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."³¹³ To pass on the legality of action under the war power cannot be such a social solecism; for, as we have seen, it has been usual.

Breiman's fifth alternative is "an unusual need for unquestioned adherence to a political decision already made."³¹⁴ In the case of the Vietnam War, there is no political need for immunity to legal scrutiny. If the Supreme Court should declare the war illegal, Congress, if it wished the war to continue, could declare war. Alternatively, the President or Congress could end the fighting. The present "unusual need" is the need for a court that will face up to its responsibilities and perform its constitutional functions.

Brennan's last cause for declaring a question political is "the potential embarrassment from multifarious pronouncements by various departments on one question."³¹⁵ Perhaps he had in mind *Luther v. Borden*.³¹⁶ Here the Court was asked to decide whether the charter government that still existed in Rhode Island in 1841 or the rival Dorr government was the legitimate republican government of the state. Chief Justice Taney said that the President, by taking measures to call out the militia at the request of the governor in the charter government, had recognized that government as legitimate and that his decision was binding on the courts.³¹⁷ But Taney said that the decision of the President was temporary and provisional;³¹⁸ Congress had the final voice.³¹⁹ In addition, the separate houses, by seating members, might de-

311. 5 U.S. (1 Cranch) at 167.

312. 369 U.S. at 217.

313. *Id.*

314. *Id.*

315. *Id.*

316. 48 U.S. (7 How.) 1 (1849).

317. *Id.* at 44.

318. *Id.* at 45.

319. *Id.* at 42.

cide independently that one government or the other was legitimate.³²⁰ Despite all this, the federal courts were bound by decisions of the state courts.³²¹ Here indeed is a possibility of multifarious pronouncements by various departments on one question. But the remedy is not equal to the problem. Even if the federal courts practice self-denial, there are five other agencies that may make pronouncements on what constitutes a republican form of government.

In the case of the Vietnam War, however, what we are suffering from is not multifarious pronouncements but a paucity of pronouncements. Congress has pronounced nothing whatever. The position of the Executive, as Judge Wyzanski accurately described it, is that we are engaged in something other than a war:

In Vietnam it is at least plausibly contended by some in authority that our troops are not engaged in fighting any enemy of the United States but are participating in the defense of what is said to be one country from the aggression of what is said to be another country.³²²

This is not a legal characterization; indeed, it would be hard to reconcile such a situation with the powers of Congress under article I of the Constitution or with the powers of the President under article II. Of course the situation is that we have illegally entered into the legal state of war. Acknowledgment of this fact would be acutely embarrassing to many individuals, but it would not produce the governmental dilemma Justice Brennan had in mind.

The upshot is that the issue presented by the Vietnam War can be fitted only in the third class of Brennan's first category of political questions. The wisdom of initiating war is a political question; but whether the agency to which there is a textual commitment of the power to initiate war has done so is justiciable.

To support his assertion that there are few judicial decisions on the war power because the courts "have usually regarded the subject as a political question and refused jurisdiction," Secretary Rogers cited three decisions, all dealing with the Vietnam War.³²³ In *Massachusetts v. Laird*,³²⁴ the State of Massachusetts asked the Supreme Court

320. *Id.*

321. *Id.* at 40.

322. *United States v. Sisson*, 294 F. Supp. 511, 515 (D. Mass. 1968). See text accompanying note 331 *infra*.

In *United States v. Averette*, 19 U.S.C.M.A. 363 (1970), the Court of Military Appeals held that the conflict in Vietnam was not a "time of war" in the meaning of article 2(10) of the Uniform Code of Military Justice because only Congress may declare war.

323. In addition, see *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970). *Contra*, *Mottola v. Nixon*, 318 F. Supp. 538 (D.N.D. Cal. 1970); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971).

324. 400 U.S. 886 (1970).

to exercise original jurisdiction in a suit *parens patriae* to restrain the Secretary of Defense from sending its citizens to Indochina to participate in an illegal war. Without hearing argument and without writing an opinion, the majority of the Court denied leave to file a bill of complaint. Mr. Justice Douglas dissented, arguing that Massachusetts had standing to sue and that the issue was justiciable.³²⁵ Justices Harlan and Stewart also dissented; they wished to hear argument on standing and justiciability.³²⁶ We have no way of discovering the reasoning of the majority. This curt disposition of a suit by a state in a memorandum opinion hardly shows "the respect due coordinate branches of government" that the doctrine of political questions counsels.

The second case cited by Secretary Rogers was *Luftig v. McNamara*,³²⁷ decided by the Court of Appeals for the District of Columbia. The action was a suit for a declaratory judgment and an injunction against sending the complainant to Vietnam, on the ground that the war was illegal. The court, in a brief *per curiam* opinion, dismissed the action as a suit against the United States, contrary to *Youngstown Sheet & Tube Co. v. Sawyer*³²⁸ and the controlling principles of the law of public officers. In addition, the opinion said:

The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.³²⁹

The court of appeals must have been aware that the suit did not ask the court to review substantive decisions by Congress or the Executive; rather, it asked the court to preserve the "fundamental division of authority and power established by the Constitution" by declaring illegal the exercise of legislative power by the Executive, a task the courts have not usually shirked. The majority of the Supreme Court was glad to deny certiorari.

Rogers' third case is *Mora v. McNamara*,³³⁰ also in the Court of Appeals for the District of Columbia, a mere *per curiam* report that judgment was entered in keeping with the decision in *Luftig v. McNamara*.

There is a fourth case, *United States v. Sisson*,³³¹ that Secretary Rogers might well have considered, for it is surely the most comic epi-

325. *Id.*

326. *Id.*

327. 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967).

328. 343 U.S. 579 (1952).

329. 373 F.2d at 665-66.

330. 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967).

331. 294 F. Supp. 511, 515, 520 (D. Mass. 1968), *appeal dismissed*, 399 U.S. 267 (1970).

sode in American constitutional law. Sisson refused to submit to induction into the armed forces and was prosecuted. He moved to dismiss the indictment on the ground that he could not be drafted to serve in an illegal war. Judge Wyzanski wrote an opinion to justify his denial of the motion.³³² He conceded that the question whether a person might be drafted to serve in a war declared by Congress was justiciable. But in the Vietnamese involvement there had been no declaration of war. "What may be involved in the present case is a choice between a limited undeclared war approved by the President and Congress and an unlimited declaration of war through an Act of Congress."³³³ The former may not be justiciable. But this will not do, for the war with France, 1798-1801, was a limited "undeclared" war authorized by Congress. The legality of such congressional action and of executive action in connection with it was justiciable and was adjudicated. Consequently, despite the exploratory remark quoted above, Wyzanski does not adopt the theory of limited war. The Vietnam War, he says, is "a result of combined legislative and executive action." It is "a situation in which there has been joint action by the President and Congress."³³⁴

What is the Executive's contribution? It is an "action" that the Executive treats "as though it were different from an unlimited war against an enemy."³³⁵ What is the contribution of Congress?

Congress in 1967 extended the Selective Service Act. . . . Congress acted with full knowledge that persons called for duty under the Act had been, and are likely to be, sent to Vietnam. Indeed, in 1965 Congress had amended the same Act with the hardly concealed object of punishing persons who tore up their draft cards out of protest at the Vietnam war. . . .

Moreover, Congress has again and again appropriated money for the draft act, for the Vietnam war, and for cognate activities. Congress has also enacted the Tonkin Gulf Resolution, which some have viewed as advance authorization for the expansion of the Vietnam War.³³⁶

This is a very fair description of the situation. The President has deployed air and ground combat forces in Vietnam, Cambodia, Laos, and Thailand. Congress has not forbidden him to do so. It has been willing that he do so and has supplied him with the men and money without which he could not have acted. But Congress has not instructed him to do so, as occurs in a declaration of general or limited

332. 294 F. Supp. 511 (1968).

333. *Id.* at 515.

334. *Id.* at 514.

335. *Id.* at 515.

336. *Id.* at 514.

war. Congress has left him free to fight or not as he pleases, and to fight whomever he pleases. Without violating any act of Congress, the President could shift his support from the side of South Vietnam to the side of North Vietnam. He has already shifted his support from one regime in Saigon to another on at least two occasions, producing the collapse of the earlier regime,³³⁷ and has immediately acquiesced in the military overthrow of other regimes,³³⁸ transferring the resources Congress has given him from the one to the other. All these things have been done with the knowledge of and almost without protest by the members of Congress. The only way to describe the situation is to say that over a period of years Congress completely delegated the war power and the control over expenditures, at least with respect to Indochina, to the Executive.

The rule against the delegation of legislative power is not a kind of spendthrift trust for the protection of the prerogatives of Congress. It exists for the benefit of the people rather than of Congress. It is intended to ensure that major decisions of policy are taken by a numerous and representative body rather than by a single man and his small clique of counsellors. The bearing of the prohibition on delegation on the Vietnam War will be discussed below;³³⁹ at present we are concerned with its relevance to the issue of political question.

What Wyzanski means by "cooperative action by the legislative and executive with respect to military activities in foreign countries"³⁴⁰ is precisely the delegation of power by Congress to the Executive to undertake and discontinue these activities at will. Wyzanski recognizes this obliquely by citing as a relevant authority *United States v. Curtiss-Wright Export Corp.*,³⁴¹ which contains a famous though now rejected dictum that the rule against the delegation of legislative power does not apply in foreign affairs. And such "cooperative action," Wyzanski says, "is the very essence of what is meant by a political question. . . . Because defendant Sisson seeks an adjudication of what is a political question, his motion to dismiss the indictment is denied."³⁴² The dictum in *Curtiss-Wright* does not support this conclusion, for in *Curtiss-Wright* the issue was held to be justiciable.

Clearly this is an improper use of the political question doctrine. There are textual commitments of various topics in foreign policy to various organs of government. The President and the Senate may make treaties. The courts will not inquire into the wisdom of the pro-

337. See text accompanying notes 425-26 *infra*.

338. See text accompanying notes 427-29 *infra*.

339. See text accompanying notes 382-455 *infra*.

340. 294 F. Supp. at 515.

341. 299 U.S. 304 (1936).

342. 294 F. Supp. at 515.

visions of a treaty, but whether these provisions offend the Constitution is a justiciable matter.³⁴³ Whether the President by independent action has usurped the treaty power is a justiciable matter.³⁴⁴ Similarly, the courts will not inquire whether it is wise as a matter of policy to fight a particular war; but the question whether the relevant constitutional provisions have been complied with in a particular case is justiciable. Judge Wyzanski concedes that questions concerning the war power have been held justiciable in the past, but this case, he says, is novel: it is a question of "cooperative action"—that is, of the delegation of the war power. Thus, the unconstitutionality of the action becomes the reason for not inquiring into its constitutionality.

Finally, there is this consideration. If we assume that Wyzanski was right and a delegation of the war power raises a political question, it follows that when the delegation is withdrawn the issue ceases to be political. The next section of this Article argues that the repeal of the Tonkin Gulf Resolution withdrew all the delegations upon which Wyzanski relied. If there are now no outstanding delegations, by Wyzanski's test the Vietnam War presents today not a political but a justiciable issue.

This first opinion of Wyzanski's was delivered on November 25, 1968. On the following day he delivered a second opinion,³⁴⁵ ruling that the court could not consider the questions of genocide or war crimes. Sisson might not offer evidence that he reasonably believed the war to be illegal, for willfulness did not depend on beliefs. If Sisson wished to claim conscientious religious objection, he must first offer his evidence to the judge; if the judge thought it tended to support his claim, it should go to the jury. On December 11, Judge Wyzanski ruled that Sisson might not present expert opinion as to the illegality of the war.³⁴⁶ He charged the jury that the only question was whether Sisson had willfully refused induction, and after 20 minutes of deliberation the jury brought in a verdict of guilty. But this was only the beginning.

After the verdict the defendant made a motion in arrest of judgment on the ground that Judge Wyzanski, by adopting the theory of political question and preventing the defendant from offering the illegality of the war as a defense, had violated article III and the due process clause and had deprived the court of jurisdiction. The earth must have opened before Judge Wyzanski. As early as 1908, in *Ex parte Young*,³⁴⁷ the Supreme Court had held that to impose penalties

343. *Reid v. Covert*, 354 U.S. 1 (1957).

344. *United States v. Belmont*, 301 U.S. 324 (1937).

345. 294 F. Supp. 515 (1967).

346. *Id.* at 520.

347. 209 U.S. 123 (1908).

so onerous as to deter a person from raising a constitutional question in court was a denial of due process of law. Judge Wyzanski had not deterred Sisson; he had forbidden him to raise the constitutional question.

It was clear that the conviction could not stand, but Judge Wyzanski was unwilling to admit that he had denied due process of law. So he granted the motion in arrest of judgment on an unanticipated ground: he had learned, by observing Sisson in the course of the trial, that he was a genuine conscientious objector.³⁴⁸ Forgotten was Wyzanski's original ruling that evidence of conscientious objection must first be submitted to the judge by the defendant and then must go to the jury. Wyzanski now rejected the proposition in that ruling that conscientious objection must be religious, and he reproved Congress for denying exemption from service to Sisson, whose conscience was as exacting a master as any orthodox religion. Under the circumstances, the free exercise clause and the establishment clause forbade drafting Sisson. On appeal Justice Harlan summarized Wyzanski's opinion: "Sisson's interest in not killing in the Vietnam conflict outweighed 'the country's present need for him to be so employed.'" ³⁴⁹ One wonders on what scales these comparative weights were measured.

The prosecution took a direct appeal to the Supreme Court. Three other Justices concurred with Justice Harlan that the appeal should be dismissed for want of jurisdiction. The Criminal Appeals Act allowed the government to appeal only when the motion arresting judgment of conviction was granted on the theory that the indictment or information was insufficient, and this was not the case in *Sisson*.³⁵⁰ What Judge Wyzanski had actually done was not to arrest judgment but to acquit Sisson, and from an acquittal there could be no appeal.³⁵¹ Justice Black concurred on this latter point.³⁵² Three Justices dissented;³⁵³ Justice Blackmun took no part in the decision. Thus, Judge Wyzanski covered up one error with another, and the Supreme Court succeeded in avoiding all substantive questions by assigning to Wyzanski's curious action the finality of an acquittal.

Clearly, the argument that the Vietnam War presents a political question is theoretically unsound and breaks with all precedent. But the issue is political in another sense. If the courts were to defend the Constitution they would be subjected to bitter attack, and neither the Executive nor the Congress would defend them. Therefore, they

348. *United States v. Sisson*, 399 U.S. 267, 277-78 (1970).

349. *Id.* at 278.

350. *Id.* at 288-89.

351. *Id.* at 289-90.

352. *Id.* at 308.

353. *Id.*

prefer to evade the problem. Yet on an issue even more dangerous to the Court than the Vietnam War, the question of state sovereignty raised in *Cohens v. Virginia*,³⁵⁴ Chief Justice Marshall said:

It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty.³⁵⁵

VI

CONGRESSIONAL AUTHORIZATION

No doubt because of lack of confidence in the arguments reviewed above, administration spokesmen³⁵⁶ and inferior courts,³⁵⁷ after contending that Congress has no authority in the premises, have almost invariably fallen back on the argument that Congress has in fact authorized the Vietnam War. Until its repeal in 1971,³⁵⁸ the Tonkin Gulf Resolution³⁵⁹ was the principal reliance of defenders of the war. Although many members of Congress voted for this joint resolution in the belief that they were doing nothing more than ratifying acts of reprisal for alleged attacks on American vessels and threatening to make such reprisals at any recurrence,³⁶⁰ the resolution was so studiously vague that the language would easily bear the interpretation subsequently put on it.

It is commonly said that the United States has "declared war" only five times. But in fact our five major wars have involved 11 formal declarations of general war.³⁶¹ And there seems to be no rea-

354. 19 U.S. (6 Wheat.) 264 (1821).

355. *Id.* at 404.

356. See 117 CONG. REC. S12968, S12969 (daily ed.) (Aug. 3, 1971) (speech of Solicitor General Griswold).

357. *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971); *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971); *United States v. Sisson*, 294 F. Supp. 511, 515 (D. Mass. 1968).

358. Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053.

359. Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

360. See Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, in 2 Falk, *supra* note 3, at 675-81.

361. Act of June 18, 1812, ch. 102, 2 Stat. 755 (against Great Britain); Act of May 13, 1846, ch. 16, 9 Stat. 9 (Mexico); Act of Apr. 25, 1898, ch. 189, 30 Stat. 364

son why the resolutions that initiated war with Tripoli in 1802³⁶² and with Algiers in 1815³⁶³ should not also be called formal declarations of war, since each instructed the President not only to conduct a naval war against a named adversary but also "to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require."³⁶⁴

Under Secretary of State Katzenbach told the Senate Committee on Foreign Relations that the Tonkin Gulf Resolution was "the functional equivalent of a declaration of war."³⁶⁵ But it cannot be that. The words "declare war" are an elision of a longer phrase—declare that a state of war exists between the United States and another named state. So the War of 1812 was initiated by a joint resolution that read:

Be it enacted . . ., That war be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect. . . .³⁶⁶

But, as Chief Justice Marshall said, "Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial war, in which case the laws of war, so far as they actually apply to our situation, must be noticed."³⁶⁷ What Marshall called partial war, Justices Washington and Paterson³⁶⁸ called imperfect war and Justice Chase³⁶⁹ called limited war. Like Marshall, these Justices believed that the power to initiate imperfect or limited war lay exclusively with Congress. And indeed the commonest means of conducting limited war, the issuance of letters of marque and reprisal, was specifically attributed to Congress in the Constitution.³⁷⁰

The event that these Justices characterized as a partial, limited, or imperfect war was the naval war with France initiated by several acts

(Spain); Act of Apr. 6, 1917, ch. 1, 40 Stat. 1 (Germany); Act of Dec. 7, 1917, ch. 1, 40 Stat. 429 (Austria-Hungary); Act of Dec. 8, 1941, ch. 561, 55 Stat. 795 (Japan); Act of Dec. 11, 1941, ch. 564, 55 Stat. 796 (Germany); Act of Dec. 11, 1941, ch. 565, 55 Stat. 797 (Italy); Act of June 5, 1942, ch. 323, 56 Stat. 307 (Bulgaria); Act of June 5, 1943, ch. 324, 56 Stat. 307 (Hungary); Act of June 5, 1942, ch. 325, 56 Stat. 307 (Rumania).

362. Act of Feb. 6, 1802, ch. 3, 2 Stat. 129.

363. Act of Mar. 3, 1815, ch. 90, 3 Stat. 230.

364. Congress has also rejected or ignored presidential proposals for the use of force abroad on 13 occasions. See Wormuth, *supra* note 3, at 727-37.

365. See note 155 *supra*.

366. Act of June 18, 1812, ch. 102, 2 Stat. 755.

367. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

368. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40-42, 45-46 (1800).

369. *Id.* at 43.

370. U.S. CONST. art. I, § 9, cl. 11.

of Congress in 1798.³⁷¹ These acts did not use the word "war," but they authorized a number of acts of hostility in coastal waters and on the high seas. The most important act provided:

That the President of the United States shall be, and he is hereby authorized to instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas. . . .³⁷²

Defenders of presidential warmaking always call the limited war with France, 1798-1801, an "undeclared war," apparently in the belief that this term somehow diminishes the authority of Congress; but what the episode shows, of course, is that the power to initiate imperfect or limited war as well as general war lies exclusively with Congress. In 1811³⁷³ and 1813,³⁷⁴ Congress passed secret legislation authorizing military action with regard to Florida. In 1839, Congress authorized the President to resist any attempt by Great Britain to assert control over the part of Maine that was in dispute between the United States and that country.³⁷⁵ In 1858, Congress authorized the use of force against Paraguay,³⁷⁶ but the issue was settled without violence. In 1890, Congress passed a censure resolution directed at Venezuela,³⁷⁷ and in 1895 another addressed to Spain.³⁷⁸ In 1914, Congress approved of the President's occupation of Vera Cruz as an act of reprisal against Mexico.³⁷⁹

Now let us examine the Tonkin Gulf Resolution³⁸⁰ of August 10, 1964. The resolution begins with a preamble reciting that "naval units of the Communist regime in Vietnam . . . have deliberately and repeatedly attacked United States naval vessels" (an incident concerning which we have not yet been given all the facts), that this was part of a campaign of aggression on the part of the Communist regime in North Vietnam, and that the United States "desires only that the peoples of Southeast Asia shall be left free to work out their own destinies in their own way." Then section 1 declares that "the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel armed attack against the forces of the United States and to prevent further aggression."

371. They are collected in Wormuth, *supra* note 3, at 718-19 nn. 3-12.

372. Act of July 9, 1798, ch. 68, 1 Stat. 578.

373. Resolution of Jan. 15, 1811, 3 Stat. 471.

374. Act of Feb. 12, 1813, 3 Stat. 472.

375. Act of Mar. 3, 1839, ch. 68, 5 Stat. 355.

376. Resolution of June 2, 1858, res. 15, 11 Stat. 370.

377. Resolution of June 7, 1890, res. 28, 26 Stat. 674.

378. Resolution of Mar. 2, 1895, res. 30, 28 Stat. 975.

379. Resolution of Apr. 22, 1914, res. 10, 38 Stat. 770.

380. Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384.

The President already had the right to repel armed attack against ships on the high seas; he did not have, and this section did not purport to give him, the right to do what he did six months later: to land large bodies of troops in a zone of war so that he might repel armed attack against them. There seems to be no agreement among Congressmen as to what Congress meant when it declared that it approved and supported the President's determination "to prevent future aggression." The language is that of applause for the President's firm character rather than legal authorization of action.

Section 2 is the vital section. It says that

international peace and security in southeast Asia [are] vital to its national interest and to world peace [and] the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

The member and protocol states were Cambodia, Laos, "the free territory of Vietnam," Australia, New Zealand, Pakistan, the Philippines, Thailand, Great Britain, and France.³⁸¹ These words will certainly bear the interpretation put upon them by the Johnson administration: the President might, if he deemed it wise, employ any means he wished, including the use of armed force, if any of these states alleged that its freedom needed defense. If, for example, the Tonkin Gulf Resolution had had legal status, and had it still been in effect in December 1971, when Indian troops entered Bangladesh, President Nixon would have had the right to intervene on the side of Pakistan if requested.

There are four obvious differences between the Tonkin Gulf Resolution and the initiation of war by Congress. When Congress exercises its war power, hostilities are mandatory. The Tonkin Gulf Resolution initiated no hostilities but only authorized the President to do so on some future occasion if he wished. Second, when Congress institutes war it declares whether it is making a general war or whether the President is limited to specified acts of hostility. This definition of legal status has consequences for both international and municipal law. But, since the Tonkin Gulf Resolution did not elect either general or limited war and did not authorize the President to define our legal status, we were in a position that had no legal characterization, except, of course, illegality. Third, a declaration of war is a declaration that a state of war, general or limited, exists between the United States and a named adversary. No adversary state was named in the

381. Southeast Asia Collective Defense Treaty, Sept. 8, 1954, [1956] 1 U.S.T. 82-88, T.I.A.S. No. 3170.

Tonkin Gulf Resolution. One cannot be in a state of war without being at war with a definite adversary. Of course the resolution allowed the President to choose an adversary in the future. This brings us to our fourth point. Since the resolution permitted the President to decide when, where, and with whom to fight, he might also discontinue hostilities at will. No treaty of peace was required in which the Senate concurred. President Nixon considers that making peace is his personal prerogative and conducts negotiations with North Vietnam and the National Liberation Front through a personal ambassador whose nomination to that function has never been submitted to the Senate. If he should arrive at an agreement, the terms of that agreement would not be reviewed by the Senate.

Since the Tonkin Gulf Resolution performed none of the functions of a declaration of war, it cannot have been the functional equivalent of a declaration of war. It was an outright gift of the war power and the use of the armed forces to the President.

May Congress delegate the power to make war to the President? Although the Tonkin Gulf Resolution has been repealed,³⁸² the question survives, for Solicitor General Griswold and some lower courts have alleged that by appropriating money with the full knowledge that it would be spent on the Vietnam War, Congress has approved of the President's activities in Indochina.³⁸³

Chief Justice Marshall laid the foundations of the law of delegation in *Wayman v. Southard*.³⁸⁴ Some powers might not be delegated: "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative."³⁸⁵ Surely the power to initiate war is strictly and exclusively legislative. The discussions in the Constitutional Convention, the *Federalist*, and the state ratifying conventions put this beyond doubt.³⁸⁶ In 1834, President Jackson asked Congress for authority to exact reprisals from French shipping to satisfy an acknowledged debt if the French Chambers should not appropriate money to satisfy the American claim. In 1835, the Senate Committee on Foreign Relations reported through its chairman, Henry Clay, that such contingent legislation would constitute an unconstitutional delegation of the war power and the Senate unanimously rejected Jackson's request.³⁸⁷ President Buchanan made eight requests for contingent legislation permitting

382. Act of Jan. 12, 1971, Pub. L. No. 91-672, 84 Stat. 2053.

383. See cases cited notes 356-57 *supra*.

384. 23 U.S. (10 Wheat.) 1 (1825).

385. *Id.* at 42.

386. See text accompanying notes 9, 56-58 *supra*; THE FEDERALIST PAPERS No. 69, at 428, 431 (J. Gideon ed. 1818) (A. Hamilton).

387. See Wormuth, *supra* note 3, at 782-83.

him to intervene militarily in Central America and Mexico, and they were all rejected on the ground that the war power could not be delegated.³⁸⁸

But in *Wayman* Chief Justice Marshall distinguished between "these important subjects which must be entirely regulated by the legislature itself" and "those of lesser interest, in which a general provision may be made, and power given to those who are to act under such provisions to fill up the details."³⁸⁹ Such subordinate rulemaking has of course become one of the principal characteristics of our legal system. And, as we have just seen, there is another form of delegation, the passage of contingent legislation. Here Congress itself formulates the rule to be applied, and the President by proclamation calls the law into play when he finds that the facts specified by Congress as the condition for the invocation of the law has come into existence. Contingent legislation was upheld in *The Brig Aurora*³⁹⁰ as early as 1813.

Chief Justice Hughes gave authoritative expression to the standard that governs both delegated rulemaking and contingent legislation, in those fields "of lesser interest" in which they may be practiced, in his opinion in *Schechter Poultry Corp. v. United States*.³⁹¹

The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the Panama Refining Case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

This formula summarizes the teaching of a multitude of cases from *Wayman* to the present day. Even where delegation is possible, Congress must determine the policy to be applied and may leave to the Executive only the subordinate task of applying the policy by making

388. *Id.* at 736-37, 783-88.

389. 23 U.S. (10 Wheat.) at 43 (1825).

390. 11 U.S. (7 Cranch) 382 (1813).

391. 295 U.S. 495, 529-30 (1935).

detailed rules or by finding the existence of the facts contemplated by the statute. This was undisputed until Justice Sutherland set forth a novel constitutional theory in 1936 in *United States v. Curtiss-Wright Export Corp.*³⁹²

Congress had passed a joint resolution authorizing the President to invoke a prohibition on the sale in the United States of arms or munitions to the participants in the Gran Chaco War if, after consultation with the governments of the other American republics and with their co-operation, as well as that of such other countries as he should deem necessary, he should find that this would contribute to the reestablishment of peace. The Curtiss-Wright Export Corporation defied a proclamation invoking the act and demurred to the indictment on the ground that the act attempted an unconstitutional delegation of power to the President. The act would have passed muster under the test laid down by Chief Justice Hughes in *Schechter*, for all that was involved was the invocation of contingent legislation upon findings by the President, and wider allowances of discretion in finding fact had been upheld in the past. But Justice Sutherland began his opinion by saying that the *Schechter* test need not be met. The constitutional prohibition on the delegation of legislative power did not apply in foreign affairs. At the Revolution "the powers of external sovereignty passed from the Crown not to the colonies severally but to the colonies in their collective capacity as the United States of America."³⁹³ The powers of internal sovereignty passed to the several states, and the Constitution redistributed the powers of the states, transferring some of them to the national government. But the national government did not acquire its authority in foreign affairs from the Constitution; it inherited it from the Confederation, and beyond that from the British crown. Consequently this authority was not limited by the Constitution, "save as the Constitution in express terms qualified its exercise."³⁹⁴ This historical argument becomes ludicrous when we remember that under the Articles of Confederation the power to impose embargoes, which was the basis of the legislation in the *Curtiss-Wright* case, did not belong to the Continental Congress but was explicitly reserved to the several states.³⁹⁵

It is unnecessary to demonstrate the incoherence of Sutherland's theory, for it is dictum. As his opinion proceeded, Sutherland abandoned the theory of extraconstitutional power and declared that the joint resolution met the tests that had always been applied to delegations of legislative power, citing two landmark decisions of orthodox

392. 299 U.S. 304 (1936).

393. *Id.* at 316.

394. *Id.* at 317.

395. ARTICLES OF CONFEDERATION OF 1781, art. IX.

law, *Field v. Clark*³⁹⁶ and *Panama Refining Co. v. Ryan*.³⁹⁷

We deem it unnecessary to consider, *seriatim*, the several clauses which are said to evidence the unconstitutionality of the Joint Resolution as involving an unlawful delegation of legislative power. It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the re-establishment of peace in the affected countries. . . .³⁹⁸

In *Youngstown Sheet & Tube Co. v. Sawyer*,³⁹⁹ in concurring in the decision that presidential seizure of factories was unconstitutional, Justice Jackson observed that much of Sutherland's opinion in *Curtiss-Wright* was dictum and that the holding on delegation was merely that in foreign affairs it was unwise to require Congress "to lay down narrowly definite standards by which the President is to be governed."⁴⁰⁰ In *Zemel v. Rusk*,⁴⁰¹ Chief Justice Warren quoted the *Curtiss-Wright* case but went on to observe: "This does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice."⁴⁰²

The more general proposition, that the Constitution does not apply in foreign affairs, was expressly repudiated by Justice Black in *Reid v. Covert*.⁴⁰³ "The United States is entirely a creature of the Constitution. Its powers and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."⁴⁰⁴ Although Justice Black wrote for only four Justices, neither the two concurring Justices nor the two dissenting Justices differed with this statement. Four years later, in *Kinsella v. United States ex rel. Singleton*,⁴⁰⁵ Justices Wittaker and Stewart announced their adhesion to the proposition stated by Justice Black in *Reid*.

In justifying the incursion into Cambodia before the New York City Bar Association,⁴⁰⁶ William H. Rehnquist relied heavily on the Tonkin Gulf Resolution and defended it by extensive quotation of dictum from *Curtiss-Wright*. Not only had the general philosophy of

396. 143 U.S. 649 (1892).

397. 293 U.S. 388 (1935).

398. 299 U.S. at 329.

399. 343 U.S. 579 (1952).

400. *Id.* at 635-36 n.2.

401. 381 U.S. 1 (1965).

402. *Id.* at 17.

403. 354 U.S. 1 (1956).

404. *Id.* at 5-6.

405. 361 U.S. 234, 261 (1960).

406. *House Hearings*, *supra* note 156, at 543.

this dictum been rejected in *Reid*; as a proposition concerning the law of delegation it had been entirely ignored in every case decided since *Curtiss-Wright*.

The *Curtiss-Wright* case was cited in Supreme Court decisions 26 times through July 1971. In only two of these cases could the problem of delegation be said to be involved. In *United States ex rel. Knauff v. Shaughnessy*,⁴⁰⁷ Justice Jackson held that Congress might authorize the Executive to exclude aliens without a hearing. He cited *Curtiss-Wright*,⁴⁰⁸ but he also cited *Fong Yue Ting v. United States*,⁴⁰⁹ which had already established that aliens might be excluded arbitrarily. As we have seen, Jackson regarded the statement on delegation in *Curtiss-Wright* as dictum.⁴¹⁰ The *Shaughnessy* case went off on the law of alienage rather than the law of delegation.

In *Zemel v. Rusk*,⁴¹¹ Chief Justice Warren upheld a congressional delegation of rulemaking power in the field of foreign commerce, the topic involved in *Curtiss-Wright*. He quoted a passage from *Curtiss-Wright* but denied that unfettered delegation was permissible. He cited as controlling authority *Kent v. Dulles*,⁴¹² in which the Court had applied orthodox law and had relied on *Panama Refining Co. v. Ryan*.⁴¹³

There have been seven Supreme Court decisions on the delegation of legislative power since *Curtiss-Wright*. *Kent*, a 1958 case, dealt with a rule introduced by the Secretary of State under delegated rulemaking power with the approval of the President that made the issuance of a passport conditional upon the satisfaction of tests as to political belief and affiliation. To save the statute, the Court held that it authorized the President to impose restrictions only within the two categories into which inquiry was made before 1926: questions of citizenship and allegiance, and seeking a passport to escape the law or otherwise engage in illegal conduct. When Congress delegates power over passports, "the standards must be adequate to pass scrutiny by the accepted tests,"⁴¹⁴ citing *Panama Refining*. The rule was invalid because it was not authorized by the statute as thus construed.

Seven years later, however, in *Zemel*, the Court discovered that in enacting the passport statute Congress had had a third administrative practice in mind, the making of rules imposing area restrictions on the issuance of passports, and upheld a rule on this topic. As we have

407. 338 U.S. 537 (1950).

408. *Id.* at 542.

409. 149 U.S. 698, 728 (1893).

410. See note 400 *supra*.

411. 381 U.S. 1, 17 (1965).

412. 357 U.S. 116 (1958).

413. 293 U.S. 388 (1935).

414. 357 U.S. at 129.

seen, Chief Justice Warren repudiated the dictum in the *Curtiss-Wright* case and followed *Kent* and thus *Panama Refining*.

In four cases, acts passed under the war power have been challenged on the theory that they attempted unconstitutional delegation of legislative power. The cases involved a wartime curfew,⁴¹⁵ price controls,⁴¹⁶ and rent controls.⁴¹⁷ In all these cases the administrative rule was upheld; but in no case was the *Curtiss-Wright* decision cited, and in no case was it suggested that the rule against the delegation of legislative power did not apply to war power legislation. In every case, the legislation was required to pass the test of orthodox law, the test stated in *Schechter*, *Panama Refining*, and earlier cases.

In *United States v. Robel*⁴¹⁸ the majority of the Court held that the Subversive Activities Control Act,⁴¹⁹ which made it unlawful for any member of an organization listed by the Subversive Activities Control Board to accept employment in what was designated a "defense facility" by the Secretary of Defense, was void on its face for overbreadth, and therefore they did not reach the question of delegation; Mr. Justice Brennan concurred on the ground that the act contained "no meaningful standard by which the Secretary is to govern his designations."⁴²⁰

It was argued above that the power to initiate war is, in Marshall's formula, legislative, and therefore cannot be delegated. However, there are many matters "of lesser interest" associated with the war power which it is impracticable, although constitutionally permissible, for Congress to decide itself. These include the topics described above, the draft, and the confiscation of enemy property. In such areas it has been usual for Congress to delegate the rulemaking power to an executive agency. Before and after the *Curtiss-Wright* decision, the Court has applied to these delegations the orthodox tests that Chief Justice Hughes described in *Schechter*. Of the four cases in which federal statutes have been held unconstitutional as delegations of legislative power, one was an attempted delegation under the war power.⁴²¹ In short, the dictum in *Curtiss-Wright* has neither paternity nor progeny.

Despite the repeal of the Tonkin Gulf Resolution, Solicitor General Griswold has persisted in asserting that the Vietnam War enjoys

415. *Hirabayashi v. United States*, 320 U.S. 1 (1943).

416. *Yakus v. United States*, 321 U.S. 414 (1944).

417. *Woods v. Miller Co.*, 333 U.S. 138 (1948); *Bowles v. Willingham*, 321 U.S. 503 (1944).

418. 389 U.S. 258 (1967).

419. 50 U.S.C. § 784(a)(1)(D).

420. 389 U.S. at 232.

421. *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921).

legislative sanction. He appeals to a succession of appropriation acts by which Congress has enabled the President to sustain the war.⁴²² It is certainly true that Congress has made available to the President both men and money without which he would have been unable to carry on wars in Indochina, and that this has been done "in full knowledge of the situation in Southeast Asia, and in support of the President's actions."⁴²³ But if these appropriation acts and the renewal of the draft in 1967⁴²⁴ are viewed as authorizing the President to conduct war, they are an even more outrageous delegation of legislative power than the Tonkin Gulf Resolution. They require neither war nor peace, but permit the President to choose either; they name no antagonist, but allow him a free hand. In fact, they name no friend. It is said that we are engaged in supporting the Government of South Vietnam, but the Executive has overthrown or sanctioned the overthrow of a long series of governments in South Vietnam that had previously enjoyed our support. Until 1955 it took the position that Vietnam was a member of the French Union and was headed by the Emperor Bao Dai.⁴²⁵ But it forced Diem on Bao Dai as prime minister and assisted Diem in expelling Bao Dai and withdrawing Vietnam from the French Union.⁴²⁶ Diem established a dictatorship with American money, but when his oppression of the population under his control made him so intolerable that he was no longer useful, the American Executive assisted in a military coup that overthrew him and led to the murder of

422. 117 CONG. REC. S12968, S12969 (daily ed. Aug. 3, 1971).

423. *Id.* The Court of Appeals for the First Circuit recently said that in a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached. The war in Vietnam is the product of the jointly supportive action of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries. Should either branch be opposed to the continuance of hostilities, however, and present the issue in clear terms, a court might well take a different view. This question we do not face.

Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971). The court does not mention the question of delegation. Is it saying that this issue can be raised by a litigant only when Congress has withdrawn the delegation? The opinion treats congressional powers as perquisites of Congress; if Congress consents to their exercise by the President, no one is injured. Of course, the rule against delegation of power is intended not for the benefit of Congress but for that of the citizenry; it represents the fundamental principle of republicanism, that policy should be made only by a numerous elective body. This responsibility cannot be evaded by any act of Congress.

Observe, however, that this opinion was handed down on October 22, 1971. On November 17, President Nixon confessed that the policy that Congress had announced in the Defense Procurement Act was at variance with his policy and said that he intended to ignore it. See note 93 *supra*. This is the exact situation in which the court of appeals said "a court might well take a different view."

424. Act of June 30, 1967, Pub. L. No. 90-40, 81 Stat. 100.

425. 1 THE PENTAGON PAPERS, *supra* note 212, at 61-70.

426. *Id.* at 181-83, 208, 214, 238-39.

Diem and his brother.⁴²⁷ It then supported the military dictatorship of General Minh until another coup, in which the American role is obscure,⁴²⁸ replaced Minh with Khanh. The Khanh government was apparently overthrown without American consent, but the Executive readily adopted the Ky regime that replaced it.⁴²⁹ Politics thereafter was dominated by a clique of officers in which Thieu bested Ky; Thieu staged two pro forma elections in order to make it appear that he had a popular as well as a military and American base. Congress authorized none of these manipulations, but it accepted them all. The situation was one of complete abdication by Congress of all its responsibilities to the Executive.

Where the Executive undertakes an action that may lawfully be initiated only by Congress, Congress may legalize his action by explicit ratification after the fact. So, on August 6, 1861, Congress ratified the enrollment of volunteers and the proclamation of a blockade by President Lincoln.⁴³⁰ On April 22, 1914, Congress ratified President Wilson's occupation of Vera Cruz as an act of reprisal.⁴³¹ No appropriation act has named any previous action in the Vietnam War that it ratified.

But of course the interest lies not in the retroactive effect of the appropriation acts but in an alleged prospective effect. It is argued that by making appropriations Congress has not only approved past actions of the President but has authorized future actions. It is indeed possible for Congress, when the President has initiated some change in legal status without authority, to approve the action and the new status by an appropriation act; but, as Mr. Justice Douglas said for the Court, "the ratification must plainly show a purpose to bestow the precise authority which is claimed."⁴³² When an appropriation act has been held to ratify an executive initiative, it is because it has identified the action in question by name or explicit designation.⁴³³ But in the case of the Vietnam War we have no identifiable status to be ratified, and no designation of any approved status in any appropriation act. Exactly as under the Tonkin Gulf Resolution, the President remains free to make

427. 2 *id.* at 206-07, 216-17; A.T. BOUSCAREN, *THE LAST OF THE MANDARINS: DIEM OF VIETNAM*, ch. 9 (1965); J. LACOUTURE, *LE VIETNAM ENTRE DEUX PAIX* 95-101 (1965); R. SHAPLEN, *THE LOST REVOLUTION* 200-12 (1966).

428. R. Shaplen, *supra* note 427, at 232-34; 2 *THE PENTAGON PAPERS*, *supra* note 212, at 277, 334-35, 340.

429. 2 *THE PENTAGON PAPERS*, *supra* note 212, at 342-48, 361-69.

430. Act of Aug. 6, 1861, ch. 63, §§ 2-3, 12 Stat. 326.

431. Act of Apr. 22, 1914, 38 Stat. 770.

432. *Ex parte Endo*, 323 U.S. 283, 303 (1944); *accord*, *Thompson v. Clifford*, 408 F.2d 154, 166 (D.C. Cir. 1968).

433. *Fleming v. Mohawk Co.*, 331 U.S. 111, 116 (1947); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937).

war or peace at will; if he chooses war, he may also choose his adversary, and he may break or displace the government to which we have allegedly made a commitment at his pleasure. Without violating any word in any appropriation act, the President could throw his weight behind the Hanoi regime and oust Thieu's government at Saigon; he could support Sihanouk and oust Lon Nol in Cambodia. If the appropriation acts have any legal effect other than the appropriation of funds, they have this entire effect. One can imagine no more complete delegation of legislative power to the President.

But let us assume that Griswold is right and that appropriation acts once legalized the Vietnam War. Whatever endorsement they may have given to the war was withdrawn when Congress repealed the Tonkin Gulf Resolution on January 12, 1971.⁴³⁴

What is called, after the language of a note by Edmund Plowden,⁴³⁵ the doctrine of "the equity of the statute" is firmly established in both English and American law.⁴³⁶ This is the proposition that the meaning of a statute is not found solely within the literal text. The statute is intruded into an existing legal order and must be read in such a way as to harmonize with related features of the law. On the other hand, to give effect to the intention of the legislature, it may be necessary to make adjustments in the existing body of the law, even when the text of the statute does not explicitly call for these changes.

Sometimes the doctrine of the equity of the statute has been pushed to what may appear unnecessary extremes. Both the House of Lords⁴³⁷ and the United States Supreme Court⁴³⁸ have held that the cumulation of statutes recognizing and regulating labor unions have in effect converted these voluntary associations into corporations liable for the torts of their members. In 1939, in *Keifer & Keifer v. Reconstruction Finance Corp.*,⁴³⁹ the Supreme Court held that because Congress had created 40 governmental corporations and had waived sovereign immunity in all but two cases, it impliedly waived immunity in the case of regional agricultural credit corporations created by the RFC, especially since it had explicitly waived immunity in the case of the parent corporation.

A less debatable situation is presented by a statute that repeals earlier legislation. In 1919, the House of Lords held that the repeal of named acts aimed at the Roman Catholic religion repealed all laws

434. Act of Jan. 12, 1971, Pub. L. No. 91-672, 84 Stat. 2053.

435. 75 Eng. Rep. 695 (1574).

436. 3 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 137 (3d ed., F.E. Horack, Jr. ed. 1943).

437. Taff Vale Ry. v. Amalgamated Soc'y of Ry. Servants, [1901] A.C. 426.

438. United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).

439. 306 U.S. 381 (1939).

against that faith, including the prohibition on bequests for superstitious uses, although this topic was not mentioned in any of the acts of repeal.⁴⁴⁰

In the United States, a series of decisions has established the proposition that an act of repeal that inaugurates a new policy repeals all acts inconsistent with that policy although they are not named. In 1845, in *United States v. Freeman*,⁴⁴¹ the Supreme Court held that an act of 1818 that in terms abolished brevet pay and rations only for army officers applied also to marine officers in the same position, because other acts had treated all brevet officers alike.

The correct rule of interpretation is that if diverse statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts in *pari materia* are to be taken together, as if they were one law.⁴⁴²

In *The Paquete Habana*,⁴⁴³ in 1900, the Court was called upon to interpret an act of Congress that revised the law governing the appellate jurisdiction of the Supreme Court. In general, the new scheme made the right to appeal turn on the nature of the case rather than the amount in controversy, but Congress did not explicitly repeal an earlier act limiting appeals in prize cases to suits where the matter in dispute exceeded \$2,000 or the district judge certified that the adjudication involved a matter of general importance. Justice Gray reviewed the law and concluded that Congress, by establishing a general policy governing review, had impliedly repealed the \$2,000 limitation in prize cases:

And it is a well settled rule in the construction of statutes, often affirmed and applied by this court, that "even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first act, it will operate as a repeal of that act."⁴⁴⁴

The most famous statement on the question is that of Justice Holmes:

A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.⁴⁴⁵

440. *Bourne v. Keene*, [1919] A.C. 815.

441. 44 U.S. (3 How.) 633 (1845).

442. *Id.* at 643.

443. 175 U.S. 677 (1900).

444. *Id.* at 685.

445. *Johnson v. United States*, 16 F. 30, 32 (1st Cir. 1908).

*United States v. Hutcheson*⁴⁴⁶ was a criminal prosecution of a labor leader under the Sherman Act for calling a jurisdictional strike. In the Clayton Act, Congress had exempted labor disputes from the Sherman Act, but in *Duplex Printing Co. v. Deering*⁴⁴⁷ the Court drastically limited the definition of labor dispute. Finally, in the Norris-La Guardia Act,⁴⁴⁸ Congress forbade the use of injunctions in labor disputes, defining this term so broadly as to include jurisdictional strikes. The question in *Hutcheson* was whether the abolition of injunctive relief in the Norris-La Guardia Act also abolished the criminal penalty of the Sherman Act in labor disputes. It was a problem, said Justice Frankfurter, of the interpretation of the "three interlacing statutes":⁴⁴⁹

[W]e need not determine whether the conduct is legal within the restrictions which *Duplex Printing Co. v. Deering* gave to the immunities of § 20 of the Clayton Act. Congress in the Norris-La Guardia Act has expressed the public policy of the United States and defined its conception of "labor dispute" in terms that no longer leave room for doubt. . . .

To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the future withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the Court is allowable conduct may in a criminal proceeding become the road to prison. . . . This is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking.⁴⁵⁰

The appropriation acts that sustained the Vietnam War were tributary to the Tonkin Gulf Resolution. When Congress revoked the delegation to the President in that resolution, it impliedly repealed the supportive effect of earlier appropriation acts. Given the doctrine of the equity of the statute, it would be irrational to say that the repeal of the explicit authorization did not carry with it the repeal of implied authorizations subsidiary to the principal statute.

446. 312 U.S. 219 (1941).

447. 254 U.S. 443 (1921).

448. 29 U.S.C. § 104 (1970).

449. 312 U.S. at 232.

450. *Id.* at 233-35.

Nor has Congress left this question open to doubt. In the National Procurement Authorization Act of November 13, 1971,⁴⁵¹ it enacted an affirmative policy for Indochina. This statement advised the President to take two actions, and only two: to negotiate an immediate cease-fire; and to negotiate a phased withdrawal of all American forces by a date certain, subject to the release of all American and allied prisoners of war. No imaginary emanation from an earlier appropriation act can enlarge the terms of this subsequent explicit declaration of Congressional purpose. It follows that President Nixon's statement of January 25, 1972,⁴⁵² that he would subscribe to no agreement that did not provide for a stipulated political settlement in South Vietnam, can claim no authorization by any act of Congress. On the contrary, it collides with an act of Congress. It represents the high water mark of the claim of presidential power, asserting that the President may carry on a war not only without the support of Congress but in defiance of Congress.

VII

CONCLUSION

The framers of the Constitution undertook to hedge in the President and to restrain him by a division of powers, but they supplied no guardian of this division except the courts. In the past, the courts have faced their responsibilities, but today only two Associate Justices of the Supreme Court are willing to pass upon the most important constitutional question of the 20th century.⁴⁵³ The others evade the issue by refusing to grant certiorari. In *Ex parte Milligan*,⁴⁵⁴ Justice Davis, a close personal friend of President Lincoln, wrote an opinion holding Lincoln's actions illegal. It was imperative to maintain the rule of law, for "[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln. . . ."⁴⁵⁵ But it appears that today the tradition of Davis and Story and Marshall, of Mansfield and Holt and Coke, is dead in the United States.

451. Act of Nov. 13, 1971, Pub. L. No. 92-156, 85 Stat. 423, 430.

452. 8 WEEKLY COMP. OF PRES. DOC. NO. 5, at 120 (Jan. 31, 1972). See Stone, *The Hidden Traps in Nixon's Peace Plan*, N.Y. REV. OF BOOKS, Mar. 9, 1972, at 13.

453. Justices Douglas and Stewart would have granted certiorari in *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir.), cert. denied, 389 U.S. 934 (1967). Mr. Justice Douglas would also have granted certiorari in *Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970); *Holmes v. United States*, 387 F.2d 781 (7th Cir. 1968), cert. denied, 391 U.S. 936 (1968); *Mitchell v. United States*, 369 F.2d 323 (2d Cir. 1966), cert. denied, 386 U.S. 972 (1967).

454. 71 U.S. (4 Wall.) 2 (1866).

455. *Id.* at 125.

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