

Presidential Ascendancy in Foreign Affairs and the Subversion of the Constitution

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“The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”

-- Justice Felix Frankfurter¹

Few issues in our long Anglo-American constitutional history can match the drama, importance and transcendent interest of the efforts to rein in executive power and subordinate it to the principle of the rule of law. Courts have grappled with the issue at least since 1608, when Sir Edward Coke boldly declared to an outraged James 1 that the King is, indeed, subject to the law. King James, according to Coke, was “greatly offended,” and declared that his opinion constituted “treason.” It was, perhaps, only Coke’s wit and willingness to fall “flat on all fower,” that spared him a sentence to the Tower of London.² James’s protest was anchored in the Stuart Kings’ theory of the Royal Prerogative, whose sweeping claims of illimitable theory were anathema to the great jurist’s devotion to the metes and bounds of law. The absolutist pretensions of the theory of High Prerogative subsequently found full-throated expression in the legendary Case of Ship Money in 1637, in which the Court of Exchequer characterized the King’s Prerogative as “innate in the person of an absolute King, and in the person of the Kings of England”; it was “the magisterial right, and power of a free monarch.”³ In his celebrated commentaries on English Law, Sir William Blackstone described the prerogative power as “that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his legal dignity.”⁴ At all events, the monarchical conception of power in seventeenth-century England asserted the unilateral power of the King to undertake any act and pursue any program or policy to promote the interests of his Kingdom.

The Framers of the United States Constitution responded to the Royal Prerogative and its assertion of inherent monarchical power grounded in royalty, not in the office of the King, through the institutionalization and constitutional confinement of the executive. The American system was designed, in part, to overcome the personalization of executive power. In their replacement of personal rule with the rule of law, the Framers rejected the historical admiration of the executive and the claims of personal authority that at least since the Middle Ages, in one form or another, had conceived of executive rights as innate; they were derived not from the office but, one might say, from the “blood and bone of the man.” Executive power had been conceived as personal, not juridical. For their part, delegates to the Constitutional convention sought to transform personal rule into a matter of law and to subordinate the executive to constitutional commands and prescriptions.⁵

The Framers were entitled to believe that they had succeeded in their quest to bridle executive power. It was, moreover, an achievement of historical proportions; at the time of the founding, the precise distinction between a republic and a monarchy lay in the subordination of the executive to the rule of law. The creation of the presidency, the powers of which, James Madison explained, were “confined and defined” by the Constitution from which they were derived, reflected the bedrock

principle of American Constitutionalism, trumpeted again and again by the Supreme Court across the decades, found eloquent expression in the words of Justice Hugo Black who, in 1957, wrote for the Court: “The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can act only in accordance with all the limitations imposed by the Constitution.”⁶ It follows that the president is required to trace his actions to the Constitution—“the charter from which he derives his authority.”⁷ The binding nature of the Constitution, expressed in its status as the law of the land, reflects fundamental choices made by the people, the essence of the principle of the consent of the governed. James Iredell, one of the most acute theorists of the founding generation, and later a Supreme Court Justice, explained: “The people have chosen to be governed under such and such principles. They have not chosen to be governed or promised to submit upon any other.”⁸ Disregard of the supreme law of the land, as seen for example, in presidential efforts to substitute values for those enshrined in the Constitution, constitutes rank usurpation and subverts the Constitution. No agent, Alexander Hamilton wrote, may “new-model his own commission,” least of all the president, who swears an oath to uphold the laws and the Constitution of the United States, a solemn duty reaffirmed by the Take Care Clause.⁹

While the Founders had committed the nation to the rule of law and to the principle of executive subordination to the Constitution, there emerged in the early days of the Republic, various controversies about the scope of executive power, disputes that would persist across two centuries. Separation of powers issues are perennial, of course, precisely because they require consideration of the proper repository of authority and the division of power between Congress and the president. As a consequence, contemporary questions about the scope of presidential power are largely the same as those addressed two centuries ago. It could hardly be otherwise since disputes about constitutional authority involve interpretation of a document—the Constitution—and discernment of the boundaries that cabin the exercise of presidential power. Manifestly, the maintenance of constitutional government requires adherence to boundaries. As Chief Justice John Marshall observed, in *Marbury v. Madison*, “To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”¹⁰

The constitutional prohibition on the transgression of boundaries has not, of course, prevented deep-seated quarrels. Across a vista of 200 years, the assertion of executive power has frequently triggered heated debate about its legality, and stressed and strained the Constitution. Indeed, American history is laced with great constitutional battles over the exercise of presidential power, beginning with the renowned eighteenth century debate between two architects of the Constitution—Alexander Hamilton and James Madison—on the constitutionality of President George Washington’s neutrality proclamation. In the years that followed, moreover, the decisions, policies and actions that lay behind Abraham Lincoln’s conduct of the Civil War, Franklin Roosevelt’s navigation of the Great Depression, Harry Truman’s choice for war in Korea and his seizure of the steel industry, in addition to Richard Nixon’s conduct of the war in Vietnam and his management of the Watergate crisis, and Ronald

Reagan's handling of the Iran-Contra Affair, have ignited constitutional storms of great intensity. More recently, the judgments, claims and exercise of executive power by Bill Clinton and George W. Bush have unleashed resentment and anger and have convulsed the nation in debate about the constitutional dimensions of the impeachment power. At the bottom of each constitutional controversy lay fundamental concerns about the scope of presidential power. In a manner that reflects the perennial nature of separation of powers disputes, moreover, the quarrels often involved the authority to initiate and conduct war, claims of executive privilege and immunity, the authority to conduct American foreign policy, power to order covert actions and issue executive orders. In the aftermath of the 9-11 outrage, assertions of presidential power by the Bush Administration raised new questions about executive use of signing statements, authorization of domestic wiretapping, and the practice of torture and extraordinary rendition as well as resort to invocation of the State Secrets Doctrine.

The rise of presidential hegemony over foreign affairs is perhaps the most conspicuous, though lamentable, feature of a constitutional system that establishes congressional primacy. The emergence of what Arthur Schlesinger, Jr. aptly described in 1973 in the title of his splendid book, *The Imperial Presidency*—the exaltation of presidential power in foreign affairs—is in sharp conflict with the constitutional blueprint for the formulation and conduct of American foreign policy. The Framers, who feared the exercise of unilateral presidential power in foreign relations, rejected the conventional wisdom of their time—centralization of foreign affairs powers in the executive—and assigned to Congress senior status in a partnership with the president for the management of foreign relations. That arrangement largely prevailed for most of the nation's first 150 years, but it succumbed to presidential domination in the post-World War II era. Constitutional governance of foreign affairs was a principal casualty of the Cold War, a chronic international crisis that afforded a pretext for the executive assumption of prerogative-like powers that the Framers has denied to the president.

In the context of the Cold War, Americans—members of Congress, judges, scholars and reporters—exhibited fawning deference to the president in foreign affairs. Lacking confidence in its own information and judgment, the citizenry imbibed the rhetoric of presidential expertise, experience and judgment, and a literature of advice urged the virtues of unfettered executive control of the nation's foreign relations. The pervasive sentiment of the Cold War promoted blind trust of the executive on the ground that he alone possessed the information, facts and experience necessary to safeguard American interests. And presidents acted the part. Executive usurpation became the norm; and covert operations—military, economic and political—avoided congressional radar and public perception. Congress was reduced to the role of spectator.

Presidential domination of American foreign affairs has become a commonplace after a half-century of unchecked expansion of executive powers. The emergence of a “presidential monopoly” over the conduct of foreign relations, built atop an extraordinary concentration of power in the president, reflects the doctrine of executive supremacy launched by the Supreme Court in *United States v. Curtiss-Wright*.¹¹ Across the decades, advocates of expansive presidential power in the realm of foreign affairs and national security have sought legal sanction in Justice George Sutherland's opinion

for the Court in *Curtiss-Wright*. In one way or another, the White House has adduced Sutherland's characterization of the president as the "sole organ" of American foreign policy, endowed with plenary, inherent and extra-constitutional powers to initiate war, authorize torture, seize and detain American citizens indefinitely, set aside laws, establish military tribunals and suspend and terminate treaties, in addition to assertions of authority to order covert operations, extraordinary rendition and warrantless wiretapping.

In his opinion for the Court in *Curtiss-Wright*, Justice Sutherland constructed a theory of presidential power that advanced the concepts of plenary, exclusive, inherent and extra-constitutional executive powers in foreign affairs. The claim of inherent and extra-constitutional executive powers rests on Justice Sutherland's reading of Anglo-American legal history. Sutherland explained that the "purpose" of the Constitutional Convention was "to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states." But the states, Sutherland observed, "never severally possessed international powers." As a consequence, they could not "vest" in the federal government powers that they did not have. According to Justice Sutherland, after the Declaration of Independence, "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." Although Justice Sutherland did not explain the mechanisms behind it, executive power over foreign affairs was extra-constitutional in its origin since it was transferred from the English Crown and not derived from the Constitution. His view that executive power in foreign relations was "inherent" in the president, as we shall see, was premised, not on constitutional grants of power but on policy needs that exalted executive control of foreign relations.

Justice Sutherland's conception of exclusive and inherent executive powers reflects his understanding of the realities and demands of international politics. "In this vast external realm," he wrote, "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." It was in this context, that Sutherland introduced a conception of presidential power that was independent of Congress. He stated:

It is important to bear in mind that we are here dealing not along with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the president a degree of discretion and

freedom from statutory restriction which would not be admissible were domestic affairs alone involved.¹

Will Justice Sutherland's opinion in *Curtiss-Wright* bear the weight assigned to it by various presidents-- Democrats and Republicans, liberals and conservatives alike? Has *Curtiss-Wright* been fairly read to defend virtually untrammelled executive authority in the formulation, management and conduct of American foreign policy? Indeed, what claims to presidential power will *Curtiss-Wright* support? In light of the sweeping implications for American citizens of presidential assertions of unilateral power in foreign affairs and war making, it is imperative to ask whether the Framers of the Constitution assigned such authority to the president. Does the Constitution reflect an intention to vest over-arching foreign relations powers in a single person? Answers to these and other questions require fresh examination, beginning with the text of the Constitution. The work of the Constitutional Convention can be gathered not merely from what the Framers said, but what they did.

The constitutional design for the conduct of American foreign policy includes four provisions that address a presidential role in foreign relations. Article 2, section 2 of the Constitution declares that "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 actual service of the United States . . . [and] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . and he shall nominate, and by and with the Advice and consent of the Senate, shall Appoint Ambassadors, other public Ministers" Article 2, section 3 provides that "he shall receive Ambassadors and other public Ministers"

The Framers' Design for Foreign Affairs

The Framers of the Constitution might have adopted the English model for reasons of familiarity, tradition and simplicity as a means of promoting and securing its vaunted values of unity, secrecy and dispatch—but they did not. Like other nations, Britain concentrated virtually unfettered authority over foreign affairs in the hands of the executive. The Framers, of course, were thoroughly familiar with both the vast foreign relations powers that inhered in the English Crown by virtue of the royal prerogative, and the values, sentiments and policy concerns that justified this arrangement. In his *Second Treatise of Government*, John Locke described three powers of government: the legislative, the executive and the federative. Federative power was the power over foreign affairs—"the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the Commonwealth." The federative power was "almost always united" with the executive¹². Locke warned that the¹³ separation of executive and federative powers would invite "disorder and ruin." Sir William Blackstone, the great eighteenth-century jurist, explained in his magisterial four-volume work, *Commentaries on the Laws of England* (1765-1769) that the King exercised plenary authority over all matters relating to war and peace, diplomacy, treaties, and military command. Blackstone defined the King's prerogative as "those rights and capacities which the King enjoys alone."¹⁴ The monarch's prerogatives, "those which are 'rooted in and spring from the King's political person,'" include the

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authority to send and receive ambassadors and the power to make war or peace.¹⁵ The Crown, moreover, could negotiate “a treaty with a foreign state, which shall irrevocably bind the nation.”¹⁶ The King, according to Blackstone, possessed the power to issue letters of marque and reprisal which, he explained, was “nearly related to, and plainly derived from, that other of making war.”¹⁷ The King, moreover, was “the generalissimo, or the first in military command,” and he possessed “the sole power of raising and regulating fleets and armies.”¹⁸ In the exercise of this lawful prerogative, Blackstone explained, the King “is, and ought to be absolute; that is, so far absolute that there is no legal authority that can either delay or resist him.”¹⁹

In light of Locke’s admonitions, the rejection by the Constitutional Convention of the English model and its promotion of unilateral executive power, grounded in inherent, discretionary and unbridled authority, could not have been more emphatic. The Convention’s penchant for enumeration of powers, as a method of avoiding doubt on the repository of key powers and providing protection against executive assertion of inherent authority, was ably explained by Madison in *Federalist No. 45*: “The powers *delegated* by the proposed constitution are *few and defined* . . . [they] will be exercised principally on *external* objects, as war, peace, negotiations, and foreign commerce.”²⁰ The Framers’ blueprint for foreign affairs reflects their determination to establish a republic premised on collective decision making, a principle that reflects confidence in the crossfire of discussion and debate as a method for producing superior laws, policies and programs. The preference for collective, rather than unilateral, decision making runs throughout the constitutional provisions that govern American foreign policy.

The Constitution assigns to Congress senior status in a partnership with the president for the purpose of conducting foreign policy. Article 1 vests in Congress broad, explicit and exclusive powers to regulate foreign commerce; raise and maintain military forces; grant letters of marque and reprisal; provide for the common defense; and initiate hostilities on behalf of the United States, including full-blown war. As Article II indicates, the president shares with the Senate the treaty-making power and the authority to appoint ambassadors. The Constitution exclusively assigns two foreign affairs powers to the president. He is designated commander in chief of the nation’s armed forces, although, as we shall see, he acts in this capacity by and under the authority of Congress. The president also has the duty to receive ambassadors, but the Framers viewed this as a routine administrative function, devoid of discretionary authority.²¹ This list exhausts the textual grant of authority to Congress and the president. The president’s constitutional powers are few and modest, and they pale in comparison to those vested in Congress. The American arrangement for the conduct of the nation’s foreign affairs bears no resemblance to the English model. In fact, the Convention discarded the British model as obsolete and inapplicable to the republican manners of the United States.²² Alexander Hamilton captured this sentiment in *Federalist No. 75*:

“The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a president of the United States.”²³

The Founders' deep-seated fear and distrust of executive power, which resonated from the colonial period and reflected their studied reading of history, made the quest for an effective foreign affairs system an arduous task. The pervasive fear of a powerful executive, particularly a president who might wield unilateral authority in an area as sensitive and critical as that of foreign relations, was reinforced by the republican ideology that permeated the Convention. The Framers' attachment to collective judgment—joint participation, consultation and concurrence—reflected their adherence to the fundamental premise of republicanism: the conjoined wisdom of the many is superior to that of one. The decision to create a structure of shared powers in foreign affairs, James Wilson told fellow delegates in the Pennsylvania Ratifying Convention, provided “a security to the people.”²⁴ The emphasis on collective decision making came at the expense of unilateral presidential authority, of course, but that consequence was of little moment, given the Founders' overriding aversion to discretionary executive power.²⁵ But that was the point, precisely. As a result of the pervasive distrust of executive power, the Framers placed control of foreign policy beyond the unilateral capacity of the president. Furthermore, as James Madison, justly known as the Father of the Constitution, declared, the Convention “defined and confined” the authority of the president so that a power not granted could not be assumed.²⁶ The Framers contrived a new constitutional arrangement for foreign affairs—a distinctively American contribution to politics and political science—and it was epitomized in their judgment that, in the newly-minted Republican Era, the executive unilateralism exalted by prevailing models was a shopworn, outdated method that belonged to an age and a means of foreign affairs governance that they rejected and discarded. As such, the Framers perceived a broad equatorial divide between the hemispheres of monarchism and republicanism, between the values of the Old World and those of the New World. The Convention's deliberate fragmentation of powers relating to diplomacy, treaties and war and peace, and the allocation of various foreign affairs powers to different departments and agencies—in defiance of conventional understandings and the explicit warnings from Locke of disorder, chaos and disaster—reflected the Framers' determination to apply the doctrines of separation of powers and checks and balances, the principle of the rule of law, and the elements of constitutionalism to the realm of foreign relations as rigorously as they had been applied to the domestic realm.

The War Power

The Constitutional Convention's repudiation of the English model was dramatically illustrated in its decision to vest the war power in Congress.²⁷ The Framers granted to Congress the sole and exclusive authority to initiate military hostilities, including full-blown, total war, as well as lesser acts of armed force, on behalf of the American people. The constitutional assignment of the War Power to Congress, which Justice William Paterson, a delegate to the Convention, described in *United States v. Smith* (1806) as the “exclusive province of Congress to change a state of peace into a state of war,” reflected the Framers' decision to deny to the president what Blackstone had attributed to the English King—“the sole prerogative of making war and peace.”²⁸ The Framers' perception of the propensity of executives to initiate war for less than meritorious reasons shadowed their discussions. In Federalist No. 4, John Jay, whose impressions, knowledge and conclusions about national security and foreign affairs were banked on his experience as Secretary of Foreign Affairs, summed up the sentiments that lay behind the

Framers' aversion to an executive war power. Jay wrote that "absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people."²⁹ Madison echoed Jay's warnings and conclusions about executive war making. In 1793, he characterized war as "the true nurse of executive aggrandizement. . . . In war, the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow that they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace."³⁰ In 1798, in a letter to Thomas Jefferson, Madison declared that the Constitution "supposes, what the History of all Govts demonstrates, that the Ex. Is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."³¹

The Framers' understanding that the power of war and peace was historically associated with the monarchy, and often exercised for arbitrary purposes, afforded a backdrop for their debates. The War Clause of the Constitution provides that "the Congress shall have power . . . to declare War [and] grant Letters of Marque and Reprisal." The debate on the proper repository of the authority to initiate war occurred at the outset of the Convention. On May 29, 1787, Gov. Edmund Randolph of Virginia proposed a constitution that included a provision "that a national Executive be instituted." The seventh paragraph stated that the executive "ought to enjoy the Executive rights vested in Congress of the Confederation."³² On June 1, the Convention took up Randolph's proposal. Charles Pinckney stated that he favored "a vigorous executive but was afraid the Executive powers of [the existing] Congress might extend to peace & war & c which would render the Executive a Monarchy, of the worst kind, towit an elective one."³³ John Rutledge supported the placement of the executive power in a single person "tho' he was not for giving him the power of war and peace."³⁴ Roger Sherman considered "the executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect."³⁵ In a remark that laid bare the Framers' opposition to the notion of executive prerogative powers, James Wilson indicated that he also preferred a single executive, but "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives," he explained, "were of a Legislative nature. Among others that of war & peace & c."³⁶ James Madison agreed that the war power was legislative in character. Rufus King noted: "Mad: agree with Wilson in his definition of executive powers—executive powers . . . do not include the rights of war & peace" Madison explained that executive powers should be "confined and defined—if large we shall have the Evils of elective Monarchies."³⁷ There was no vote on Randolph's resolution, but the discussion reflects an understanding that the power of "war & peace"—the power to initiate war—did not belong to the executive but to the legislature.

On August 6, the Committee of Detail circulated a draft constitution which provided: "the legislature of the United States shall have the power . . . to make war."³⁸ This clause bore sharp resemblance to the Articles of Confederation, which vested the "sole and exclusive right and power of

determining on peace and war” to the Continental Congress.³⁹ This design was thoroughly familiar to the Framers, thirty-five of whom had served in the Continental Congress, and it reflected the fact, as the distinguished legal historian, Charles Warren, observed, that this power, as well as others, came “bodily from the old Articles of Confederation.”⁴⁰ This provision gave rise to debate. When the War Clause was considered in debate on August 17, Charles Pinckney opposed placing the power in Congress. “Its proceedings were too slow”; he favored the Senate,⁴¹ as Alexander Hamilton had in the plan he presented to the Convention.⁴² Pierce Butler, however, “was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the nation will support it.”⁴³ Butler’s opinion shocked Elbridge Gerry, who declared that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”⁴⁴ Butler stood alone in the Convention; there was no support for his opinion and no second to his motion. Credit Butler for being a quick study; by the end of the day, he was in full retreat from his initial position.⁴⁵

The proposal of the Committee of Detail to vest the legislature with the power to make war proved unsatisfactory to Madison and Gerry. In a joint resolution, they moved to substitute “declare” for “make,” leaving to the Executive the power to repel sudden attacks.”⁴⁶ The meaning of the motion is unmistakable. Congress was granted the power to make, that is, initiate war; the president, for obvious reasons, could act immediately to repel sudden attacks without authorization from Congress. There was no quarrel whatever with respect to the sudden-attack provision, but there was some question as to whether the substitution of “declare” for “make” would effectuate the intention of Madison and Gerry. Roger Sherman of Connecticut thought the motion “stood very well. The Executive shd. be able to repel and not to commence war. ‘Make’ better than ‘declare’ the latter narrowing the power [of the legislature] too much.” Virginia’s George Mason “was agst. giving the power of war to the Executive, because not [safely] to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred ‘declare’ to ‘make.’” The Madison-Gerry proposal was adopted by a vote of seven to two. When Rufus King explained that the word “make” might be understood to authorize Congress to initiate as well as to conduct war, which was an “executive function,” Connecticut changed its vote so that the verb “declare” was approved, eight states to one.⁴⁷

The debates and vote on the War Clause make it clear that Congress alone possesses the authority to initiate war. The war making power was specifically withheld from the president; he was given only the authority to repel sudden attacks. Only one delegate—Pierce Butler—had advanced the concept of an executive power to initiate war. However, by the end of the August 17 debate on the War Clause, he clearly understood the Convention’s intention to place the war power under legislative control, as evidenced by his motion “to give the Legislature the power of peace, as they were to have that of war.”⁴⁸ The motion, which represented a volte-face on Butler’s part, drew no discussion, and it failed by a vote of 10-0. In all likelihood, it was viewed by the delegates as utterly superfluous given their understanding that the war power encompassed authority to determine both war and peace.⁴⁹ In a telling moment, reflective of an air of self-defense and contrived detachment, Butler explained to his colleagues at the South Carolina Ratifying Convention that the grant of power to “make war” to the

president “was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war.”⁵⁰ Butler did not disclose that the idea was his.

The Framers’ aversion to the royal prerogative precluded an assignment of the war power to the president. The Madison-Gerry motion, which provided that the president would possess the power to “repel sudden attacks,” would not have been necessary *if* the war power had been granted to the president. It was the grant to Congress of the war power, precisely, that raised the question of an exception, that is, the need to clothe the president with the authority to “repel *sudden* attacks.” The emergency created by a *sudden* attack implies that there is no time to consult with Congress. Surely, Gerry, who co-authored the resolution with Madison, cannot be viewed as repudiating his stated opposition that very day to Butler’s idea that the executive “alone could declare war.” Nor could it be said with any credibility that Madison, who had explained that the power to initiate war was *legislative* in character, had intended in the resolution to attribute the war power to the president.

With the exception of Butler’s remark, there is nothing in the Framers’ comments, arguments or train of discussion to suggest even a mild flirtation with the concept of executive war making. The Convention’s decision to leave the war power in Congress, where it had been under the Articles of Confederation, and the reasoning on which it was grounded, was embraced by delegates to the various state ratifying conventions, early governmental practice and a series of decisions rendered by the Supreme Court at the dawn of the republic. Space does not permit a comprehensive review of the discussions in the state conventions, but James Wilson, only slightly less important than Madison as an architect of the Constitution, and regarded as the “most learned and profound legal scholar of his generation,” explained the rationale behind the design of the War Clause to his colleagues in the Pennsylvania Ratifying Convention in terms that echoed the sentiments of the Framers:

“This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into war.”⁵¹

As a means of preventing the president from “hurrying” the nation into war, the Framers, as Wilson later explained, conferred upon Congress the bulk of the war powers, and relegated the president to a subordinate role:

“The power of declaring war, and the other powers naturally connected with it, are vested in congress. To provide and maintain a navy—to make rules for its government—to grant letters of marque and reprisal—to make rules concerning captures—to raise and support armies—to establish rules for their regulation—to provide for organizing . . . the militia and calling them forth in the service of the Union—all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress.”⁵²

The Framers’ additional grant to Congress of power to “provide for the common defense” and to make all appropriations to effectuate its exercise of all powers “naturally connected” with war, left the

president with no authority to initiate hostilities. The president, moreover, would be barred from exercising any powers vested in Congress by both the separation of powers and the Take Care Clause, which requires the president to “take care to faithfully execute the law.”⁵³ The Convention’s denial to the president of constitutional authority to commence war was complete.

Challenges to a Congressional War Power

In spite of the illuminating debate and vote on the War Clause, the shift from “make” to “declare” has induced revisionists to find in the presidency a power to initiate war. The Vietnam War provided a backdrop for their efforts. Senator Barry Goldwater, writing in the latter, hectic days of the Vietnam War, was among the first to assert that the shift reflected the Framers’ intention to “leave the ‘making of war’ with the President.”⁵⁴ Leonard Ratner explained that that the “declare war clause” recognized “the warmaking authority of the President, implied by his role as executive and commander-in-chief and by congressional power to declare, but not make, war,” an explanation embraced thirty years later by John Yoo.⁵⁵ There is little dispute that Professor Yoo has been the most prominent advocate of broad presidential powers in recent years, from his post at the law school at the University of California, Berkeley, as well as his position as an Assistant Attorney General in the Office of Legal Counsel under the administration of George W. Bush. Yoo has asserted that the Constitutional Convention embraced the foreign affairs and war making powers of the English King, and concludes that “the Framers created a framework designed to encourage presidential initiatives in war.” According to Yoo, the congressional role in making decisions about war is derived not from the War Clause, but from its power to constrain the executive the appropriations and impeachment powers. Congress may not initiate war. The purpose of the “Declare War Clause,” rather, is to merely announce to the nations of the world that America is at war. As Yoo states: “A declaration did not create or authorize; it recognized.” The provision did not “add to Congress’ store of war powers at the expense of the President.” Rather, it granted to Congress “a judicial role in declaring that a state of war exists between the United States and another nation.”⁵⁶ Other scholars have advanced the idea that the president may order military hostilities, so long as they fall short of war.⁵⁷

We shall defer for the moment consideration of the Executive Power and Commander in Chief Clauses, but these revisionist efforts ignore the fact that, at the time of the framing, the word “declare” enjoyed a settled understanding and an established usage. Simply stated, as early as 1552, the verb “declare” had become synonymous with the verb “commence”; they both meant the initiation of hostilities.⁵⁸ This was the established usage in international law as well as in England, where the terms to declare war and to make war were used interchangeably.⁵⁹ The Framers were familiar with this usage. Chancellor James Kent of New York, one of the leading jurists of the founding period, stated: “As war cannot be lawfully commenced on the part of the United States without an act of Congress, such an act is, of course, a formal official notice to the world, and equivalent to the most solemn declaration.” Though Kent interpreted “declare” to mean “commence,” he did not assert that the Constitution requires a congressional declaration of war before hostilities could be lawfully commenced but merely that war is initiated by Congress. What “is essential,” according to Kent, is “that some formal public act, proceeding directly from the competent source, should announce to the people at home

their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact.”⁶⁰

Given the equivalence of commence and declare, it is clear that a congressional declaration of war would institute military hostilities. According to international law commentators, a declaration of war was desirable because it announced the institution of a state of war and the legal consequences that it entailed, to the adversary, to neutral nations, and to citizens of the sovereign initiating the war. Indeed, this is the essence of a declaration of war: notice by the proper authority of intent to convert a state of peace into a state of war.⁶¹ But under American law only a joint resolution or an explicit congressional authorization of the use of military force against a named adversary is required. This can come in the form of a “declaration pure and simple” or in a “conditional declaration of war.”⁶² There are also two kinds of war, those which U.S. courts have termed “perfect” or general and those labeled “imperfect” or limited wars.⁶³

It was decided in three early and important Supreme Court cases that the power of determining perfect and imperfect war lay with Congress. These decisions put the meaning of the War Clause beyond doubt. No court since has departed from these precedents, which are as old as *Marbury v. Madison*, the greybeard of all precedents. In 1800, in *Bas v. Tingy*, the Court determined that Congress might declare an imperfect war or limited war, as well as a perfect or general war.⁶⁴ In 1801, in *Talbot v. Seeman*, Chief Justice John Marshall, who had been a member of the Virginia Ratifying Convention, delivered the opinion: “The whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied, nor in the course of the argument has it been denied, that 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.”⁶⁵ The power of Congress to authorize limited war is, of course, a necessary concomitant of its power to declare general war. If, as John Bassett Moore has suggested, the president might authorize relatively minor acts of war or perhaps covert military operations in circumstances not demanding full-blown war, that power could be wielded in a way that would easily eviscerate the Constitution’s placement of the war power in Congress. Moore, perhaps the most eminent American scholar of international law, justly rebuked that proposition:

“There can hardly be room for doubt that the framers of the Constitution, when they vested in Congress the power to declare war, they never imagined they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his notion of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace.”⁶⁶

In *Little v. Barreme* (1804), a case arising from the war with France from 1798-1800, Marshall held that President John Adams’s instructions to seize ships were in conflict with an act of Congress, thus affirming executive subordination to Congress during war.⁶⁷ In 1806, in *United States v. Smith*, Justice William Paterson, while riding circuit, held that Congress alone possesses the constitutional authority to

initiate military hostilities. Paterson stated that “it is the exclusive province of Congress to change a state of peace into a state of war.”⁶⁸ In *Smith*, Paterson explained that the rationale for vesting the president with authority to repel sudden attacks rested on the fact that an invasion constituted a state of war, thus rendering a declaration of war by Congress superfluous. In such an event, the president was authorized to initiate offensive action against the attacking enemy. But the president’s power of self-defense does not extend to foreign lands. The Framers did not give the president the right to intervene in foreign wars, or to choose between war and peace, or to identify and commence hostilities against an enemy of the American people. Nor did they empower him to initiate force abroad on the basis of his own assessments of U.S. security interests. These circumstances involve choices that belong to Congress under its exclusive province to change a state of peace into a state of war. The president’s power is purely defensive and strictly limited to attacks against the United States.

These early decisions have not been disturbed. In the Prize Cases in 1863, the Supreme Court considered for the first time the power of the president to respond to sudden attacks. Justice Robert Grier delivered the opinion of the Court:

“By the Constitution, Congress alone has the power to declare a national or foreign war. . . . If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force, by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be “unilateral.”⁶⁹

All of the offensive powers of the nation, then, were located in Congress. Consistent with this constitutional theory, the Convention gave to Congress the power to issue “letters of marquee and reprisal.”⁷⁰ Dating back to the Middle Ages, when sovereigns employed private forces in retaliation for an injury caused by the sovereign of another state or his subjects, the practice of issuing reprisals gradually evolved into the use of public armies. By the time of the Convention, the Framers considered the power to issue letters of marque and reprisal sufficient to authorize a broad spectrum of armed hostilities short of declared war. In other words, it was regarded as a species of imperfect war. For example, Madison, Hamilton and Jefferson, among others, agreed that the authorization of reprisals was an act of war and belonged to Congress.⁷¹ As a direct riposte to the revisionists’ claim of a presidential power to order acts of war, we may consider what Jefferson said in 1793 of the authority necessary to issue a reprisal: “Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not with the executive.”⁷²

In sum, when the Framers granted to Congress the power to declare war, they were vesting in that body the sole and exclusive power to initiate military hostilities on behalf of the American people. The record reveals that no member of the Philadelphia Convention and no member of any state ratifying

convention held a different understanding of the meaning of the War Clause. The Supreme Court, as we have seen, shared that understanding as well. If revisionists are to find constitutional authority for executive ascendancy on matters of war and peace and national security, it must derive from another source. Let us turn to their purported legal justifications for presidential dominance of American foreign policy.

The Commander-in-Chief Clause

The Commander in Chief Clause has become the principal pillar for those who would vest in the president the power of war and peace. Article 2, section 2 of the Constitution provides: “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.” The commander-in-chief provision, in the words of Justice Robert H. Jackson, has been invoked for the “power to do anything, anywhere, that can be done with an army or navy.”⁷³ Though stated in the context of reviewing President Harry Truman’s invocation of the clause to support his seizure of steel mills, Jackson’s observation certainly anticipated the claims of executives who have seized the provision as justification for their military adventures. Presidents Harry Truman, Lyndon Johnson, Richard Nixon, Gerald Ford, Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton and George W. Bush fall into this camp.⁷⁴ As the chief architect of the Bush Administration’s view of executive power in foreign affairs, in his position in the Office of Legal Counsel, Yoo stated in what became known as the “Torture Memos” that the president possesses an inherent, plenary power in foreign affairs, including a unilateral power to initiate war. He stated in an OLC Memo of September 25, 2001, that “the Constitution vests the president with the plenary authority, as Commander in Chief and the sole organ of the Nation’s foreign relations, to use military force abroad” Yoo added that all three branches “agree that the president has broad authority to use military force abroad, including the ability to deter future attacks.”⁷⁵ These assertions find no foundation in the text, structure or history of the Constitution.

As Francis D. Wormuth observed, 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.”⁷⁶ The office was introduced by King Charles 1 in 1639 when he named the Earl of Arundel commander-in-chief of an army to battle Scottish forces in the First Bishops War. In historical usage, the title was conferred upon the highest ranking military official in a theatre of battle. The commander-in –chief was always subordinate to a political superior. As a consequence, the title carried with it little discretion. At all events, it conferred no authority to initiate war.⁷⁷ The Continental Congress continued the usage of the title on June 15, 1775 when it appointed George Washington as general. His commission named him “General and Commander in Chief, of the Army of the United Colonies.” In the manner of subordinating the commander in chief to a political superior, Washington was ordered “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.” Congress did not hesitate to instruct the commander in chief on military and policy matters.⁷⁸

The practice of entitling the office at the apex of the military hierarchy as commander in chief and of subordinating the office to a political superior, whether a king, parliament or congress, was thus

firmly established for a century and a half and thoroughly familiar to the Framers when they met in Philadelphia. Perhaps this settled understanding and the consequent lack of concern about the nature of the post account for the absence of any debate on the Commander in Chief Clause at the Convention. When Hamilton submitted a plan to the Convention on June 18, he probably did not propose the title commander-in-chief, but he undoubtedly had it in mind when he said that the president was “to have the direction of war when authorized or begun.”⁷⁹

It was Hamilton’s speech, then, that summarized the essence of the president’s power as commander-in-chief: when war is “authorized or begun,” the president is to command the military operations of American forces. War, it is to be recalled, might be initiated by Congress or by sudden attack on the United States. In both cases, as Hamilton explained in Federalist No. 69, the office of commander in chief “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.”⁸⁰ In Federalist No. 74, Hamilton explained the rationale for making the president commander in chief. The direction of war, he stated, “most peculiarly demands those qualities which distinguish the exercise of power by a single head,” a conclusion widely shared by his contemporaries.⁸¹ Then too, the power of directing war and emphasizing the common strength, he observed, “forms a usual and essential part in the definition of the executive authority.”⁸² As General Washington’s chief aide in the Revolutionary War, Hamilton was familiar with the rationales that the Framers would employ in constructing the office of commander in chief. The conduct of war was better left in the hands of a single officer, to be sure, but that officer might be directed or instructed by a political superior. At all events, neither Hamilton nor any of his contemporaries claimed for the president a unilateral war making power in his capacity as commander in chief.

The president as commander in chief was to be “first General and Admiral” in “the direction of war when authorized or begun.” But all political authority remained in Congress, as it had under the Articles of Confederation. As Louis Henkin has observed, “Generals and Admirals, even when they are ‘first,’ do not determine the political purposes for which troops are to be used; they command them in execution of policy made by others.”⁸³ The commander-in-chief in the tradition of a century and a half was made subordinate to a political superior. The office carried with it no power to declare war; as Hamilton and Iredell explained, that power is the exclusive prerogative of Congress. Proponents of executive war making will find nothing in the origins of the Commander in Chief Clause to support their agenda.

Executive Power Clause

Advocates of presidential domination of matters involving war and peace and national security have sought to adduce an executive war power from Article 2, section 1, which reads: “The executive power shall be vested in the President of the United States.” In 1966, for example, the State Department cited the president’s role as chief executive to adduce constitutional support for President Johnson’s entry into the Vietnam War.⁸⁴ Richard Nixon’s legal advisers similarly invoked the clause to

justify his adventures in Southeast Asia.⁸⁵ In 1975, Gerald Ford found constitutional warrant in the “President’s Constitutional executive power” the military activities he ordered in Cambodia. On April 26, 1980, Jimmy Carter authorized an attempted rescue of American citizens held hostage by Iran. He justified the attempt as being “pursuant to the President’s powers under the Constitution as Chief Executive and as Commander in Chief.”⁸⁶

The effort to ground presidential war making on the Executive Power Clause is unavailing. Indeed, the very premise was raised –and rejected–in the Constitutional Convention. It will be recalled that Madison and Wilson, among others, pointed out that writers on the law of nations regarded the war power as “legislative,” not “executive,” in nature. When Randolph proposed that the executive would have the “executive rights vested in Congress” under the Articles of Confederation, various members of the Constitutional Convention raised objections if that would mean that the president would inherit the power of war and peace. The Convention embraced a narrow view of executive power, and the discussions of it never referred to it as a source of authority to formulate foreign policy or make decisions on matters of war and peace.

The concept of an executive power, flush with far-reaching discretionary authority, held no charm for the Framers. For the Framers, the phrase “executive power” was limited, as Wilson put it, to “executing the laws and appointing officers.” Roger Sherman “considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect.” Madison agreed with Wilson’s definition of executive power. He thought it necessary “to fix the extent of Executive authority . . . as certain powers were in their nature Executive, and must be given to that department” and added that “a definition of their extent would assist the judgment in determining how far they might be safely entrusted to a single officer.” The definition of the executive’s powers should be precise, thought Madison; the executive power “shd. be confined and defined.”⁸⁷ There was no challenge to the definition of executive power offered by Madison and Wilson, nor was there even an alternative understanding advanced. And there was no argument about the scope of executive power; indeed, any latent fears were quickly arrested by assurances from Madison and Wilson that the power of war and peace was not an executive but a legislative function. Given the Framers’ conception of the chief executive as little more than an institution to effectuate the “will of the legislature,” that is to execute laws and appoint officers, there was little about the office to fear.

Lockean Prerogative

Extollers of a unilateral executive war making authority also have invoked the Lockean prerogative as a source of inherent presidential power. Drawing on John Locke’s defense of the right of an executive to act for the common good, even if it requires breaking the law (*salus populi suprema lex*), defenders have adduced a similar claim for the president.⁸⁸ There is not a scintilla of evidence that the Framers intended to incorporate the Lockean Prerogative in the Constitution. And lacking a textual statement or grant of power to that effect, such intent is indispensable to the claim of constitutional power. In fact, the evidence runs in the other direction. Fears of executive power led the Framers to enumerate the president’s power to “define and confine” the scope of his authority. And clearly, an undefined

reservoir of discretionary power in the form of Locke's prerogative would have unraveled the carefully crafted design of Article 2 and repudiated the Framers' stated aim of corralling executive power.

The absence of such authority means that by definition any presidential assertion of a prerogative power to violate the law is an assertion of extra-constitutional power; an action based on such an assertion is definitionally unconstitutional. This claim, then, does not afford a president any constitutional or legal authority to initiate war. The issue is merely whether a president might commence war in violation of the supreme law of the land and then attempt to justify it on grounds of necessity. Of course, he cannot be the judge of his own actions. He must seek immunity and exoneration from Congress in the way of retroactive authorization, a practice that is deeply imbedded in the American tradition.⁸⁹ Whether or not congressional approval of the claimed prerogative is granted, the review itself is an admission of presidential usurpation of power.

Executive Precedents

Champions of executive power have fashioned the argument that executive war making, if repeated often enough, acquires legal validity. This is the contention, as expounded by Henry P. Monaghan, among others, that "history has legitimated the practice of presidential war-making."⁹⁰ The entire argument rests on the premise that the president frequently has exercised the war power without congressional authorization. The actual number of these episodes varies among the several compilations, but defenders usually list between 100 and 200 unilateral acts, each of which constitutes a legitimizing precedent for future executive wars.⁹¹

In detail and in conception, the argument is flawed. In the first place, the revisionists' lists are inaccurately compiled. Francis D. Wormuth has thoroughly deflated their claims with what Raoul Berger rightly characterized as a "painstaking analysis."⁹² Space does not permit a critical analysis of each alleged assertion of executive precedents. Consider, however, an error common to the lists: the claim that unilateral war making was initiated by the "undeclared" war with France in 1798. The claim, as Professor Wormuth justly observed, "is altogether false. The fact is that President John Adams took absolutely no independent action. Congress passed a series of acts that amounted, so the Supreme Court said, to a declaration of imperfect war; and Adams complied with these statutes."⁹³ In a detailed analysis of the quasi-war, Dean Alfange concurred in Wormuth's assessment. Adams's action, Professor Alfange explained, "certainly provides no precedent for a claim of presidential prerogative to commit the United States to war without congressional authorization. Adams made absolutely no claim of a general presidential power to initiate hostilities."⁹⁴

Moreover, many of the episodes involved initiation of hostilities by a military commander, not by authorization from the president. If practice establishes law, then the inescapable conclusion is that every commander of every military unit has the power to initiate war. What is perhaps most revealing about presidential understanding of the constitutional locus of the war power is that in the one or two

dozen instances in which presidents personally have made the decision unconstitutionally to initiate acts of war, they have not purported to rely on their authority as commander in chief or chief executive. In “all of these cases the Presidents have made false claims of authorization, either by statute or by treaty or by international law.”⁹⁵

Moreover, it cannot be maintained that constitutional power, in this case the war power, can be acquired through practice. In *Powell v. McCormack*, Chief Justice Earl Warren wrote: “That an unconstitutional action has been taken before surely does not render that action any less unconstitutional at a later date.” Earlier, Justice Felix Frankfurter, writing for a unanimous Court, echoed a centuries-old principle of Anglo-American jurisprudence: “Illegality cannot attain legitimacy through practice.”⁹⁶ The Court has repeatedly denied claims that the president can acquire constitutional power through a series of usurpations. If it were otherwise, the president might aggrandize all governmental power. Neither Congress nor the judiciary could lawfully restrain the exercise of the president’s accumulated constitutional powers. Clearly, this practice would scuttle our entire constitutional jurisprudence. Thus, the most recent act of usurpation stands no better than the first.

The efforts of revisionists to adduce an executive war making power on the basis of a list of “presidential wars” in the nineteenth century is unpersuasive.⁹⁷ As we have seen, the occasional president who did in engage in unilateral executive war making sought refuge in casuistry and contrivance. The Mexican War, which lasted from 1846 to 1848, deserves attention in this context. Following the annexation of Texas, a dispute arose over the title to territory between the Nueces River and the Rio Grande. President James K. Polk ordered an army into the area, and it defeated the Mexican forces. In a message to Congress, Polk offered the rationale that “Mexico has passed the boundary of the United States, has invaded our territory and shed American blood on American soil.” It was on the basis of this report that Congress declared, “by the act of the Republic of Mexico, a state of war exists between the Government and the United States.”⁹⁸

If Polk’s rationale was correct, then his action could not be challenged on constitutional grounds, for it was well established that the president had the authority to repel sudden attacks. If, however, he had been disingenuous, if he had in fact initiated hostilities, then he had clearly usurped the war making power of Congress. It is worth noting that he made no claim to constitutional power to make war. The Whigs greatly resented Polk’s actions, and in 1847 the two houses of Congress commenced an inquiry into the circumstances surrounding the outbreak of the war. On January 3, 1848, the House concluded, by a vote of 85 to 81, that the war had been “unnecessarily and unconstitutionally begun by the President of the United States.”⁹⁹ Congressman Abraham Lincoln of Illinois voted with the majority. Lincoln’s law partner, William Herndon, had written a letter to Lincoln in which he stated that he assumed that Polk had initiated the hostilities, but nevertheless defended the action as a legitimate means of preventing an invasion by Mexico. Lincoln answered his friend in words that have become famous:

“Let me first state what I understand to be your position. It is that if it shall become necessary to repel invasion, the President may, without violation of the Constitution, cross the line and invade the territory

of another country, and that whether such necessity exists in any given case the President is the sole judge. . . .

Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such a purpose and you allow him to make war at his pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much power as you propose. . . .

The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings have always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to frame the Constitution that no one man should hold the power of bringing oppression upon us¹⁰⁰. But your view destroys the whole matter, and places our President where kings have always stood.”

As president, Lincoln did not alter his view of the war power. This conclusion may be drawn from his first annual message on December 3, 1861, when he referred to prior congressional authorization for American ships to “defend themselves against and to capture pirates.” It was his opinion that congressional authorization was necessary “to recapture any prizes which pirates may make of United States vessels and their cargoes,” which was exactly the understanding of the war power held by Madison, Hamilton and Jefferson.¹⁰¹ It bears reminder, moreover, that none of Lincoln’s actions in the Civil War constitutes a precedent for presidential initiation of war. The attack on Fort Sumter represented a “sudden attack” that Lincoln had the constitutional power to repel.¹⁰² Lincoln, it is to be emphasized, clearly understood what the Framers had undertaken in their construction of the War Clause. In the Prize Cases of 1863, Richard Henry Dana, Jr., who was representing the president, acknowledged that Lincoln’s actions had nothing to do with “the right to *initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress.”¹⁰³ Lincoln’s views on the war power do not aid the efforts of those who would champion executive ascendancy in matters of war and peace. On the contrary, adherence to the Lincoln Doctrine would force them to abandon their cause.

Conclusions

The ascendancy of the president in the area of war and peace finds no foundation in the Constitution. It reflects, rather, the tendency among presidents --Republicans and Democrats, conservatives and liberals alike --to aggrandize and abuse power. Usurpation of the war power, particularly in an era that exalts the concept of a personal or Imperial Presidency at the expense of a constitutionally confined presidency, lays bare the paramountcy of a president’s personal characteristics. Indeed, it is precisely in the realm of a personal presidency that a decidedly executive perspective, subject to the full measure of the president’s talents, strengths and temperament, as well as his judgment, knowledge and self-restraint, will be brought to the policy anvil. The historical portrait may not be pretty. Consider, for example, the arrogance and self-righteousness of Woodrow Wilson, the inclination toward dramatic posturing by Theodore Roosevelt, the inattentiveness of Ronald Reagan, as well as the indiscipline of Bill Clinton and the stunning, yet naïve certainties of George W. Bush. Then,

too, there is the question of the president's ambition, political agenda, personal distractions and desire for fame and glory.

A considerable literature urges executive supremacy, and extols the supposed virtues of presidential assertion, domination and control; yet this body of work often ignores the dimensions of executive flaws, foibles, and frailties. The electoral process is not infallible; an elected president may lack the wisdom, temperament and judgment, not to mention perception, expertise and emotional intelligence to produce success in matters of war and peace. Those qualities which, to be sure, are attributes of the occupant and not of the office, cannot be conferred by election.¹⁰⁴ Champions of a unilateral executive war power have ignored and, perhaps, forgotten the institutional safeguards of separation of powers, checks and balances and collective decision making urged by the Framers as protection from the flaws of unilateral judgment and the temptations of power. Among those who have lost their memory of the virtues and values of those institutional safeguards, apparently, are those many members of Congress and dozens of judges over the years, who have acquiesced in the face of presidential usurpation in the realm of national security. Perhaps seduced by the allure of swift, bold military action under the banner of nationalism, patriotism and ideological and political certainty, these representatives, some elected and others appointed, have forgotten their institutional duties and responsibilities. It is not probable, but certain, that the Imperial Presidency would be brought to heel if the other branches duly exercised their powers and responsibilities, but they have lost their way. No less a personage than the late Senator Sam Ervin questioned, in the course of hearings in 1973 on the unchecked executive practice of impoundment, whether the Congress of the United States will remain a viable institution or whether the current trend toward the executive use of legislative power is to continue unabated until we have arrived at a presidential form of government." Senator Ervin justly criticized executive aggrandizement of legislative authority, but he also found Congress culpable for the rise of presidential dominance: "The executive branch has been able to seize power so brazenly only because the Congress has lacked the courage and foresight to maintain its constitutional position."¹⁰⁵ What was true of impoundment, is true of the war power. Only "Congress itself," to borrow from Justice Robert H. Jackson, "can prevent power from slipping through its fingers."¹⁰⁶

The siren song of unilateral presidential war making ignores the tragedies of Korea, Vietnam and Iraq, and the cost to America of its precious blood and treasure as well as denied and stolen. The American constitutional system is grounded in the conviction, as James Iredell explained it, that there is "nothing more fallible than human judgment."¹⁰⁷ It is sometimes observed that the intentions of the Framers are outdated and irrelevant. But before we too readily acquiesce in that verdict, we might do well to recall the policy considerations that underlay the decision to vest the war power in Congress and not the president. Painfully aware of the horror and destructive consequences of warfare, the Framers wisely determined that before the very fate of the nation were put to risk that there ought to be some discussion, some deliberation by Congress, the people's representatives. The Founders did not, as James Wilson explained it, want "one man to hurry us into war."¹⁰⁸ As things stand in the United States today, however, the president has been exercising that power. The "accretion of dangerous power," Justice Frankfurter has reminded us, occurs when power is freed from institutional restraints, checks and safeguards. The eminently sound rationales that convinced the Framers to vest the war power

exclusively in Congress, however, have been ignored and abandoned in recent decades. There is a cost in that, too. It was the artist, Goya, who in one of his etchings, graphically portrayed the consequences of ignoring reason with the inscription: "The sleep of reason brings forth monsters."¹⁰⁹ There is no comfort to be found in a practice which permits unilateral executive war making, particularly in the age of nuclear weapons, when war might lead to the incineration of the planet. When it comes to the constitutional design for war making, it is clear that the Framers' policy concerns are even more compelling today than they were two centuries ago.

¹ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952).

² Sir William Holdsworth, 5 *A History of English Law* 428-31 (Metheun, 1937).

³ 3 Howell's state Trials 826, 844 (1637).

⁴ 1 Blackstone's commentaries 232.

⁵ James Wilson, second in importance to James Madison as an architect of the Constitution, observed that "the most powerful magistrate should be amenable to the law . . . No one should be secure while he violates the constitution and the laws." James Wilson, 1 *The Works of James Wilson* 425 (Robert Greene McCloskey, ed. Harvard University Press, 1937).

⁶ 2 Max Farrand, *The Records of the Federal convention of 1787*, at 62-63 (Yale University Press, 1911); *Reid v. Covert*, 354 U.S. 1, 5-6 (1957).

⁷ John Hart ely, "The Wages of Crying Wolf: A comment on *Roe v. Wade*," 82 *Yale L.J.* 920, 949 (1973).

⁸ 2 Griffith J. McRee, *Life and Correspondence of James Iredell* 146 (1857-1858).

⁹ Alexander Hamilton, *Camillus*, No. XXXV1, in 6 *The Works of Alexander Hamilton* 166 (Henry Cabot Lodge, ed. 1904) (1796).

¹⁰ 5 U.S. (1 Cranch) 137, 176 (1803).

¹¹ The rise of presidential hegemony in foreign affairs, and particularly the practice of executive abuse of power, has provoked considerable commentary and criticism. For recent discussion see, e.g., Frederick A.O. Schwarz Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (2007); Louis Fisher, *The Constitution and 911: Recurring Threats to America's Freedoms* (2008); Louis Fisher, *Military Tribunals & Presidential Power* (2005); Gene Healy, *The Cult of the Presidency* (2008); James P. Pfiffner, *Power Play: The Bush Presidency and the Constitution* (2008); Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (2007); *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (2007); Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (2006); Russell A. Miller, ed., *US National Security, Intelligence and Democracy* (2008); Michael A. Genovese and Lori Cox Han, eds., *The Presidency and the Challenge to Democracy* (2006); John Dean, *Worse Than Watergate: The Secret Presidency of George W. Bush* (2004). See, also, David Gray Adler, "George Bush and the

Abuse of History: The Constitution and Presidential Power in Foreign Affairs,” 12 *UCLA Journal of Int. Law and Foreign Affairs* 75 (2007); Adler, “George Bush as Commander in Chief: Toward the Nether World of American Constitutionalism, 36 *Pres. Stud. Q.* 525 (2006). Executive domination of foreign affairs has been promoted and defended by, among others, John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 911* (2005), and Yoo, *War by Other Means: An Insider’s Account of the War on Terror* (2006).

¹² John Locke, *Second Treatise on Civil Government*, sec. 146-148 (1690).

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¹⁴ 2 William Blackstone, *Commentaries on the Laws of England* 238 (1803).

¹⁵ *Id.* At 239.

¹⁶ *Id.* at 251.

¹⁷ *Id.* at 258.

¹⁸ *Id.* at 262.

¹⁹ *Id.* at 250.

²⁰ *Federalist No. 45* at 303 (emphasis added).

²¹ In *Federalist No. 69*, Alexander Hamilton explained that the authority to receive ambassadors is “more a matter of dignity than authority,” “without consequence,” in order to avoid the “necessity of convening the legislature . . . upon every arrival of a foreign minister. . . .” *Federalist No. 69* at 451. The Framers regarded the reception of an ambassador as a routine, clerk-like administrative function, devoid of discretion. See my article, “The President’s Recognition Power,” in David Gray Adler and Larry N. George, eds., *The Constitution and the Conduct of American Foreign Policy* (1996), pp. 133-158.

²² In the Convention, James Wilson echoed his colleagues when he declared that the English model was “inapplicable” to the “republican” system that that Framers had undertaken to create. Max Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. (1937), 1:66.

²³ *Federalist No. 75* at 487.

²⁴ Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 5 vols. (1836-1845), 2:507. In the First Congress, Roger Sherman, who had been a delegate to the Constitutional Convention, argued in defense of the shared-powers arrangement in foreign affairs: “The more wisdom there is employed, the greater security there is that the public business will be done.” 1 *Annals of Congress* 1085. Sherman’s statement echoed the sentiment expressed by Benjamin Franklin at the close of the Convention, when he urged the delegates to set aside their remaining differences in favor of the collective judgment. 2 *Farrand* 641-43. For an excellent discussion of republicanism see, generally, Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969) at 1-124.

²⁵ Dread of executive power surfaced again and again in the various conventions. See *Farrand, Records*, 1:66, 83, 90, 101, 113, 119, 153, 425; and 2:35-36, 101, 278, 513, 632, 640; *Elliot, Debates*, 3:58, 60; and 4:311.

²⁶ *Farrand*, 1:70.

²⁷ In *Federalist No. 69*, Alexander Hamilton was at pains to distinguish the powers of the English King from those vested in the president. While the King possessed the power of “declaring” war, that power, under the proposed Constitution, would be granted to Congress. *Id.* at 448. In sum, Hamilton explained, “there is no comparison between the intended power of the President and the actual power of the British sovereign.” *Id.* at 451.

²⁸ *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y.) (1806).

²⁹ *The Federalist No. 4* at 18. See David Gray Adler, “Presidential Greatness as an Attribute of Warmaking,” *Pres. Stud. Q.* (2003), 33: 466-483.

³⁰ *The Writings of James Madison* (Gaillard Hunt, ed., 1900-1910), 6:174.

³¹ *Id.* at 312.

³² 1 *Farrand* 121.

³³ 1 *Farrand* 64-65.

³⁴ *Id.* at 65.

³⁵ *Id.*

³⁶ *Id.* at 65-66.

³⁷ *Id.* at 70.

³⁸ 2 *Farrand* 182.

³⁹ Henry Steele Commager, *Documents of American History*, 7th ed. (1963), at 133.

⁴⁰ Warren, *The Making of the Constitution* (1947), at 389. The provision would maintain significant continuity, moreover, since it would retain legislative control of the war power. While neither the Virginia nor the New Jersey plans mentioned the war power, the former did stipulate that Congress would become the repository of all of the “Legislative Rights” of the Continental Congress, a fact that assumes great importance when it is recalled that the Framers, as Madison and Wilson explained, regarded the war power as “legislative” in nature.

⁴¹ 2 Farrand 318. The Senate, Pinckney believed, was “more acquainted with foreign affairs, and most capable of proper resolutions.” *Id.*

⁴² 1 Farrand 292. Hamilton, it is to be emphasized, never asserted an executive power to make war.

⁴³ 2 Farrand 318.

⁴⁴ *Id.*

⁴⁵ See discussion in text accompanying notes [00-000], *infra*.

⁴⁶ 2 Farrand 318.

⁴⁷ *Id.* at 318-319.

⁴⁸ 2 Farrand 319.

⁴⁹ *Id.*

⁵⁰ 4 Elliot 263.

⁵¹ 2 Elliot 528. Similar assurance was provided in other state conventions. In North Carolina, James Iredell, destined to be a member of the U.S. Supreme Court, stated: “The President has not the power of declaring war by his own authority. . . . These powers are vested in other hands. The power of declaring war is expressly given to Congress.” 4 Elliot 107-108. See also, 4 Elliot 287; 2 Elliot 278. Wilson’s impact on the Convention, and the early development of the Constitution, should not be underestimated. Robert G. McCloskey, ed., *James Wilson, Works*, 2 vols. (1967), Introduction, 1.

⁵² 1 Wilson Works 433. Wilson is referring to powers vest in Congress by Article I, Section 8 of the Constitution.

⁵³ It is a necessary predicate of separation of powers that no branch may usurp the powers of another. It is equally true that no branch “may abdicate its powers to either of the others.” *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). Art. II, Sec. 3 of the Constitution provides that the president “shall take Care that the Laws be faithfully executed. . . .” A president who usurps congressional power is not complying with the Take Care Clause.

⁵⁴ 119 Cong. Rec. S14141 (daily ed. 19 July 1973).

⁵⁵ Ratner, “The Coordinated Warmaking Power—Legislative, Executive and Judicial Roles,” 44 S. Cal. L. Rev. 19 (1971); Professor Yoo’s views on presidential power to initiate war may be seen in John C. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (2005). His first substantial foray into the debate appeared in a lengthy article in 1996, “The Continuation of Politics By Other Means,” 84 Cal. L. Rev. (1996), pp. 167-305. For critiques of Yoo’s work, see, e.g., Louis Fisher, “Unchecked Presidential Wars,” 148 U. Penn. L. Rev. (2000), pp. 1637-1672; David Cole, “What Bush Wants to Hear,” *New York Review of Books*, November 17, 2005, pp. 8-12; David Gray Adler, “Presidential Power and Foreign Affairs in the Bush Administration: The Use and Abuse of Alexander Hamilton,” *Presidential Studies Quarterly* (forthcoming, June 2010).

⁵⁶ Yoo, *Continuation*, at 170. Yoo has also invoked the Commander in Chief Clause as a source of presidential authority to commence war. See, *infra*, text accompanying notes 71-78.

⁵⁷ See, e.g., H. Jefferson Powell, *The President’s Authority Over Foreign Affairs: An Essay in Constitutional Interpretation* (2002), pp. 119-125. For a critique of Professor Powell’s views, see David Gray Adler, “Constitution, Foreign Affairs and Presidential War-Making: A Response to Professor Powell,” 19 *Geo. State L. Rev.* (2003), pp. 947-1019. See also, John Norton Moore, “The National Executive and the Use of Armed Forces Abroad,” in Richard Falk, ed. *The Vietnam War and International Law*, 4 vols. (1969), 2:814. Senator Paul Douglas defended President Harry Truman’s unauthorized venture in Korea on this ground (Cong. Rec. 9648 (1950)).

⁵⁸ Huloet’s dictionary provided this definition: “Declare warres. Arma Canere, Bellum indicere.” We have here two meanings: to summon to arms; to announce war. Quoted in Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dogs of War* (1986), at 20.

⁵⁹ In 1744, *Comyn’s Digest*, an authoritative treatise on English law, stated: “To the king alone it belongs to make peace and war,” as well as “the king has the sole authority to declare war and peace.” Quoted in Wormuth and Firmage, at 20. For discussion of the founders’ understanding of international law, see the excellent article by the

historian, Charles Lofgren, "War-Making Under the Constitution: The Original Understanding," 81 Yale L.J. (1972) 672, 685-695.

⁶⁰ James Kent, *Commentaries on American Law*, 2d ed., 4 vols. (1896), 1:55.

⁶¹ Lofgren, "War-Making," at 685-695.

⁶² According to Emerich de Vattel, the leading international law publicist, a conditional declaration of war, an ultimatum demanding satisfaction of grievances, ought properly to precede a declaration of general war. Vattel, *The Law of Nations*, trans. Charles Fenwick (1916), at 254-57.

⁶³ *Miller v. The Ship Resolution*, 2 U.S. (2 Dall.)12, 21 (1782).

⁶⁴ 4 Dall. 37 (1800).

⁶⁵ 5 U.S. (1 Cranch) 1, 28 (1801).

⁶⁶ John Bassett Moore, *The Collected Papers of John Bassett Moore*, 7 vols. (1944), 5:195-196.

⁶⁷ 6 U.S. (2 Cranch) 170, 177-78 (1804).

⁶⁸ 27 F. Cas. 1192, 1230 (No. 16342) (C.C.D.N.Y. 1806).

⁶⁹ 67 U.S. (2 Black) 635, 668 (1863).

⁷⁰ For an excellent discussion of the origins and development of the use of letters of marque and reprisal, with an application to contemporary covert operations, see Jules Lobel, "Covert War and Congressional Authority: Hidden War and Forgotten Power," 134 Penn. L. Rev 1035 (1986).

⁷¹ *Id.* at 1045-47.

⁷² Quoted in Moore, *Digest of International Law*, 7:123.

⁷³ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952)(concurring opinion).

⁷⁴ For example, the State Department justified Johnson's involvement in Vietnam on the basis of his authority as commander in chief. Dept of State Bull., 54: 474, 484 (1966). For the same justification by Reagan with respect to his actions in Lebanon and Grenada, respectively, see 18 Weekly Comp. Pres. Docs. 1181, 1183 (1993). For discussion of presidential invocation of the Commander in Chief Clause, see Adler, "The Constitution and Presidential Warmaking: The Enduring Debate," 103 Political Science Quarterly 1 (1988); Fisher, *Presidential War Power*.

⁷⁵ John Yoo, "Memo: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," September 25, 2001, in Karen J. Greenberg and Justin L. Dratel, eds., *The Torture Papers: The Road to Abu Graib* (2005), at pp. 3-4. Yoo's argument in this memo, and others, substantively track his academic work, before and after, his stint at the OLC. From the mid 90's through 2008, Yoo has consistently asserted the view that the president inherited the English King's "plenary power," except where specifically altered in the Constitutional Convention.

⁷⁶ Wormuth, "The Nixon Theory of the War Power," 60 Cal. L. Rev., 623, 630 (1972).

⁷⁷ *Id.* at 630.

⁷⁸ For example, the Continental Congress ordered George Washington to Massachusetts to take command of the United Colonies. See *Journals of the Continental Congress*, 34 vols. (1904-1937), 2:101. Washington was directed to intercept two British vessels on October 5, 1775. *Id.* at 3:276.

⁷⁹ 1 Farrand 292.

⁸⁰ Federalist No. 69 at 448.

⁸¹ Federalist No. 74, at 482. In the North Carolina Ratifying Convention, for example, James Iredell delivered remarks that mirrored Hamilton's observations. 4 Elliot 197-108.

⁸² Federalist No. 74, at 482.

⁸³ Louis Henkin, *Foreign Affairs and the Constitution* (1972), at 50-51.

⁸⁴ Leonard Meeker, "The Legality of the United States Participation in the Defense of Vietnam," 54 Department of State Bulletin 474 (1966).

⁸⁵ William P. Rogers, "Congress, the President and the War Powers," 59 Cal. L. Rev. 1194 (1971), at 1207-12.

⁸⁶ Carter justified his attempted rescue of the hostages on April 24, 1980, on his powers as chief executive and commander in chief. 126 Cong. Rec. H2991 (daily ed., April 28, 1980).

⁸⁷ 1 Farrand 65-70.

⁸⁸ For a detailed discussion of this claim see Adler, "The Steel Seizure Case and Inherent Presidential Power," 19 Constitutional Commentary 155 (2002), at 163-95. See also, Symposium, "Invoking Inherent Presidential Powers," Louis Fisher, ed., 37 Pres. Studies Q 1-152 (2007).

⁸⁹ For discussion of this point, see Fisher, Constitutional Conflicts, at 287-92; Adler, Steel Seizure Case, at 173-80.

⁹⁰ Henry P. Monaghan, "Presidential War-Making," 50 Boston University L. Rev. 19 (1970). The Clinton Administration, in *Campbell v. Clinton*, adduced the argument about precedent. Its claims were demonstrably false. See Adler, "The Clinton Theory of the War Power," 30 Pres. Studies Q. 155 (2000), at 164-166.

⁹¹ For example, in 1967 the State Department published a study that listed 137 cases of unilateral presidential action. Department of State, Historical Studies Division, *Armed Actions Taken by the United States Without a Declaration of War, 1789-1967* (1967). J. Terry Emerson, legal adviser to Sen. Barry Goldwater, published a list in 1973 in which he alleged 199 incidents of presidential acts of war without congressional authorization. 119 Cong. Rec. S14174 (daily ed. July 20, 1973). In a footnote to the Clinton Administration's brief in *Campbell v. Clinton*, it was asserted that "US Armed Forces have acted without a declaration of war in scores of instances from the presidency of George Washington to the present." See, "Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss," p. 27, n. 9, in *Clinton v. Campbell*, 52 F. Supp. 2d 34 (D.D.C. 1999).

⁹² Raoul Berger, *Executive Privilege* (1974), at 76. See Wormuth, "Nixon Theory," at 652-654, and Wormuth and Firmage, *Chain the Dogs*, at 133-49.

⁹³ Wormuth, *Vietnam*, at 718.

⁹⁴ Alfange Jr., "The Quasi-War and Presidential War Making," in David Gray Adler and Larry N. George, eds. (1996), at 281.

⁹⁵ Wormuth and Firmage, *Chain the Dogs*, at 149.

⁹⁶ *Powell v. McCormack*, 395 U.S. 486, 546 (1969); *Inland Waterways Corp. v. Young*, 309 U.S. 518, 524 (1940).

⁹⁷ The phrase was introduced in the literature by Francis D. Wormuth, "Presidential Wars: The Convenience of 'Precedent,'" in *The Nation*, October 9, 1972, at 301.

⁹⁸ 9 Stat. 9, 29th Cong., 1st sess., ch. 16 (May 13, 1846). Richardson, *Messages and Papers of Presidents*, 3:2292.

⁹⁹ Cong. Globe, 30th Cong., 1st sess., at 95.

¹⁰⁰ Richardson, *Messages and Papers of Presidents*,

¹⁰¹ *Id.* at 6:47.

¹⁰² Arthur Schlesinger, Jr., has written: "There is no suggestion that Lincoln supposed he would use this power in foreign wars without congressional consent." Schlesinger, "Congress and the Making of American Foreign Policy," 51 *Foreign Affairs* 78 (1972), at 89.

¹⁰³ *The Prize Cases*, 67 U.S. 635, 660 (emphasis in original).

¹⁰⁴ Professor Richard Pious has exposed the claims of presidential superiority in matters of information, expertise and experience. Those alleged virtues of executive primacy in foreign affairs were unable to secure accurate information or provide accurate projection in a variety of episodes, which proved costly to America: the Bay of Pigs, the Cuban Missile Crisis, and the attempted rescue of the merchant ship, *Mayaguez*, were riddled by inaccurate information, poor judgment and deceptive statements. Pious, *Why Presidents Fail* (2008).

¹⁰⁵ Quoted in Louis Fisher, *Congressional Abdication on War and Spending* (2000), p. 119. Another indefatigable defender of congressional powers and constitutional responsibilities, Sen. Robert Byrd of West Virginia, has recently lamented the decline of Congress. See Byrd, *Losing America: Confronting a Reckless and Arrogant Presidency* (2004). Insightful remedies and prescriptions for restoring constitutional balance have been advanced in a very fine work written by Eric Lane and Michael Oreskes, *The Genius of America: How the Constitution Saved Our Country and Why it Can Again* (2007).

¹⁰⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 655 (concurring opinion). Professor George Edwards has justly stated: "There is little question that the Constitution allocates to Congress a central role in determining the major elements of national security policy if Congress chooses to do so." George S. Edwards III, "Congress and National Strategy: The Appropriate Role?" in *U.S. National Security Strategy for the 1990s*, ed. Daniel J. Kaufman, David S. Clark, and Kevin P. Sheehan (1991), p. 82.

¹⁰⁷ 4 Elliot 14.

¹⁰⁸ 2 Elliott 528.

¹⁰⁹ Goya, *Caprichos*