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CONGRESS, THE PRESIDENT, AND THE POWER TO DECLARE WAR: A REQUIEM FOR VIETNAM

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Several arguments have been advanced in support of the President's authority to continue use of the Armed Forces in Vietnam without a congressional declaration of war as provided by the Constitution. Congressional ratification of the Southeast Asia Treaty and the Charter of the United Nations, as well as enactment of the Gulf of Tonkin Resolution, are often urged as constituting sufficient congressional authorization for the President's actions. Some have gone further and contended that congressional authorization was not a prerequisite in the Vietnam conflict because the President never exceeded his historically recognized authority to act unilaterally in defense of the security of the United States. In this Article and the one that follows, the authors respond to each of these arguments. Professor Van Alstyne examines whether delegation of Congress' authority to declare war is ever permissible either by treaty or by joint resolution. He concludes that while enactment of the Gulf of Tonkin Resolution may have constituted a sufficient congressional authorization, the President has acted illegally since that resolution's repeal. Professor Berger argues that the President's unilateral acts in Vietnam can find no justification in either the text of the Constitution or in past presidential practices. Taking issue with Professor Eugene V. Rostow, Professor Berger con-

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cludes that the recently considered War Powers Bill, designed to curtail future unilateral acts of war by the President, is a return to constitutional precepts which has long been necessary.

> 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.[1]

I. INTRODUCTION

Far more than a decade has elapsed since the first insertion of active United States military advisers into Vietnam, and we have now passed the sabbatical of 1965, when a half-million American troops entered that war. A number of months have put behind us the anniversary of the date when new thrusts were directed into Laos and Cambodia as well, an event memorialized this year by the resumption of massive air and naval bombardment of North Vietnam. A hundred billion dollars, fifty thousand of our own dead, three hundred thousand personal casualties, the new chemistry of spoliation and the old alchemy of bombs and napalm greater than any previous war in the history of mankind: headstones of American history in the late twentieth century.

The sheer endurance of this staggering fait accompli of war overhangs the Constitution and seems to ridicule its present usefulness. Renewed inquiry into the continuing legitimacy of the Vietnam War would seem to be especially pointless, moreover, in light of the State Department's lengthy Legal Memorandum of 1966 arguing that the executive practice of war has become so well established as virtually to have been absorbed into the Constitution even in the absence of any antecedent declaration by Congress.[2] If the matter were thought doubtful and not entirely moot on that account alone, still there is but the one forum in which scholastic opinion may evidently be composed for any useful purpose, the Supreme Court, and for reasons it has declined publicly to share at all, that forum has thus far been entirely closed to the question.[3]

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[1] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring in the upholding of an injunction against the executive seizure of steel mills during the Korean War).

[2] OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, THE LEGALITY OF U.S. PARTICIPATION IN THE DEFENSE OF VIETNAM, *reprinted in* 112 CONG. REC. 5504-09 (1966).

[3] *See, e.g.*, Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967). It is assuredly debatable whether cases otherwise ripe, brought by parties with appropriate standing, under clearly adversary circumstances with terrific personal interests at stake are nonetheless not "justiciable" so far as the declaration of war clause is concerned.

Yet, what was occasionally denied consideration as "nonjusticiable" in the past has been more than once subsequently considered on the merits;[4] and though the Court has yielded an almost obsequious deference to other departments of government from time to time, even upon consideration of the merits of a case, it has just as often eventually reclaimed the independence of its judgment.[5] Whatever the immediate political result, moreover, it is surely never trivial to form one's own opinion as to the legitimacy of executive authority which presumes upon the horrendous use of armed force. Perhaps the duty to do so is most pressing precisely when there is no other forum of decision. The recent practice of several presidents since World War II to draw extraordinary inferences from their powers as Chief Executive and Commander in Chief (in eclipse of the war declaration clause) is certainly not dispositive of the question unless, by thinking it so, we compound the error and invest it with the ironic power of self-fulfilling prophecy.

In addition, the claim that constitutional legitimacy may be settled by the sheer weight of an unexamined governmental practice (and the claim of practice is not in this instance nearly as long-lived or as substantial as alleged) ought not lightly be accepted. To this extent, no apology is owing for the suggestion that recent practice is perhaps the *least* instructive source of constitutional legitimacy. Twice within this generation the government's reliance upon such practice was specifically rebuked when the Supreme Court finally came to terms with

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See Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131 (1971); Henkin, *Viet-Nam in the Courts of the United States: "Political Questions,"* 63 AM. J. INT'L L. 284 (1969); Schwartz & McCormick, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEXAS L. REV. 1033 (1968); Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A.L. REV. 1135 (1970). *Compare* Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), *with* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964). Given what is at stake for those willing to risk prolonged imprisonment as a condition of being heard at least on this bare threshhold question alone, however, when all constitutional requisites, statutory criteria, and announced judicial standards for the rationing of certiorari have been satisfied, it is surely a singular indecency that the Supreme Court declines even to hear the justiciability issue on the merits: "These petitioners should be told whether their case is beyond judicial cognizance." Mora v. McNamara, 389 U.S. 934, 939 (1967) (Douglas, J., dissenting from the denial of certiorari).

[4] *Compare* Fortson v. Dorsey, 379 U.S. 433 (1965), Wesberry v. Sanders, 376 U.S. 1 (1964), *and* Baker v. Carr, 369 U.S. 186 (1962), *with* South v. Peters, 339 U.S. 276 (1950), *and* Colegrove v. Green, 328 U.S. 549 (1946) (reapportionment). For analogous developments in judicial willingness to consider constitutional questions previously avoided, see, *e.g.*, Powell v. McCormack, 395 U.S. 486 (1969); Flast v. Cohen, 392 U.S. 83 (1968).

[5] *Compare* United States v. Robel, 389 U.S. 258 (1967), *with* American Communications Ass'n, CIO v. Douds, 339 U.S. 382 (1950). *Compare* Duncan v. Kahanamoku, 327 U.S. 304 (1946), *with* Korematsu v. United States, 323 U.S. 214 (1944). *Compare Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866), *with* Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

the issue in controversy. In 1952, military seizure of a private steel mill by presidential directive, during the Korean War but without congressional authorization, was rested in argument by government counsel partly on the prior practice of other American presidents acting under allegedly similar emergency circumstances. Concluding that any such unexamined prior executive practice was virtually weightless in measuring the constitutional propriety of still another instance of that practice, the district court concluded:

> [I]t is difficult to follow [the government's] argument that several prior acts apparently unauthorized by law, but never questioned in the courts, by repetition clothe a later unauthorized act with the cloak of legality.[6]

Upon appeal, the Supreme Court affirmed the injunction against the Secretary of Commerce, in an opinion accompanied by the mindful dictum with which this Article is prefaced.

More recently still, the Congress became embroiled in controversy respecting the entitlement of one of its members to assume his seat. Though no one had disputed that Adam Clayton Powell met the only enumerated constitutional standards for eligibility, Powell was nonetheless excluded on the determination of the House that he was unfit on other grounds. When the ensuing controversy eventually came before the Supreme Court, counsel for Congress correctly noted that since 1868 the House of Representatives had excluded a number of members on the basis of its determination of disqualifications other than those expressly listed in article I; given the ambiguity of the document (and the virtual "nonjusticiability" of this internal House matter), he argued, this practice of Congress must itself be seen as an illumination of its constitutional authority. In declaring against the use of that claim of authority, however, the Court offered an observation which will be taken to heart in this Article as it relates to the use of governmental practice in aid of constitutional interpretation, a limited use restricted to inferences from practices reasonably contemporary with the Constitution itself:

> That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date . . . . The relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedental value of these cases tends to increase in proportion to their proximity to the Convention in 1787. And, what evidence we have of Congress' early understanding confirms our

[6] Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, 575 (D.D.C. 1952).

> conclusion that the House is without power to exclude any member-elect who meets the Constitution's requirements for membership.[7]

II. The Essential Meaning of That Power in Congress "To Declare War"

Article I of the Constitution provides for a Congress in whom "[a]ll legislative powers herein granted shall be vested . . . ." Included among the specific powers listed in article I, section 8, is that "[t]he Congress shall have Power . . . To declare War . . . ." Also within that section is the power to grant letters of marque and reprisal, the authority to make rules concerning captures on land and water, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, and other associated matters.

In article II, which describes the executive power, invested in a single individual, section 2 provides that the President shall be "Commander in Chief of the Army and Navy of the United States," and that he shall have power to make treaties by and with the advice and consent of the Senate. Section 3 of the same article further provides that the President shall from time to time give to the Congress information on the state of the Union, recommend to their consideration such measures as he shall judge necessary and expedient, and that he shall take care that the laws be faithfully executed. Finally, provision is made by section 4 of article IV that the United States shall guarantee to every state in the Union a republican form of government, that it shall protect each of them against invasion and, on application of a state's legislature or of the state's executive (when its legislature cannot be convened) against domestic violence as well.

Among those interpretations consistent with the language of these several war-related provisions are at least three which offer quite different impressions of the congressional power to declare war. First, perhaps this particular clause merely confirms a ceremonial duty on the part of Congress to ratify an obvious condition of war and thus to give a certain official imprimatur of its own to events of de facto belligerency that have already taken place. Second, and more significantly, perhaps it establishes in Congress a more definite power of veto, to arrest what is otherwise an executive power to make war, to declare *against* a war and thereby to check the executive from further pursuit of specific hostilities. Or third, that in the absence of an affirmative declaration by Congress authorizing the extraterritorial

[7] Powell v. McCormick, 395 U.S. 486, 546-47 (1969) (footnote omitted).

use of armed force as a reasonably unmistakable exercise of this very power, the President may not pursue any national policy whatever through the use of such force. There are doubtless other possibilities as well, and certainly each of these may permit significant differences of nuance, but they do not seem unfair to the basic alternatives of construction.

The most frequently used first source in coming to terms with these and other possible interpretations and questions affected by the war declaration clause are the notes of James Madison made during the course of the discussions of the Constitutional Convention. As originally drafted, the clause provided that Congress shall have power to "make" war, but debate ensued which Madison reported as follows:[8]

> "To make war"
>
> Mr. PINCKNEY opposed the vesting this power in the Legislature. Its proceedings were too slow. It would meet but once a year. The House of Representatives would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one authority to make war, and another peace.
>
> Mr. BUTLER. The objections against the Legislature lie in great degree against the Senate. He 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.
>
> Mr. MADISON and Mr. GERRY moved to insert "*declare,*" striking out "*make*" war; leaving to the Executive the power to repel sudden attacks.
>
> Mr. SHERMAN thought it stood very well. The Executive should be able to repel and not to commence war. "Make" better than "declare" the latter narrowing the power too much.
>
> Mr. GERRY never expected to hear in a republic a motion to empower the Executive alone to declare war.
>
> Mr. ELLSWORTH [said] [t]here is a material difference between the cases of making *war* and making *peace*. It should be more easy to get out of war than into it. War also is a

[8] 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, at 318-19 (M. Farrand ed. 1911) (Friday, Aug. 17, 1787) (minor changes concerning grammar, abbreviations and appearance have been made to facilitate reading) [hereinafter cited as RECORDS].

simple and overt declaration, peace attended with intricate and secret negotiations.

Mr. MASON was against 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.*"

On the motion to insert *declare*—in place of *make*, it was agreed to.

N.H. no.

Mass. absent.

Conn. no (On the remark by Mr. King that "make" war might be understood to "conduct" it which was an Executive function, Mr. Ellsworth gave up his objection, and the vote of Connecticut was changed to—ay.)

Pa. ay.
Del. ay.
Md. ay.
Va. ay.
N.C. ay.
S.C. ay.
Geo. ay.

Mr. Pinckney's motion to strike out the whole clause, disagreed to without call of States.

As thus accepted—"The Congress shall have power . . . to declare War"—it was apparent that the draftsmen wished to avoid their experience under British rule where an individual alone had power to determine the alleged necessity of embarking upon a course of war and thus to draw the people into foreign adventures that required their blood, extracted their treasure, and subordinated their liberties. It was also clear that the institutions and processes of the United States should be so arranged as to make it harder to initiate war and easier to achieve peace, and yet not hamstring the executive when conducting a war already declared or deny him an interim emergency power as the Commander in Chief to repel attacks against the United States until Congress could meet to consider its will.

An examination of the Federalist Papers, those political essays which accompanied the general ratification controversy in New York, assists in clarifying what was meant by the Philadelphia Framers. Of particular significance is *Federalist Number 69*, allegedly authored by Alexander Hamilton, the ardent leader of the centralist-federalist party.

In this instance, moreover, nothing is to be found in the anti-federalist tracts[9] which deny or take exception to Hamilton's view that:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature.[10]

That the war declaration clause was urged by the federalists as a highly important and wholly independent source of citizenry protection against the risk of executive commitments to war, quite aside from the separate control of Congress to raise or not to raise an army and navy and to control the purse, is wholly reflected by the character of their debate with the anti-federalists with respect to the anti-federalist position that Congress should be denied authority to raise a peacetime army at all.[11]

These early discussions were soon put to the test of contemporary construction during tense relations between the United States and principalities along the Barbary Coast of North Africa, at the very turn of the nineteenth century. At that time, American merchant ships were set upon by outlaws known as the Barbary Pirates. President Jefferson's reactions in his immediate Message to Congress are illuminating:

> I sent a small squadron of frigates into the Mediterranean, with assurances to that Power of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. The measure was seasonable and salutary. The Bey had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the Tripolitan cruisers, having fallen in with and engaged the small schooner *Enterprise,* commanded by Lieutenant Sterret, which had gone as a tender to our larger vessels, was captured, after a heavy slaughter of her men, without the loss of a single one on our part . . . . *Unauthorized by the*

[9] *See, e.g.*, THE ANTIFEDERALISTS (C. Kenyon ed. 1966); J. MAIN, THE ANTIFEDERALISTS—CRITICS OF THE CONSTITUTION, 1781-1788, at 119-67 (1961).

[10] THE FEDERALIST No. 69, at 446 (B. Wright ed. 1961) (A. Hamilton).

[11] *See, e.g.*, sources cited note 9 *supra.*

> *Constitution, without the sanction of Congress,* to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The *Legislature* will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that *in the exercise of this important function confided by the Constitution to the Legislature exclusively* their judgment may form itself on a knowledge and consideration of every circumstance of weight.[12]

In a later message to Congress, Jefferson held the same, steady course:

> Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided.[13]

With virtual unanimity, the same attitude was shared by all contemporaries of these formative years.[14]

Specifically, then, the lodgment of the power to declare war exclusively in Congress forbids the sustained use of armed force abroad in the absence of a prior, affirmative, explicit authorization by Congress, subject to the one emergency exception: an interim emergency defense power in the President to employ armed force to resist invasion or to repel a sudden armed attack until Congress can be properly convened to deliberate on the question as to whether it will sustain or expand the effort by specific declaration or, by doing nothing, require the President to disengage our forces from the theater of action.

The explanation of the use of the word "declare" rather than "make" now seems clear as well. If it is the case that the Congress has made a suitable determination to authorize the use of armed force to effectuate national policy in any given instance, then discretion concerning affiliated logistical, tactical, and strategic decisions properly reposes within the presidency, consistent always, however, with the scope of the antecedent congressional declaration. The case for ungrudging construction of the power of the President as Commander in Chief, acting within the specific war authorization of Congress, was well expressed by Hamilton:

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[12] 11 ANNALS OF CONG. 11 (1801), *reprinted in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 326-27 (J. Richardson ed. 1898) (emphasis added).

[13] 3 T. JEFFERSON, WRITINGS 400 (A. Bergh ed. 1907).

[14] For example, John Marshall's opinion for the Court in Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801), was that:

> 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.

Id. at 28.

> Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The *direction* of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.[15]

The Congress would be left with a flexible power of review and control by its continuing legislative authority over appropriations, levies upon manpower, and, of course, the prerogative to repeal prospectively its declaration of war.

The line between the rule and the limited exception of an interim defensive emergency use of force seems to have been respected, incidentally, in President Johnson's initial reaction to the alleged firing by PT boats of North Vietnam on American destroyers in the international waters of the Gulf of Tonkin in August, 1964. The original reaction was limited to defensive action against those particular boats and the immediate bases from which it was believed they had come.

Though the incident was unquestionably an act of war, it was within the interim emergency exception of repelling armed attack, and only a single question might fairly be raised about it in isolation. President Johnson authorized no more than the limited "hot pursuit" of the PT boats, their destruction, and an attack on their immediate bases. While it is debatable that even the authorization of attack on the immediate bases was within the executive discretion, clearly prolongation beyond that point in time when Congress had an adequate opportunity to consider its will and to ratify and authorize a continuation of armed force, would have been wholly illegitimate. Again, the situation and response is well attested by presidential practice contemporary with the Federalist Period, witnessed by Jefferson's decision with respect to our schooner, the Enterprise, and the Bey of Tripoli's Cruiser:

> Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense . . . . I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.[16]

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[15] THE FEDERALIST No. 74, at 473 (B. Wright ed. 1961) (A. Hamilton) (emphasis added).

[16] I MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 327 (J. Richardson ed. 1898).

In 1798, Hamilton was cautious in the quasi-war with France:

> In so delicate a case, in one which involves so important a consequence as that of War—my opinion is that no doubtful authority ought to be exercised by the President . . . .[17]

The declared executive position on this matter remained highly consistent for a long period of years, and the fact that one or another President may otherwise have utilized his office so to force upon Congress the manner in which it may have determined to use its own authority (as was arguably done in the Mexican-American War),[18] far from providing evidence of a different rule, rather confirms the felt necessity of securing an explicit congressional declaration as a prerequisite of any extraterritorial military action not under the pretense and limitation of repelling attack. Thus, responding to inquiry on the subject while serving as Secretary of State in 1851, Daniel Webster observed:

> In the first place, I have to say that the war-making power in this Government rests entirely with Congress; and that the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws. By these no power is given to the Executive to oppose an attack by one independent nation on the possessions of another. We are bound to regard both France and Hawaii as independent states, and equally independent, and though the general policy of the Government might lead it to take part with either in a controversy with the other, still, if this interference be an act of hostile force, it is not within the constitutional power of the President; and still less is it within the power of any subordinated agent of government, civil or military.[19]

Similarly, in his Message to Congress on December 6, 1858, President Buchanan noted:

> The executive government of this country in its intercourse with foreign nations is limited to the employment of diplomacy alone. When this fails it can proceed no further. It can not legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks. It would have no authority to enter the territories of Nicaragua even to prevent the destruction of the transit and

[17] Letter from Alexander Hamilton to James McHenry, May 17, 1798, in 1 OFFICE OF NAVAL RECORDS AND LIBRARY, U.S. DEP'T OF THE NAVY, NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE 75 (1935).

[18] A declaration of war was entered by Congress on May 13, 1846, declaiming that hostilities had been initiated by the other side. Even so, the House subsequently excoriated Polk for having "unnecessarily and unconstitutionally" begun that war. CONG. GLOBE, 30th Cong., 1st Sess. 95 (1848).

[19] 7 DIGEST OF INTERNATIONAL LAW 163-64 (J. Moore ed. 1906).

> protect the lives and property of our own citizens on their passage.[20]

While serving in Congress, Abraham Lincoln drew the following sharp line conservatively rejecting the extraterritorial use of force even under claim of the interim emergency executive power to repel invasion:

> 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 purpose, and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much 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 had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood.[21]

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[20] 5 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 516 (J. Richardson ed. 1898).

> The immediate next sentences in Buchanan's Message are these, and seem less clear: It is true that on a sudden emergency of this character the President would direct any armed force in the vicinity to march to their relief, but in doing this he would act upon his own responsibility.

Id. Even assuming that in saying that by thus acting "on his own responsibility" with emergency military force solely for the immediate "relief" of American citizens caught in a war zone, Buchanan meant that the President would be utilizing a proper constitutional executive power (rather than acting simply from a sense of personal duty whether or not it is constitutionally supportable), still, in context, the most that is claimed is only the interim emergency use of such military force as would be reasonably necessary to secure the safe and speedy removal of our citizens, unless Congress were to authorize a more ambitious undertaking.

[21] 2 A. LINCOLN, WRITINGS 51-52 (A. Lapsley ed. 1905). Lincoln's subsequent executive imposition of a blockade on April 27, 1861, following the firing on Fort Sumter, pending prompt convocation of an extraordinary session of Congress which approved his proclamation and other interim emergency measures on July 13, 1861 (sustained five-to-four in The Prize Cases, 67 U.S. (2 Black) 635 (1862)), are not inconsistent in the least with this view. How far they might be independently supportable under article IV powers, was not examined by the Supreme Court. Even so, the majority of the Court seemed to make a distinction not only relating to the suddenness of actual civil war hostilities, the need to meet it "without waiting for Congress," and its recognition by other nations for purposes of triggering international law duties of neutrality by the time the proclamation of blockade took effect, but that civil war may be distinguishable even with respect to the declaration of war clause: "By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution." *Id.* at 668. *See also* 7 DIGEST OF INTERNATIONAL LAW 172 (J. Moore ed. 1906): "Civil war begins by insurrection against the lawful authority of the Government, and is never solemnly declared." In directing the use of force to suppress the alleged insurrection led by Aaron Burr, moreover, Thomas Jefferson (perhaps the most scrupulous President of all in relating the war power to Congress) did not regard the declaration of war clause to be involved.

Far from *The Prize Cases* yielding great significance regarding an uncabined executive power to sustain the engagement of major military force overseas without an

Three decades earlier, when Colombia had drawn upon the newly promulgated Monroe Doctrine to request the use of military force from President Monroe against France, the administration denied its authority to intervene by such means. Writing to former President Madison, Monroe noted: "The Executive has no right to compromit the nation in any question of war . . . ." Three days later, Secretary of State Adams formally advised the Minister of Colombia: "[B]y the constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government."[22]

While a number of additional questions remain now to be examined, the configuration of immediately relevant war-related constitutional clauses appears clearly to yield the following propositions:

1. In the absence of a declaration of war by the Congress, the President may not sustain the systematic engagement of military force abroad for any purpose whatever.

2. The interim use of military force solely to repel invasion of the United States or to relieve American citizens from an existing attack is an authorized executive war power granted by the Constitution. That power expires *ex proprio vigore* when the Congress has had reasonable opportunity immediately to convene and to authorize the continuation or enlargement of hostilities by express declaration, *i.e.*, even the constitutional authorization of emergency executive war power of immediate self-defense terminates upon opportunity and failure of Congress to sustain it by express declaration.

3. In the event that the Congress authorizes the initiation, continuation, or enlargement of military hostilities by express declaration, the constitutional initiative of logistical, tactical, and strategic decision in the conduct of those authorized hostilities belongs to the executive.

4. A residual power of review and control is vested in the Congress through its continuing authority over appropriations, levies upon manpower, and its prerogative to modify or to repeal its declaration of war.

III. The Non-Delegability of the Congressional Responsibility

The next level of question is to determine whether or not this responsibility and power of Congress alone to declare war, it being

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antecedent declaration of war by Congress, *cf.* 2 B. Schwartz, A Commentary on the Constitution of the United States—Part I, The Powers of Government 203-06 (1963), it may be more significant that even with all the distinguishing elements of the case, four of nine Justices thought the decision to be incorrect and constitutionally insupportable.

22 The Record of American Diplomacy 185 (R. Bartlett ed. 1954); Robertson, *South America and the Monroe Doctrine, 1824-28*, 30 Pol. Sci. Q. 89-91 (1915).

understood that in the absence of its exercise no executive authority in the sustained extraterritorial engagement of military force has constitutional foundation, is subject to delegation to some other office or party. The question divides itself into two parts, the first being readily answerable and the second being somewhat more doubtful: the first being directed to alleged delegations by treaty, and the second being directed to alleged prospective delegations by joint resolution.

In the current controversy, some support has been sought in the fact of the Senate's earlier ratification of the Southeast Asia Treaty combined with the constitutional provision that it is the President who shall take care that the laws be faithfully executed, *i.e.*, that he shall act to fulfill that Treaty obligation. Not dissimilar reference was made during the Korean War, conducted without declaration of war by Congress, to the Uniting for Peace Resolution of the United Nations which we were allegedly bound to support through executive action alone.

Most discussions of this subject have countered these executive claims simply by observing that the particular treaties cited in aid of the President's actions are not self-executing of their obligations; rather, they specifically do not purport prospectively to delegate the power to declare war but merely establish an international obligation that *Congress* will, when the circumstances contemplated by the treaty actually arise, then act upon its authority to fulfill that obligation insofar as the use of military force may be involved. Thus, the Southeast Asia Treaty provides that, in the event of armed attack on any member, each signatory will "act to meet the common danger in *accordance with its constitutional process*."[23] In short, the treaty commitment, rather than empowering the President to undertake the use of military force, sets an international contractual obligation—obliging Congress to make the declaration of war if it intends to fulfill the treaty commitment. But again, the cross-reference is back to the constitutional process that Congress itself shall authorize the President to engage armed force abroad before such use of force would become legitimate under our internal law as we have deemed fit to regulate it, even in the phraseology of the treaty we have signed. It follows, therefore, that the unilateral invocation of the particular treaty responsibility by the President cannot stand as a substitute for a specific and requisite authorization by Congress upon such occasions when our assistance pursuant to that treaty may be sought.

But a conclusive answer on this score is not dependent upon the

[23] Southeast Asia Collective Defense Treaty, Feb. 4, 1955, art. IV, para. 1, [1955] 1 U.S.T. 81, T.I.A.S. No. 3170 (emphasis added).

conservative parsing of particular treaty phrases, for it is clear in any event that the war power cannot constitutionally be delegated by treaty at all. Treaties become law when made under the authority of the United States merely upon ratification by two-thirds of the Senate alone. This alternative of lodging the war power in the combination of the President and the Senate—rather than in the House and the Senate as was finally done with the war power—was specifically considered in the Philadelphia Convention and explicitly rejected.[24] No case, therefore, can be made that a treaty can grant to a third party, or indeed grant to the President pursuant to that treaty, the authority to engage in systematic military hostilities abroad as a claim of faithful execution of the law of that treaty. No treaty, or anything else for that matter, can serve as a declaration of war, thus satisfying that section of the Constitution, unless shared in by the House of Representatives: the constitutional draftsmen engaged in a deliberate, determined, and successful effort to include that body, with its more popular representation, in the decision prerequisite to sustained armed hostilities.

If the treaty power does not permit Congress to delegate its war powers to the President, what then of the propriety of other means, for example, a joint resolution, whereby both Houses of Congress might attempt prospectively to shift to the President the determination of the use of war as an instrument of national policy? In favor of that reading, one might review an enormous amount of material on the general question of congressional delegation of legislative powers[25] noting that not since the 1930's has the executive exercise of authority following even a loose prospective attempt at delegation been disfavored by the Supreme Court on constitutional grounds;[26] that the Court has waxed most eloquent in favor of congressionally-supported, quasi-legislative presidential discretion in foreign affairs;[27] that decisions sustaining prospective delegations with but the barest hint of standards can

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[24] *See* 1 RECORDS, *supra* note 8, at 292, 300; 2 *id.* 318-19.

[25] *See, e.g.*, L. JAFFEE & N. NATHANSON, ADMINISTRATIVE LAW 81-122 (1968). Professor Davis, possibly the leading exponent of a liberal delegation view, disparages the importance or sufficiency of legislatively-stipulated guidelines vis-à-vis the alleged greater importance of adequate procedural safeguards, appropriate legislative supervision or reexamination, and the accustomed scope of judicial review. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 99 (1958). As the Supreme Court has wholly failed to provide any judicial review, as there are no procedural prerequisites to the executive rendering of his authorization, and as the fait accompli of executive action appears to overwhelm the capacity for legislative supervision or reexamination at the point in time when it is most needed, however, all these alternative protections in respect to the delegation of war declarations being conspicuously weak, perhaps the delegation doctrine ought to be applied more restrictively in this area than in any other. *See also* Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 582-87 (1972).

[26] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[27] *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

readily be found;[28] that at least the usual strong presumption of constitutionality would apply were the executive to be challenged on the validity of a clear and specific congressional statement of delegation; and that even where a "preferred freedom" was involved the furthest the Court has gone in recent decades has been to construe the scope of delegation short of the executive presumption.[29] In 1965, moreover, but a single vote could be mustered from the Supreme Court that Congress had too far abdicated its legislative responsibility in granting the President and Secretary of State power to regulate passports under a statute providing nothing more definite on its face than that it should be done "under such rules as the President shall designate and prescribe . . . ."[30]

In a characteristically literate and measured criticism of executive action in Vietnam (which he concludes went beyond the authority delegated by that portion of the Tonkin Gulf Resolution he considers), Professor Bickel of the Yale Law School finds that the power to delegate the war power to the President is granted to Congress, provided only (but importantly) that it not be "without standards [the absence of which] short circuits the lines of responsibility that make the political process meaningful."[31] I agree entirely with Professor Bickel so far as he would go, to construe congressional attempts at delegation on so momentous a subject most conservatively.

I am inclined to go considerably further, however, for it seems to me clearly the case that the exclusive responsibility of Congress to resolve the necessity and appropriateness of war as an instrument of national policy at any given time is uniquely not delegable at all. The pursuit of national interest by sustained extraterritorial uses of direct force was textually reserved to Congress alone after alternative formulations were pressed on precisely the grounds that conventionally rationalize a limited power to delegate an interstitial lawmaking authority to the executive, *viz.*, superior expertise in the executive, the need for

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[28] *E.g.*, Fahy v. Mallonee, 332 U.S. 245 (1947).

[29] Kent v. Dulles, 357 U.S. 116 (1958).

[30] Zemel v. Rusk, 381 U.S. 1, 20-21 (1965) (quoting 22 U.S.C. § 211 (a) (1970)) (Black, J., dissenting) (The Court was divided 6-3 on the basic questions whether the Secretary of State's refusal to validate passports for travel in Cuba was statutorily and constitutionally permissible). *See also* Professor Rostow's very forceful discussion in Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEXAS L. REV. 833, 885-92 (1972).

[31] Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 137 (1971). For similar views that the Tonkin Gulf Resolution lacked adequate standards, see Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 680 (R. Falk ed. 1969), and Wormuth, *The Vietnam War: The President versus the Constitution*, in *id.* 780-90.

flexibility in the face of rapidly changing circumstances, the cumbersomeness of parliamentary processes, and a residual power to check the executive in the event of displeasure with the manner in which he might make war. To the extent that such arguments were considered to have merit, they were accommodated by *other* means among the several war-related clauses. To the extent that they were not thus accommodated, the conclusion seems inescapable that they were rejected and correspondingly, that no further latitude of executive control was to be permitted than that already provided for.

To express the same matter less passionately, specific contingencies which give sense and shape to the general doctrine permitting limited delegations of legislative power in other areas of congressional responsibility are *already* provided for in respect to war, *so far as it was felt safe to do so*. Thus, it was contemplated and made possible that peacetime armies might be raised under presidential discretion though this might even increase the risk of war. Similarly, an interim executive capacity to respond to outright emergencies, authorizing the president to resist invasion or repel an attack when war might be thrust upon the nation too quickly for Congress to convene to authorize even such limited defensive measures, was provided. Additionally, executive discretion to make command decisions of tactics and strategy within the express war declaration by Congress was conceded. Further, confidence was also reposed of necessity in the President in recognizing that the congressional power would be exercised or not substantially depending upon the information and advice the President would provide in his emergency message of exigent circumstances asking for *their* decision to initiate hostilities, sustain present emergency defensive war actions he had taken, enlarge upon them, or, by doing nothing, require that our extraterritorial forces be immediately disengaged and withdrawn. Finally, although there might have been much to be said for a different view (so to make going to war especially grave and therefore desirably difficult to accomplish), the Constitution does not require that the declaration of war be an all or nothing response. In the exercise of its responsibility, it is not essential that Congress must declare a total war against one or more nations, contemplating effective occupation of their territory and capitulation by their governments. Rather, the document contemplates congressional recourse to a declaration of *limited* war with specifically designated objectives which the President may then pursue through the use of armed force once that specific declaration and circumscribed objective have been articulated by Congress.

For instance, by the Act of July 7, 1798, Congress authorized President Adams to respond to French depredations on the seas in the following very specific and limited war terms:

> That the President of the United States shall be, and he is hereby authorized to instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas . . . .[32]

Without question, the President's execution of that antecedent authorization of specific armed force would have been pursuant to a declaration ("*hereby* authorized . . . to subdue, seize and take") of limited war. Similarly, in passing on the question in a case raising the issue, Mr. Justice Chase declared for the Supreme Court in 1800 that:

> Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, in time.[33]

A present and specific authorization of armed force against the territory or possessions of another country does not fail as a prerequisite congressional declaration of war, of course, simply by the nature of the objectives or extent of war that it may authorize.[34]

But precisely because of these various provisions and accommodations, it is even more clearly the case that there is no standing room left for a theory which would transfer to the executive the power to authorize war on his own initiation. When all the accommodations to shared authority otherwise provided by the several war-related clauses are thus aggregated, it becomes quite evident that the determination as to whether circumstances at any given time in fact make it necessary and appropriate to engage in war, however limited in scope or objectives, resides solely in Congress subject to no delegation whatever. In-

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[32] Act of July 9, 1798, ch. 68, §1, 1 Stat. 578.

[33] Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800).

[34] Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.):

> 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 hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.

Even the very marginal use of force, in satisfaction of private grievances unredressed by an offending sovereign against whom the government might not wish to commit a public force as an act of war, was subjected to prerequisite and exclusive congressional control in its sole authority to issue letters of marque and reprisal. The provision was added in Convention on August 18, 1787, the day following the principal discussion of the war power, Mr. Gerry remarking that such provision should be made as it was not clear that letters of marque were subsumed in the power of war. 2 RECORDS, *supra* note 8, at 326.

deed, were it the case that the Constitution contemplated a capacity in Congress simply to stipulate conditions (however clearly stated) upon whose happening as subsequently determined by the President war would then be deemed to be declared, it would be a surpassingly strange departure from the concerns that gave the clause its final form:

> Mr. GERRY never expected to hear in a republic a motion to empower the Executive alone to declare war.
>
> . . . .
>
> Mr. MASON was against giving the power of war to the Executive, because not safely to be trusted with it . . . .[35]

Again, this proposition also is not without its testing early in the history of the Constitution. During the conflict with France, in 1798, Hamilton prepared legislation which would have empowered "the President 'at his discretion . . . to declare that a state of war exists between the two countries if negotiations with France did not begin by August 1 or, if they started, should they fail." President Adams wrote to Harrison Gray Otis, Chairman of the House Committee on Defense (through whom the bill was introduced) that Hamilton was crazy. Adams and Pickering maintained that war did not exist between the two countries, given the absence of a congressional declaration to that effect.[36]

Against the background of this general discussion, it may now be appropriate to offer a personal assessment of the war in Vietnam.

IV. An Application to Vietnam

The interim emergency defense war power of the President, to engage in acts of war without declaration of war by Congress, did not endure beyond the moment that the attack upon American destroyers had been repelled and an opportunity was provided for Congress to deliberate. From that time forward, through the undoubted, massive, and prolonged war in Vietnam, no authority existed for the President's ever-widening uses of armed force in the absence of a declaration of war by Congress.

Such a declaration, to have been sufficient, need not have been unqualified or in any specific form. It would, however, have to have been approved by both Houses of Congress. Equally, it would also have to have expressed a specific and unequivocal commitment by Congress, clearly authorizing the President thereafter to employ armed force at

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[35] 2 *id.* 318-19.

[36] A. De Conde, The Quasi-War: The Politics and Diplomacy of the Undeclared War with France, 1797-1801, at 171 (1966).

the level of engagement, in the area of engagement, and against such parties involved in that engagement, as he did in fact pursue. The necessity for this extent of antecedent congressional action, not subject to correction or repair by anything that even Congress might do later on as war was to develop, is built into the declaration of war clause itself: a pause must occur following the first use of war power even in emergencies and *prior* to any further deterioration of relationships; inertial movement down the slippery face of war is momentarily arrested by the force of constitutional requirement and cannot be resumed save on deliberate choice affirmatively asserted by joint declaration of war by both Houses. For this reason, it is not possible to conjure up suitable later substitutes for any congressional action which may have failed at the time as a requisite declaration of war. On the other hand, assuming that an otherwise suitable declaration of war had been made by Congress, it would of course have remained subject to subsequent modification or repeal, just as the continuing capacity of the executive would depend upon adequate congressional support in the supply of money and manpower. In the event of an act of unqualified repeal, the President would again lack authority save only to withdraw all forces from the area of war at once.

Without conceding that any kind of declaration of war was required antecedent to its widening pursuit of war following the incident of Tonkin Gulf, the executive has at different times claimed one or more of three sets of congressional action for its presumption. Two of these, consisting of two treaties and a variety of congressional bills of conscription and appropriation, clearly do not meet the requisites of an antecedent declaration of war. The reasons for their inadequacy should now already be apparent, but I shall briefly outline them again. The third, the Tonkin Gulf Resolution of August 10, 1964,[37] may just possibly have done so, however, notwithstanding the subsequent protestations of a number of members of Congress who joined in the vote to adopt that Resolution. In retrospect, promulgation of the Tonkin Gulf Resolution as a possible declaration of war may seem ironic. Even so, the greater irony by far occurred six years, four months, and two days later: on January 12, 1971, this arguably sufficient declaration of war was repealed without qualification.[38]

In repealing the Tonkin Gulf Resolution outright, rather than amending it to preserve executive authority to persist in the use of armed force at some level, for at least some purposes, for example, as

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[37] H.R.J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384 (1964), reproduced at text accompanying notes 42, 44 *infra*.

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

might be thought essential to negotiate the return of prisoners, Congress wholly removed the only authority which sustained the executive use of armed force in Vietnam. It matters not at all that the President (a different President, of course) may by then have disclaimed reliance upon the Tonkin Gulf Resolution or, indeed, that members of Congress may not themselves have intended the consequence of their affirmative vote for outright repeal, any more than careless misapprehension of the significance of one's vote can alter the consequence of other acts of Congress. The repeal being complete when signed by the President himself on January 12, 1971, the executive use of armed force in Vietnam since that date has been without constitutional authority.

Executive claims in respect to congressional authorization for the sustained use of armed force in Vietnam, as previously stated, rested partly upon two treaties, the Southeast Asia Treaty and, indirectly, the Charter of the United Nations, both of which the Senate had previously ratified. In answer to the objection that the ratification of these treaties can in no manner be construed as declarations of war, the claim may be offered that ratification can be understood either as the delegation of authority to the President so to declare war when in his judgment conditions triggering our treaty obligations arise and we are called upon to fulfill them, or if that view is inadmissible, that ratification of the treaty was itself an inchoate declaration of war subsequently effective upon determination of the President under circumstances that he would assess in accordance with the terms of the treaties. For each of three reasons, however, the claim utterly fails.

First, neither treaty provides any basis in fact for the claim that is made. To the contrary, each provides that commitment to the use of force must be made only "in accordance with [our] constitutional process."[39] Assuming that one such obligation may involve the actual engagement of armed force, fulfillment of a treaty obligation is thus to furnish an occasion for Congress to act under the declaration of war clause, without, however, dispensing with the constitutional necessity of that action as an essential predicate to the executive use of military force. Insofar as the President may have been placed under an independent duty of his own in this respect, *i.e.*, faithfully to execute the obligation of the treaty consistent with our constitutional processes, it was only to take account of subsequent conditions which in his judgment called up our obligation to engage in war and thereupon urgently to convene and to address Congress that Congress should act upon its

[39] U.N. CHARTER, art. 43, para. 3 (concerned with *ratification* of agreements). The comparable language from the Southeast Asia Collective Defense Treaty (concerned with *action* to meet a threat) is quoted at text accompanying note 23 *supra*.

own obligation. Under no view, however, is it maintainable that either treaty attempted to dispense with the constitutional requisite of subsequent congressional declaration prior to the actual commitment of armed force.

Second, even assuming a limited power in Congress to shift the determination to embark upon war to the President, under specified conditions expressed in clear and definite guidelines, the transfer of such authority cannot be accomplished by *treaty*. The House of Representatives' prerequisite consent to this nation's involvement in war was most deliberately required by the declaration of war clause after consideration of several alternatives, including the specific proposed alternative of vesting the power jointly in the Senate and President alone which was itself rejected.[40] As the House does not consent to treaties, manifestly a treaty cannot be among the possible means of delegating its authority. To imply that the constitutional draftsmen could possibly have formulated a document so specific in its precautions against involvements of war while simultaneously creating an enormous loophole of exclusive Senate power to give it away by simple treaty ratification is wholly without logic or evidence.

Third, and more briefly still, for reasons offered earlier I believe that the declaration of war clause disallows any delegation at all, *i.e.*, that Congress not only lacks power to relieve itself of that responsibility by shifting it generally to the President, but that it may not do so even fortified with the strictest and most unequivocal guidelines "merely" enabling the President to direct the sustained use of armed force when, in *his* judgment, specific conditions have arisen to trigger a prior authorization by Congress. Consider it as one will, the requirement that *Congress* shall declare war if and when war is to be declared at all leaves no room for contingent declarations where the determination of the contingency is sought to be dislocated from Congress subject only to a power to reclaim it too late to serve the function of the clause. The congressional responsibility may not be thus diluted, no matter how eagerly Congress itself might wish to be quit of it, nor will it do at all to argue that Congress might always reclaim its authority and thereupon vote *against* the pursuit of war if in disagreement with the President's assessment that led him to trigger the use of armed force pursuant to the congressional delegation. For again, the function of the clause was to force a momentary pause upon Congress even on the brink of hostilities, that there could be no slipping into war where the slippage itself might well transfigure what would otherwise have been a congressional decision not to become engaged.

[40] *See* 2 RECORDS, *supra* note 8, at 318-19.

Especially for this reason, as well as for the reason that none of the subsequent "supportive" bills of appropriation or manpower even purport to direct the specific use of armed force (though many were doubtless passed with complicit understanding of how the President proposed to use the additional monies and manpower thus made available), neither can these later and related pieces of legislation repair the omission of a declaration of war required *before* hostilities had been allowed to proceed in a manner making it impossible to say how far they had trammeled the congressional choice. In short, the declaration of war clause provides no means by which Congress can reduce its responsibility to a different task than that assigned to it, *i.e.*, the qualitatively different task, rejected as an inadequate constitutional safeguard, to check the dog of war *after* it had already been released by executive action.[41]

There remains only the Tonkin Gulf Resolution. Part of it, the following part in section 2, seems not at all sufficient as a declaration of war:

> The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its treaty obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.[42]

There is altogether lacking here a present declaration of war. On its face, the section does no more than to serve notice that the country is *prepared* to go to war in the event of that necessity as a means of fulfilling its treaty obligation. The Congress states, moreover, that it has full confidence in the President and will be guided in its actions by what the President recommends. A resolution sharply pointing up

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[41] Letter from Thomas Jefferson to James Madison, Sept. 6, 1789, in C. WARREN, THE MAKING OF THE CONSTITUTION 481 n.1 (1928):

> We have already given, in example, one effectual check to the dog of war, by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

Consider also Mr. Justice Brandeis' observation (dissenting in Myers v. United States, 272 U.S. 52, 293 (1926)):

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

[42] H.R.J. Res. 1145, 88th Cong., 2d Sess., § 2, 78 Stat. 384 (1964).

what Congress is "prepared" to do is doubtless within the power of Congress publicly to resolve and may indeed be extremely useful. That it constitutes a present declaration of even limited hostilities is manifestly unreasonable for anyone to infer. That it is an oblique and disingenuous *present* authorization to the President, that he is thereafter to utilize armed force as he deems necessary to vindicate the readiness of the country to assist any member of SEATO upon their request, surely twists the words ("[T]he United States is . . . *prepared* . . . to take all necessary steps") and cannot be preferred on a matter of such gravity.[43]

The fact that section 2 seems so clearly a notice of warning, rather than a declaration of war, doubtless lends support to an argument favoring a similar and co-ordinated construction for the balance of the whole Resolution. Yet, a contrary possibility cannot be dismissed on that basis alone, and the very different wording of the balance of the Resolution must be seen in its entirety:[44]

> Whereas naval units of the Communist regime in Vietnam, in violation of the principles of the Charter of the United Nations and of international law, have deliberately and repeatedly attacked United States naval vessels lawfully present in international waters, and have thereby created a serious threat to international peace; and
>
> Whereas these attacks are part of a deliberate and systematic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors and the nations joined with them in the collective defense of their freedom; and
>
> Whereas the United States is assisting the peoples of Southeast Asia to protect their freedom and has no territorial, military or political ambitions in that area, but desires only that these peoples should be left in peace to work out their own destinies in their own way: Now therefore, be it

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[43] *But see,* for the view that § 2 is a present authorization of force, Note, *Congress, the President, and the Power to Commit Forces to Combat,* 81 HARV. L. REV. 1771, 1804 (1968): "This rather comprehensive language certainly supports the interpretation given it by the administration: that it is a functional equivalent of a declaration of war." Moreover, certain portions of the Senate debate favor that impression, *e.g.,* 110 CONG. REC. 18,410 (1964):

> Mr. COOPER. . . . But the power provided the President in section 2 is great.
>
> Mr. FULBRIGHT. This provision is intended to give clearance to the President to use his discretion. . . .
>
> Mr. COOPER. I understand, and believe that the President will use this vast power with judgment.

For the view that so interpreted, however, § 2 then fails as too broad a carte blanche delegation of the war power, see note 25 *supra.* Consider also the views of Senator Morse, one of but two Senators voting against the Resolution:

> I shall not support any substitute which takes the form of a predated declaration of war. In my judgment, that is what the pending joint resolution is.

110 CONG. REC. 18,139 (1964).

[44] H.R.J. Res. 1145, 88th Cong., 2d Sess., 78 Stat. 384 (1964).

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.
>
> . . . .
>
> Section 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

In spite of certain language which still looks in the same mood as the "notice and warning" style of section 2, there is much here of a different tone. In section 1 of the Resolution itself, Congress formally resolves a joint and solemn approval and support for the President, as Commander in Chief, not only to take all necessary measures to repel any armed attack against the forces of the United States (which might merely evidence positive support of the executive's interim emergency power which he would possess in the absence of congressional restriction and without declaration of war, but which might be believed useful to relieve the executive of any margin of doubt or anxiety of subsequent congressional criticism in the event of its exercise); it appears also to authorize the President "to take all necessary measures . . . to prevent further aggression" which section 2 of the preamble identifies as "aggression that the Communist regime in North Vietnam has been waging against its neighbors," presumably South Vietnam, Laos, and Cambodia.[45] Moreover, section 3, stipulating conditions under which the Resolution will expire, would appear to be of no purpose if the entire Resolution is to be taken merely as a solemn declaration of notice and warning. Rather, what is it that may subsequently be terminated by a later concurrent resolution of the Congress unless, indeed, it is a present declaration of war authorizing the President to use armed force as he finds necessary to thwart "further aggression" of the kind which Congress declares North Vietnam has already undertaken against its neighbors as well as "repeatedly" against our naval vessels as "part of a deliberate and systematic campaign of aggression?"

The following exchange in the Senate, between Senator Fulbright,

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[45] That the phrase extended at least to South Vietnam, and not merely to protection of other American ships from sudden attack, was explicitly acknowledged:

> Mr. MILLER. It is left open. It does not say aggression against whom. It is broad enough so that it could mean aggression against the United States, or aggression against the South Vietnamese Government. . . .
>
> Mr. FULBRIGHT. I believe that *both* are included in that phrase.

110 CONG. REC. 18,405 (1964) (emphasis added).

Chairman of the Foreign Relations Committee and floor manager for the Resolution, and Senator Brewster is extremely telling:

> Mr. BREWSTER. [M]y question is whether there is anything in the resolution which would authorize or recommend or approve the landing of large American armies in Vietnam or in China.
>
> Mr. FULBRIGHT. There is nothing in the resolution, as I read it, that contemplates it. I agree with the Senator that that is the last thing we would want to do. However, the language of the resolution would not prevent it. *It would authorize whatever the Commander in Chief feels is necessary.*[46]

And, again, in response to a question from Senator Cooper:

> Mr. COOPER. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, *we will give that authority by this resolution?*
>
> Mr. FULBRIGHT. *That is the way I would interpret it.* If a situation later developed in which we thought the approval should be withdrawn, it could be withdrawn by concurrent resolution.[47]

One may faithfully attend other views of the matter, of course: that the standards delimiting the executive use of force are too indefinite thus to delegate the power to declare war; but is not section 1 rather a present declaration and current authorization of executive power sufficient for its purpose, and not a delegation at all? Again, the Resolution "was passed with great speed and in the heat of emotion," at a time when "there were few American troops in Vietnam;"[48] but have not declarations of war most commonly been issued exactly under such circumstances, and are they less adequate on that account even assuming that explicit provision for the declaration of war clause may not itself adequately have reckoned with this difficulty? Additionally, it has been correctly noted that the next President foreswore any reliance on the Resolution, and that even President Johnson never relied exclusively upon it for his claim of authority;[49] but what use or inter-

[46] *Id.* 18,403 (emphasis added).

[47] *Id.* 18,409 (emphasis added).

[48] 116 CONG. REC. S7119 (daily ed. May 13, 1970), reproducing a memorandum signed by a number of legal luminaries.

[49] 117 CONG. REC. H4342 (daily ed. May 25, 1971):
President Johnson said in a news conference: "We did not think the resolution was necessary to do what we did and what we are doing." Hearings on S. Res. 151 before the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. 126 (1967). Nor does the current administration of President Nixon rely for authority upon the Gulf of Tonkin Resolution. On March 12, 1970, in response to

pretation can safely be made of such subsequent politics? Finally, it is true as well that not all who spoke at the time necessarily intended this consequence of their vote, a telling example being the somewhat equivocal statement by Congressman Morgan, Chairman of the House Foreign Affairs Committee that "this Resolution is definitely not an *advance* declaration of war."[50] Still, in all, it is exceedingly difficult to disagree with Senator Eagleton's own reluctant conclusion that:

> Faulty vision and political pressures cannot be permitted to minimize the legal significance of the Tonkin Gulf Resolution . . . . Although the existence of the Tonkin Gulf Resolution did not make the war we have waged in South Vietnam any wiser or any more explicable, it did make it a *legitimate* war authorized by the Congress.[51]

Were the question a different one, for instance one involving conscientious judicial determination of whether executive action ordering troops or planes into *China* would exceed the bounds of the Tonkin Gulf Resolution, then I should think it might quite sensibly be argued that so great a quantum leap in the executive escalation of the Vietnam War would have required that the President return to Congress, before taking that leap, so as to secure a modified and expanded declaration of the limited war previously declared.[52] Given the Resolution as it was framed, however (and the unabating manpower and financial support Congress subsequently provided in the prosecution of the war), we would succumb to the temptation of current remorse and an overwrought desire to find additional argument to force total disengagement to insist that Congress never really declared the war at all.

Yet, ironies are heaped up on both sides, and resort to argument torturing the original adequacy or scope of the Tonkin Gulf Resolution is surprisingly beside the point so far as the constitutional imperative of total disengagement is now concerned. As the President would have had to return to Congress to secure constitutional authority for any enlargement of the war that was declared and authorized by the Tonkin Gulf Resolution, so too, at all times Congress retained the power to amend the Resolution to reduce the scale of war or, indeed, to end it. Rather than scaling down the war by any mere amendment, however,

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a letter from Senator Fulbright, H. G. Torbert, Jr. stated on behalf of the Department of State:

"[T]his administration has not relied on or referred to the Tonkin Gulf resolution of August 10, 1964, as support for its Vietnam policy. . . ."

[50] 110 CONG. REC. 18,539 (1964) (emphasis added).

[51] Eagleton, *Congress and the War Powers*, 37 MO. L. REV. 1, 14-15 (1970). In full accord is Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEXAS L. REV. 833, 874-75 (1972).

[52] *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 169 (1804).

the unalterable fact of the matter is that Congress wholly repealed the Tonkin Gulf Resolution.[53] Nothing having been left of it, and no subsequent declaration of even limited war having been substituted, the President now conducts hostilities in Vietnam utterly without constitutional authority. It is simply true that the uses of American armed force in Vietnam since January 12, 1971, defy the Constitution of the United States.

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