killed or injured. The Americans suffered no serious casualties.\textsuperscript{75}

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

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

II. Michael Tigar

A. Introduction

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

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

\textsuperscript{76} Jefferson informed Congress of the Dale mission in his First Annual Message to Congress, December 8, 1801. See 11 \textit{Annals of Cong.} 11 (J. Gales ed. 1801), \textit{reprinted in } Messages and Papers of the Presidents 314 (J. Richardson rev. ed. 1908).

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

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

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

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

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

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


82. Tigar, supra note 77, at 1165-67.
B. The Constitution, Foreign Affairs, and the Judiciary

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

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

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83. 5 U.S. (1 Cranch) 137 (1803).
84. Id. at 165-66.
86. Id. at 34.
89. Speaking for the Court, Mr. Justice Black delineated the President’s role in the “law life” of our Nation with succinctness. He stated:

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

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

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

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

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

[Where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis;]
even in times of war. Third, the judiciary has the power to declare the law, regardless of who the parties are, when a real case or controversy requires such a declaration in order to decide who wins and who loses. Recently, a majority of the District of Columbia Circuit, sitting en banc, echoed these principles when an American citizen sued the Secretary of Defense because the United States Government had taken over his land in Honduras to help mount covert military operations in Central America.

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

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

Id. at 662.

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

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

Youngstown, 343 U.S. at 587.

91. Id. at 583-84. Mr. Justice Frankfurter was more explicit on this point:
To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him would in effect always preclude inquiry into challenged power, which presumably only avowed great public interest brings into action.

Id. at 596.


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

Of course, Congress was also empowered to restrain foreign military activity through the control of appropriations,\textsuperscript{95} declaration of war,\textsuperscript{96} and grant of letters of marque and reprisal.\textsuperscript{97} In addition, the Senate's power of concurrence in treaties\textsuperscript{98} gave it a role in shaping foreign policy, although sadly, some are arguing that the Senate can consent to a treaty without understanding what the executive branch thinks the treaty means.\textsuperscript{99} Although the President may embark upon a course of foreign policy, or step down the road of foreign military adventure, however, the judiciary will presumptively have power to fashion some remedy when that conduct infringes upon a private right.

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

\textsuperscript{94} U.S. CONST. art. I, § 8, cls. 1, 12.
\textsuperscript{95} U.S. CONST. art. I, § 8, cl. 11.
\textsuperscript{96} Id.
\textsuperscript{98} U.S. CONST. art. II, § 2.
\textsuperscript{99} For a discussion of this dangerous "constitution busting" tactic, see Glennon, \textit{Interpreting "Interpretation": The President, the Senate, and When Treaty Interpretation Becomes Treaty Making}, 20 U.C. DAVIS L. REV. 913 (1987).
\textsuperscript{100} 745 F.2d at 1545-74.
\textsuperscript{101} Id. at 1546-49 (Tamm, J., dissenting); id. at 1561-62 (Scalia, J., dissenting).
\textsuperscript{102} See J. STORY, \textit{Commentaries on the Constitution} §§ 1166, 1171, at 95-97 (3d ed. 1858); see also \textit{The Federalist} Nos. 24-26 (A. Hamilton) (G. Carey & W. Kendall ed. 1966); Comment, \textit{Congress, the President, and the Power to Commit Forces to Combat}, 81 HARV. L. REV. 1771 (1968); Comment, \textit{The President, the Congress, and the Power to Declare War}, 16 U. KAN. L. REV. 82 (1967).
demonstrates that the rush towards improvident armed conflict is often associated with jingoistic rhetoric, systematic assaults on the right of dissent, and a public atmosphere of intolerance. Non-elected judges are supposed to restrain such things in the service of the countermajoritarian values built into the Constitution by the framers.

C. The Sources of Law

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

I am not talking solely about the so-called Boland amendment, but also about the network of laws that limit the use of United States funds, territory, and personnel to conduct hostile actions against countries with whom we are at peace. Nothing in the text, history, or authoritative interpretation of the Constitution gives the President a shred of justification for violating, or purporting to authorize violation of, such laws. To argue the contrary is to sunder the most basic understanding upon which the Constitution was ratified: namely, that the states party to this compact were not installing as head of state a king by some other name. Certainly, then, these parties did not intend to create a “king” free to disregard the law. As Lord Coke explained in Dr. Bonham’s Case, the law stands indifferent between sovereign and citizen and binds them both. Military activity under-
taken without affirmative congressional approval may also be unlawful, depending on one's interpretation of the Constitution.\textsuperscript{111} I have defended the view that all presidential military activity, other than repelling a sudden attack, requires congressional authorization, at least if the activity involves what are, under international law, acts of war.\textsuperscript{112}

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

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

\textsuperscript{112} See Tigar, \textit{supra} note 77, at 1170 nn.152-54. \textit{See generally} authorities cited in R. \textsc{Falk, supra} note 97.


\textsuperscript{115} The Paquete Habana, 175 U.S. 677 (1900).


\textsuperscript{117} The Paquete Habana, 175 U.S. at 686.
ordered to restore the proceeds of sale to the vessel owners, with damages and costs.118

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

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118. *Id.* at 714.


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

121. 726 F.2d 774, 808-10 (D.C. Cir. 1984) (Bork, J., concurring).
In sum, Presidents and their agents—including military commanders and troops—are subject to the commands of customary international law that limit violations by one nation of another nation’s sovereignty and territorial integrity, and that limit interference in another nation’s internal affairs. My summary of the sources of law is quite independent of my earlier discussion of the proper role of the judiciary. Even if one believes that judges should not interfere with particular kinds of executive decisions, the rules of law are still there, and a President’s obedience to them is at least a function of the oath of office.

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

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

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123. U.S. CONST. art. I, § 8, cls. 1, 12; art. I, § 9, cl. 7.
124. Case Concerning Military and Paramilitary Activities in and Against Nicaragua
attempted to revoke its long standing acceptance of jurisdiction by the
International Court of Justice. Laudably, despite the opening pro-
vided by the United States' continued insistence that the International
Court of Justice lacked jurisdiction, the court fulfilled its duty by
accepting the case, investigating the facts, finding the law, and ruling
on the merits.\textsuperscript{125} By a lopsided majority, the court proclaimed that
the United States' actions violated settled rules of international law,
regarding the conduct of nations.\textsuperscript{126}

The President and his advisers first derided, then ignored, the
Court's decision\textsuperscript{127}—a defiance that sets them against the supremacy
clause, and weakens an already fragile, though decisively important,
participant in the quest for peace and freedom in the international
community. I would add that in grasping at the prerequisites of the
imperial presidency, the incumbent has sought to curb dissent by
imposing far reaching curbs on free access to governmental informa-
tion, all in the name of national security, and supposedly insulated
from meaningful judicial review.\textsuperscript{128}

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\textsuperscript{125}Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment on Merits of June 27, 1986), discussed in Hightet,
Evidence, the Court and the Nicaragua Case, 81 AM. J. INT'L L. 1 (1987); see also Maier,
Appraisal of the ICJ's Decision: Nicaragua v. United States (Merits), 81 AM. J. INT'L L. 77
(1987) (comments by Briggs, Boyle, Christenson, D'Amato, Falk, Farer, Franck, Glennon,
Gordon, Hargrove, Janis, Kirgis, Moore, Morrison, Reisman, Teson).
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\textsuperscript{126}Nicaragua, 1986 I.C.J. 14, at 17, 22-26 (Judgment on Merits of June 27, 1986). On
November 26, 1984, the court found that it had jurisdiction and accepted the Nicaraguan
application. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.),
1984 I.C.J. 392 (Judgment of Jurisdiction and Admissibility of Application of November 26,
1984). In response, the Agent of the United States, on January 18, 1985, informed the court
that the United States would no longer appear. Military and Paramilitary Activities In and
expressing its regret, the court did not refuse to further hear the case. The court recalled to the
United States:

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

\textsuperscript{127}See Hightet, supra note 124. See also Maier, supra note 124.
\textsuperscript{128}See, e.g., Federal Polygraph Limitation and Anti-Censorship Act, 1984: Hearings on
H.R. 4681 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the
D. Implications for Today

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

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

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

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

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130. While Texas adheres to the requirement that only "the immediate influence of sudden passion" will reduce a homicide offense from murder to manslaughter, TEX. PENAL CODE ANN. § 19.04(a) (Vernon 1974), that is not the end of the story. The accused will generally be entitled to an instruction that he had the right to carry arms "to the scene of the difficulty and seek an explanation." See Ruiz v. State, 747 S.W.2d 535, 538 (Tex. Ct. App. 1988); Mathews v.
If William Randolph Hearst and Teddy Roosevelt thought we should go down into some small Latin American or Caribbean country, avenge some insult, grab some territory, and further our theory of government, well, that was the way it was. But in today's world, we are all—to my regret, at times—living a little closer together and the armament is a little more powerful.\textsuperscript{1}

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

\textbf{III. Eugene V. Rostow}

Let me start this talk by recalling what I regard as the most important and most profound sentence John Marshall ever wrote: “Let us never forget that it is a Constitution we are expounding.”\textsuperscript{2}

By that I think Marshall meant at least three things. First, the Const-

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\item At the Symposium, where these thoughts were first expressed, Professor Rostow remarked to me during a break that “You do not understand anything about self-defense.” I have read the recent literature expounding a right of self-defense that includes anticipatory invasion of the territorial integrity and sovereignty of other states. Nothing in the jurisprudence of any international tribunal, and nothing in the history of either the Security Council or the General Assembly, justifies such views. The only conceivable justification is an expansive conception of United States' security interests that is at war with the collective security obligations of the United Nations Charter, and cynical in light of our rejection of ICJ jurisdiction in \textit{Nicaragua v. United States}. The United States cannot unilaterally define its rights by expanding its claims to dominance: A buffalo does not become a giraffe simply by sticking its neck out.
\item McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
\end{itemize}