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PRESIDENTIAL WAR-MAKING

HENRY P. MONAGHAN*

The Vietnam "war" has convinced many persons that the president of the United States claims apparently unlimited power to commit this country to war. Not surprisingly, therefore, considerable interest has focused on the powers that inhere in the presidency. And many critics of the war—those who in other times and in other contexts might have been sympathetic to a spacious conception of presidential power—have concluded that the Vietnam conflict is not only a tragic error, but is the direct result of unconstitutional conduct by the president. I cannot accept this view; at bottom, it seems to me yet another example of the American propensity to substitute "for the question of the beneficial *use* of the powers of government . . . the question of their *existence*."¹ In view of what has already been written,² I shall confine myself to the considerations that impress me as controlling. Since my concern is with the constitutional relationship between the president and congress, I shall give no consideration to the consistency of the president's action with American treaty obligations or with international law generally.³

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¹ Corwin, *The Constitution as Instrument and as Symbol*, 30 *Am. Pol. Sci. Rev.* 1071, 1077 (1936) (emphasis in original).

² Particularly helpful discussions are found in Note, *Congress, The President, and The Power to Commit Forces to Combat*, 81 *Harv. L. Rev.* 1771 (1968) and an earlier symposium, *Legality of United States Participation in the Viet Nam Conflict: A Symposium*, 75 *Yale L.J.* 1084 (1966). See also M. Pusey, *The Way We Go To War* (1969) for a lucid, non-technical discussion of the relevant historical materials and of the events surrounding our involvement in Vietnam.

Of a more polemical character are F. Wormuth, *The Vietnam War: The President versus the Constitution* (April 1968) (Occasional Paper: Center for the Study of Democratic Institutions); Malawer, *The Vietnam War Under the Constitution: Legal Issues Involved in the United States Military Involvement in Vietnam*, 31 *U. Pitt. L. Rev.* 205 (1969); and Velvel, *The War in Viet Nam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 *Kan. L. Rev.* 449 (1968).

There has been considerable debate in the senate on the constitutionality of the presidential action. See in particular: (1) Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. (1967); (2) Senate Comm. on Foreign Relations, *National Commitments*, S. Rep. No. 797, 90th Cong., 1st Sess. (1967); (3) Senate Comm. on Foreign Relations, *National Commitments*, S. Rep. No. 129, 91st Cong., 1st Sess. (1969). More recently, the president's action in Cambodia has triggered another round of intense debate, largely in the context of two sets of proposals: Hatfield-McGovern Amendment, S. Amend. 609, 91st Cong., 2d Sess. (1970); Church-Cooper Amendment, S. Amend. 620, 91st Cong., 2d Sess. (1970).

³ For a general collection of articles on this aspect of the Vietnam conflict see *The Vietnam War and International Law* (R. Falk, ed. 1968) and see R. Hull & J. Novogrod, *Law and Vietnam* (1968), most of which is devoted to the nonconstitutional law aspects of Vietnam. While I do not purport to have made a careful analysis of this aspect of the Vietnam conflict, I must say that the efforts to show that United States action in Vietnam violates accepted norms of international law seem quite insubstantial. Accordingly, I have not included any separate consideration on the restraint that accepted rules of international law imposed upon presidential war-making. That, however, is an issue that merits careful consideration.

I

If one examines the text of the constitution, he is at once struck by the differences between the powers conferred upon congress by article I and those given to the president by article II. The great powers that one identifies with the national government are conferred upon congress: the powers to tax and to spend, to regulate commerce, to raise armies and navies, and to declare war.⁴ By contrast, the textual powers conferred upon the president are both few and of uncertain dimension. Some are plainly of a trivial character.⁵ The few more open-ended clauses upon which "strong" presidents have based their authority are as follows:

Section 1. The executive Power shall be vested in a President of the United States of America. . . .

. . . .

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;

He shall have power, by and with the Advice and Consent of the Senate, to make Treaties, providing two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls. . . .

. . . .

Section 3. [H]e shall take Care that the Laws be faithfully executed⁶

But, textually, none of these powers need be read as a significantly independent, substantive power. For example, the grant of the "executive power" in section 1 can be understood simply as creating a unitary executive department that, in turn, will possess the powers subsequently enumerated in sections 2 and 3.⁷ The power to receive ambassadors might mean no more than that, as the nation's symbolic head, the president has a ministerial, non-discretionary duty to receive foreign representatives. The president's power as commander in chief, so heavily relied upon by modern presidents, could be read only as constituting the president, in Hamilton's phrase, "the first general and admiral of the confederacy,"⁸ and not as an independent authority for making decisions that, in turn, require use of the armed forces to back them up.⁹ Finally, the "take care" clause could be taken as simply declaratory of a presidential obligation to enforce existing congres-

⁴ See U.S. Const. art. I, § 8, cls. 1-18. See also U.S. Const. amend. XIV, § 5.

⁵ For example, the president "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." U.S. Const. art. II, § 2.

⁶ U.S. Const. art. II, §§ 1-3.

⁷ See C. Black, *Perspectives in Constitutional Law* 58 (1963).

⁸ *The Federalist* No. 69 (A. Hamilton). See also *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).

⁹ Note, *supra* note 2, at 1775.

sional policy. Not surprisingly, therefore, the presidency was not originally viewed as a great office. The dominant mood was that of legislative prerogative.

But the measure of presidential power cannot be gleaned simply from the words of article II alone, nor from references by eighteenth century statesmen as to the appropriate distribution of legislative and executive power. For reasons that are beyond the scope of this paper to examine, there has been a vast accretion of power in the presidency, particularly in this century.¹⁰ Moreover, there has been a sharp decline in congressional power. The amount of political power in any society is not a fixed, determinate sum; it can expand or contract as a society changes. Accordingly, congressional as well as presidential power could have significantly increased as American society and the entire world became more complicated and interdependent. It did not do so largely because of congress' increasing inability to deal with national and international problems.¹¹ "Presidential government" has, therefore, emerged as the dominant aspect of modern American political life;¹² it is to the presidency, not congress, that we look for realization of the aspirations of a "great society."

I doubt whether the emergence of presidential government is a process capable of significant reversal; an apparently universal characteristic of twentieth century government has been the growth of "executive" power and the relative decline of the legislative process. Whether this result is desirable is, of course, an issue of major contemporary importance.¹³ Whether it "defeats" the framers' intention is, however, a profitless speculation.¹⁴ We do not and cannot know, what, specifically, they would have thought about a world so different from their own. Nor would we really care.¹⁵ The central

¹⁰ This development stems from such diverse factors as the rise of political parties, the advent of mass communications, and the complexity and highly interdependent character of modern life. For particularly helpful discussions of the growth of and the present dimensions of the presidency see J. Burns, *Presidential Government* (1965); R. Neustadt, *Presidential Power: The Politics of Leadership* (1960).

¹¹ Kurland, *The Impotence of Reticence*, 1968 *Duke L.J.* 619, 634-36.

¹² *Id.* at 627-28. Professor Kurland, it should be noted, deeply laments this result.

¹³ Increasing concern has been expressed whether, institutionally, the presidency has inadequate information on which grave decisions must be based. G. Reedy, *The Twilight of the Presidency* 24-29 (1970). Like many writers who are deeply disturbed by the concentration of power in the president, Mr. Reedy shows a preference for a strong senate.

¹⁴ For a brief discussion of the view of the framers see E. Corwin, *The President: Office and Powers 1787-1957*, at 10-19 (4th rev. ed. 1957). It should be recalled that this discussion took place against a backdrop of the United States and of the world that bears little semblance to our times. Even so, Hamilton vigorously advanced the conception of a strong president.

¹⁵ *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (Holmes, J.):

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that the framers have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

fact is that the framers left us with a structure of government sufficiently fluid to accommodate a good deal of shifting power between congress and the president. The relative balance of power between the branches has varied over the course of our history. But the long era of "congressional government,"¹⁶ which extended from the civil war to the end of the nineteenth century, has now given way to an era of presidential dominance.

By and large the broad expansion of presidential power has occurred as a result of large, open-ended legislative grants from congress itself. At least with respect to internal matters, presidents have seldom been forced to rely upon any claim of "inherent" presidential powers.¹⁷ However, appeals to this source have not been lacking. Pointing to the grant of the executive power, as well as the "commander-in-chief" and the "take care" clauses, "strong" presidents have always asserted the power to act in the absence of statute where there was an emergency. And despite the loose manner in which the case is sometimes read, the *Steel Seizure* case¹⁸ fully supports their claim. There, the secretary of commerce, acting under the direction of the president, seized the steel mills during the height of the Korean conflict in order to prevent interruption of vital supports for the war effort. A lower court injunction against the seizure was affirmed in the supreme court by a six-to-three vote. To be sure, in his brief "opinion for the court" Mr. Justice Black rejected the proposition that the president could act without congressional authorization;¹⁹ in so doing, he ignored innumerable instances to the contrary, as the dissenting opinion convincingly demonstrated.²⁰ More importantly Mr. Justice Black spoke only for himself and Mr. Justice Douglas. Four concurring and three dissenting justices—seven of the nine members of the court—either reserved judgment on the issue or expressly recognized that the president had inherent power to act in an emergency so long as he did not contravene a specific congressional mandate. Analysis of the opinions shows that the real division within the court was over the far narrower issue of whether the president's act did in fact contravene existing federal statutes.²¹

¹⁶ J. Burns, *supra* note 10, at 70-71:

In the deepest sense congressional government was not really government. It was rather brokerage—a place for the adjustment of competing economic interests. The main interest in Congress, Bryce noted, related to the raising and spending of money. And the more the Presidency was drawn into the congressional orbit, the less the Presidency could be a place for the expression and realization of great dreams, programs, and conflicts.

¹⁷ C. Black, *supra* note 7, at 57:

[W]ithout straining a single provision in the text, Congress might have made the President into a symbolic chef d'état. . . .

[C]ongress, instead of reducing the Executive to a formal status, has by its own laws steadily added to his power; most of the legally warrantable powers of the Presidency today come from statutes.

¹⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁹ *Id.* at 587-88. See also J. Smith & C. Cotter, *Powers of the President During Crisis* (1960).

²⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 683-700 (1952).

²¹ E.g., Kauper, *The Steel Seizure Case: Congress, The President and The Supreme Court*, 51 Mich. L. Rev. 141, 178 (1952). I do not mean to suggest that the division on

It seems to me indefensible to assert that even on internal matters the president must invariably point to a statute to justify his conduct. Should an emergency arise, the president must and will act so as to protect the nation's interest as he conceives it.²² To require the existence of a statute would leave an enormous gap in the nation's power to meet an emergency, a doctrine not likely to commend itself to men of affairs. And I would add that the existence of an emergency is largely a political not a judicial question. If the president abuses that power, the only recourse is subsequent congressional action and, ultimately, the displeasure of the electorate.

As it does with respect to internal matters, the constitutional text assigns broad powers to congress in the area of foreign affairs: congress is given power to regulate commerce with foreign nations; to define and punish offenses against the law of nations; to declare war; to advise and consent to treaties (the senate); to raise and support the army and navy; and finally, it has control over the purse strings.²³ The president is also expressly vested with some powers bearing on foreign relations, principally the power to make treaties (with the advice and consent of the senate) and the power to receive foreign envoys.²⁴ More importantly, from the beginning the Hamiltonian contention²⁵ that the president possessed broad "inherent" powers in representing the nation in our foreign relations gained considerable currency. Thus Marshall could refer to the president as "the sole organ of the nation in its external relations, and its sole representative with foreign nations."²⁶ By 1935 the supreme court, undoubtedly influenced by the long and steady growth of presidential activity, characterized the presidential

this issue is unimportant. Congress had, after all, not *expressly* forbidden the president to seize the steel mills. See, e.g., C. Black, *supra* note 7, at 64.

²² Mr. Justice Black's opinion has been widely criticized. Professor Black characterizes it as "unhistoric and unworkable." C. Black, *supra* note 7, at 63. "[T]he opinion," says Professor Corwin, "bears all the earmarks of hasty improvisation as well as of strong prepossession, being unquestionably contradicted by a long record of presidential pioneering in territory eventually occupied by Congress." E. Corwin, *supra* note 14, at 155. See also Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 *Colum. L. Rev.* 53 (1953); Kauper, *supra* note 21; Lea, *The Steel Case: Presidential Seizure of Private Industry*, 47 *Nw. U.L. Rev.* 289 (1952).

It has, of course, sometimes been suggested that, given a grave enough situation, the president can act *in disregard of a legislative command*. Lincoln put the matter sharply: "Are all the laws *but* one to go unexecuted, and the Government itself to pieces lest that one be violated?" Message to Congress, July 4, 1861 (emphasis in original), quoted in E. Corwin, *supra* note 14, at 252. See generally E. Corwin, *supra* note 14, at 228-30, 250-52. Despite the evident appeal in Lincoln's position it is difficult to frame any theory of separation of powers that would permit the president to claim inherent power to disregard congressional commands because he deemed an emergency to exist. Of course, there are techniques by which this issue can be avoided. It seems likely, for example, that existing statutes could generally be construed in a manner so as not to present any conflict.

²³ U.S. Const. art. I, § 8, cls. 3, 10-14; U.S. Const. art. II, § 2.

²⁴ U.S. Const. art. II, §§ 2-3.

²⁵ The respective prerogatives of congress and the president were vigorously debated by Hamilton and Madison. See E. Corwin, *supra* note 14, at 177-84. Hamilton pressed for a particularly broad construction of presidential power to conduct foreign affairs. See *id.*

²⁶ — *Annals of Cong.* 613 (1800).

prerogative to conduct foreign affairs as "delicate, plenary and exclusive."²⁷

Not surprisingly, therefore, most writers recognize that the respective ambits of congressional and executive powers in controlling the direction of American policy cannot be resolved simply by an appeal to the constitutional text. That document "is remarkably inexact concerning the distribution of responsibilities . . . for the making of foreign policy";²⁸ it seems to permit the exercise of considerable power over this subject matter in both branches.²⁹ Writing in 1957, Professor Corwin accurately summarized the situation:

[C]onsidered only for its affirmative grants of powers capable of affecting the issue, [the constitution] is an invitation to struggle for the privilege of directing American foreign policy. In such a struggle the President has, it is true, certain great advantages, which are pointed out by Jay in *The Federalist*: the unity of the office, its capacity for *secrecy* and *dispatch*, and its superior sources of *information*; to which should be added the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time. But despite all this, actual *practice* under the Constitution has shown that, while the President is usually in a position to *propose*, the Senate and Congress are often in a technical position at least to *dispose*. The verdict of history, in short, is that the power to determine the substantive content of American foreign policy is a *divided* power, with the lion's share falling usually, though by no means always, to the President.³⁰

Accordingly, even if one were inclined to accept Mr. Justice Black's view that presidential action within the United States must be grounded in a statute, there is no basis for applying such a rigid concept of separation of powers past our shorelines.

The general view for which I have been contending is that analysis of the doctrine of separation of powers should focus more on a recognition that often what is being separated are institutions and not necessarily "powers."³¹ To some degree these institutions have unique powers; one would not expect the president to promulgate an income tax code merely because in his

²⁷ *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Here, the court accepted the doctrine of "inherent" presidential power over foreign affairs. *Id.* at 319-20. See generally E. Corwin, *supra* note 14, at 170-226; G. Schubert, *The Presidency in the Courts* 101-36 (1957).

²⁸ L. Koenig, *The Presidency and The Crisis* 18 (1944).

²⁹ Professor Black argues, however, that the textual powers of the president to conduct foreign affairs are in fact minimal. Accordingly, he is of the opinion that the constitutional text presupposed congressional supremacy in the area of foreign affairs corresponding to a similar supremacy in internal affairs. C. Black, *supra* note 7, at 57-59. Professor Kurland is of the same view. Kurland, *supra* note 11, at 621-23. I tend to agree with this view. Historical necessity has, however, expanded the content of such terms as "executive power" and "commander in chief" and it has given sanction to the Hamiltonian view of "inherent" powers—i.e., to powers not in the constitutional text. See generally authorities cited in note 27 *supra*.

³⁰ E. Corwin, *supra* note 14, at 171 (emphasis in original) (footnote omitted).

³¹ R. Neustadt, *supra* note 10, at 33: "The constitutional convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions *sharing* powers." (emphasis in original). See also S. Huntington, *Political Order in Changing Societies* 109-12, 115-21 (1968).

judgment congress should have done so. But there are gray areas where joint power exists—where both branches have tremendous and overlapping power and where any “conflict” must be resolved on the political not the legal level.³² This seems to me indisputably true in the area of foreign affairs. And the consequences of this view are of course evident: the existence of the congressional power over the subject of foreign affairs will not support a narrow definition of presidential power. Absent congressional action, the president has (to use a conclusory term) “inherent” constitutional power in the conduct of our foreign affairs. *It is, therefore, an error of considerable significance to adopt uncritically an “either-or” logic—to assume that the doctrine of separation of powers requires that power must be either in, and only in, congress or in the president.* Such a rigid, mechanical view has never accurately described the relationship between congress and the presidency even with respect to internal affairs; it is wholly insupportable in the area of foreign affairs. The fact is that power may inhere in both branches.

Necessity, of course, requires that the president have the major responsibility for day-to-day conduct of foreign affairs. Coupled with the institutional weakness of congress³³ this fact gives modern presidents tremendous leverage in any struggle with congress for control over the direction of American foreign policy. A determined president can confront congress with a *fait accompli*; nonetheless, congress is under no constitutional compulsion to back it up.³⁴ Thus, while it lacks the institutional capacity to play a sustained affirmative role in shaping American foreign policy, a sufficiently determined congress³⁵ can exercise considerable direction over at least specific aspects of that policy.

It is, I submit, with the foregoing general considerations in mind that one should commence any assessment of presidential power to commit the armed forces to hostilities without prior congressional authorization.

II

The occasions on which presidents have refused to take military action abroad because of a lack of prior congressional authorization are few in num-

³² There are numerous areas where clashes between the president and congress are not easily resolvable apart from the play of the political process. For example, there are no clear rules governing the power of the executive to withhold information from congress. Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. Pitt. L. Rev. 755 (1959). See also the questions arising from the presidents asserted power to “impound” funds voted by congress for expenditures.

³³ The “conclusion is unavoidable that the national legislature, as it now plays its exacting role on the political stage, is remarkably ill-suited to exercise a wise control over the nation’s foreign policy.” R. Dahl, *Congress and Foreign Policy* 3 (1950). However, Professor Finer has voiced grave concern about the capacity of one man to respond in a rational manner to constant world crises and has suggested institutional restraints on the presidency. H. Finer, *The Presidency: Crisis and Regeneration* 198 (1960).

³⁴ E. Corwin, *supra* note 14, at 184-93.

³⁵ “Senate” should in all probability be substituted for “congress.” But see J. Clark, *The Senate Establishment* 15 (1963) (“the Senate has become archaic, outmoded, obsolete as a meaningful democratic institution”). It is, I think, exceedingly difficult to imagine any real role in foreign affairs for the house of representatives.

ber and increasingly rare.³⁶ From the beginning of our constitutional history, presidents have both deployed the armed forces abroad and committed them to actual hostilities without explicit congressional authorization. In excess of one hundred and twenty instances of such action exist.³⁷ The precedents extend back to Washington and include that great "strict constructionist" Jefferson; they run through the nineteenth century;³⁸ and with the emergence of the United States as a global power in this century, they become sharper and more spectacular. The presidencies of the two Roosevelts provide classic examples.³⁹ Moreover, no recent president has refused to commit the armed forces to actual hostilities because of a lack of congressional approval, as the conduct of Truman in Korea, Johnson in the Dominican Republic, and Kennedy, Johnson and Nixon in Southeast Asia demonstrate.⁴⁰ Thus, argues the state department, "practice and precedent have confirmed the constitutional authority of the president to commit the armed forces to battle without a declaration of war."⁴¹

The strength of the "practice and precedent" has, however, not gone unchallenged. Most writers who seek constitutionally based restrictions on the president's war-making power argue that the precedents are not compelling.⁴² Indeed, it has been suggested that there is only one prior illustration of presidential commitment of armed forces to war without congressional authorization, namely, Korea.⁴³ The other instances cited, it is argued, were simply presidential responses to reprisals, or "relatively minor and short-lived occurrences [that] do not establish precedent for the massive and long-

³⁶ In recent times President Wilson alone seems to have been troubled by lack of congressional authorization. See Comment, *The President, The Congress, and The Power to Declare War*, 16 Kan. L. Rev. 82, 85 (1967). Nonetheless, he ordered the bombing of Vera Cruz without congressional authority. *Id.* at 84. Moreover, with respect to World War I, he took action that, he conceded, was quite likely to draw us into war.

³⁷ For a valuable collection of instances of such presidential action extending through 1941 see J. Rogers, *World Policing and The Constitution* 92-123 (1945). See also F. Wormuth, *supra* note 2, at 6-43; M. Pusey, *supra* note 2, at 41-114.

³⁸ Professor Commanger describes the post civil war instances as "so numerous as to be tedious." Commanger, *Presidential Power: The Issue Analyzed*, N.Y. Times, Jan. 14, 1951, § 6 (Magazine), at 23.

³⁹ For a detailed discussion of the conduct of Franklin Roosevelt see L. Koenig, *supra* note 28, 18-66.

⁴⁰ It should also be noted that President Eisenhower deployed 14,000 troops in Lebanon without statutory authority, and on the basis of his "inherent" constitutional power. See 104 Cong. Rec. 13, 903-04 (1958) (statement by President Eisenhower). Mention should also be made of President Kennedy's use of the navy in Cuba. See M. Pusey, *supra* note 2, at 9-10. Fortunately, in neither instance did actual hostilities occur. However, in each case the deployment of the armed forces may actually have constituted an act of war.

⁴¹ U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet Nam*, 54 Dep't State Bull. 474, 488 (1966), reprinted in *Legality of United States Participation in the Viet Nam Conflict: A Symposium*, 75 Yale L.J. 1084, 1085 (1966).

⁴² See, e.g., F. Wormuth, *supra* note 2. Not all the critics agree with this view. For example, Pusey writes that "[i]n recent years, however, the President has been exercising the power to make war with alarming consistency." M. Pusey, *supra* note 2, at 1.

⁴³ Malawer, *supra* note 2, at 224. See also Standard, *United States Intervention in Vietnam Is Not Legal*, 52 A.B.A.J. 627, 632 (1966). If a full-blown declaration of war is a necessary condition for presidential action, Korea cannot be distinguished by a reference to alleged United States obligations under the United Nations Charter, which is merely a treaty. Only congress, not the senate, can declare war.

lasting [Vietnam] war . . . ”:⁴⁴ “minor” and “short-lived” from whose point of view? Certainly not from the perspective of those against whom the armed forces were employed; and certainly not from the presidents’ view, since they generally brought about the results intended. To dismiss American interventions in Latin America as “minor” amounts to recognition of presidential power to wage war against weak opponents for limited purposes.

The validity of each of the precedents relied upon by the state department need not be separately defended. Taken as a whole, they seem to me to add up to the following: with ever-increasing frequency, presidents have employed that amount of force that they deemed necessary to accomplish their foreign policy objectives. When little force was needed (*e.g.*, in our incursions in Latin America), little was used; when larger commitments were necessary, they too were forthcoming. Whatever the intention of the framers, the military machine has become simply an instrument for the achievement of foreign policy goals,⁴⁵ which, in turn, have become a central responsibility of the presidency. Congress has seldom objected on legal grounds,⁴⁶ and so the only limitation upon presidential power has been that imposed by political considerations. That is the teaching of our history.

To be sure, various legal theories have been advanced in defense of presidential power. In good lawyer-like fashion these theories have been framed in terms no broader than necessary to justify the particular presidential action at issue.⁴⁷ For example, in the late nineteenth century, American troop interventions in Latin America were rationalized in terms of “inherent” presidential power “neutrally” to protect the rights of American citizens abroad during foreign disorders—a fiction that did not survive the turn of the century.⁴⁸ Since presidential use of armed forces abroad has assumed considerably enlarged dimension in this century, it is hardly surprising that the supporting rationales have been constantly broadened and adjusted.⁴⁹ The rationales have, in a word, followed the practice.

Despite the foregoing history, most contemporary writers, deeply distressed by the Vietnam war, have insisted that presidential power over foreign affairs does not embrace the power to “make” war. And, they argue, committing the armed forces to hostilities on the scale that has occurred in

⁴⁴ Malawer, *supra* note 2, at 213-14.

⁴⁵ Professor Wormuth argues that this radically distorts the intention of the framers. F. Wormuth, *supra* note 2, at 46. See also *id.* at 35. In the words of President Buchanan: “The executive government of this country in its intercourse with foreign nations is limited to the employment of diplomacy alone. When that fails it can proceed no further. It cannot legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks.” *Id.* at 17, quoting from 5 Messages and Papers of the Presidents, 1789-1908, at 516 (J. Richardson ed. 1908).

⁴⁶ L. Koenig, *supra* note 28, at 46: “Congress seldom has objected to the action of the President, as commander-in-chief, in sending abroad and maintaining the armed forces without its prior concurrence. The instances of objection are important, but the otherwise general consent has tacitly established the rule of practice. . . .”

⁴⁷ See Note, *supra* note 2, at 1776-85 for a discussion of the various theories advanced in support of presidential action.

⁴⁸ *Id.* at 1788-90.

⁴⁹ *Id.* at 1793.

Vietnam is "making" war. These writers argue that the decision to make war has such obviously far-reaching consequences that the framers wisely required that it must be made by a broadly representative body, namely, congress.⁵⁰ So stated, the argument has considerable appeal; nonetheless, I do not believe that it can provide an acceptable basis for developing constitutionally based restrictions upon use of military force as an instrument of presidential foreign policy.

All the commentators agree that the president has some "inherent" power to commit the armed forces to hostilities where necessary to repel "sudden attacks." And few, if any, would restrict that power to one of repelling attacks on American soil—thereby ignoring attacks on Canada and (in a highly interdependent world) attacks on NATO countries. Generally speaking, the commentators recognize that a president can take action with respect to any "sudden attack" where American interests are at stake.⁵¹

In its most rudimentary form, the "sudden attack" theory suggests a line between defensive and aggressive action. The president may take only that action necessary to defend American interests; he cannot go further and engage in the "aggressive" use of military force.⁵² So conceived, the sudden attack theory has little to recommend it. A line between defensive and aggressive action might have been workable in the era of Jefferson and Madison; the vast expanse of two oceans and generally poor communications permitted some content to such a distinction. But that distinction can have little meaning for the president of a great global power in a highly complex and interdependent world. Modern presidents are faced with endless "emergencies" of varying duration and intensity, and the military apparatus has become an important instrument of their foreign policy. Given the evolution of the presidency, it is hardly surprising that in the twentieth century the presidential power to repel sudden attacks has "developed into an undefined power . . . to employ without Congressional authorization the armed forces in the protection of American rights and interest abroad whenever necessary."⁵³

Rejecting a narrow version of the "sudden attack" theory, several writers seek to articulate constitutional limitations on presidential war-making in terms of the president's opportunity to consult with congress.⁵⁴ Where an "emergency" precludes an opportunity to consult with congress the president may commit the armed forces to hostilities to the extent he deems necessary. A narrow definition of "emergency" could make this theory substantially equivalent to the sudden attack theory; but emergency can be

⁵⁰ For an exposition of the view of the framers see M. Pusey, *supra* note 2, at 41-57.

⁵¹ E.g., Velvel, *supra* note 2, at 453-55.

⁵² Professor Malawer seems to assume this view. Malawer, *supra* note 2, at 223. See also Comment, *The President, The Congress and The Power to Declare War*, 16 Kan. L. Rev. 82, 94-95 (1967).

⁵³ Corwin, *Who has the Power to Make War*, N.Y. Times, July 31, 1949, § 6 (Magazine), at 14. See also R. Hull & J. Novogrod, *supra* note 3, at 171-72.

⁵⁴ E.g., Velvel, *supra* note 2, at 454-55, 499 n.216; Note, *supra* note 2, at 1794-98.

conceived more generously so as to include any situation in which the president could conclude that quick, decisive use of force is necessary.⁵⁵ The important point of the theory is that the president must seek congressional authorization at the first available opportunity.

There are, however, differences among these writers who hold to this "congressional approval" theory. Some commentators apparently assume that any "major" foreign deployment of the armed services under circumstances that might constitute an act of war under international law should have congressional approval.⁵⁶ Others assert that only the actual commitment of the armed forces to hostilities requires congressional approval.⁵⁷ In turn, some writers believe that any commitment of the armed forces to battle requires approval;⁵⁸ others apparently assume that only "massive," "major" or "prolonged" use of the military requires congressional action.⁵⁹ The former position is at least clear; as previously indicated, the latter position amounts to a concession that the president is authorized to wage "quick" wars against weak opponents for limited objectives.

To ask, if possible, that the president obtain authorization from congress before making any (major?) commitment of the armed forces to hostilities may represent desirable policy. That judgment depends largely on one's assessment of the respective institutional competence of congress and the president.⁶⁰ But the central issue is whether such authorization is constitutionally required. To my mind, there are several objections to asserting that the proposed rule is of constitutional magnitude: (1) it is too uncertain in what it demands; (2) history has legitimated the practice of presidential war-making; and (3) the proposed rule stems from an unrealistic model of separation of powers.

First. It is unclear precisely what the ambit of any supposed congressional prerogative is. Can the president continue to act if congress is too divided to act clearly either in support of or in opposition to the president's action? And what precisely is the president to ask of congress? One commentator would apparently require a declaration of war or of "limited war."⁶¹ These are drastic steps, which could have serious and damaging consequences both

⁵⁵ Velvel, *supra* note 2, at 454-55, 499 n.216; Note, *supra* note 2, at 1794-98.

⁵⁶ Note, *supra* note 2, at 1798:

[I]nstead of assuming that the President may deploy American forces as he sees fit and only in the exceptional case need he seek congressional approval, the presumption should be that congressional collaboration is the general rule wherever the use of the military is involved, with presidential initiative being reserved for the exceptional case.

⁵⁷ Professor Velvel apparently assumes that the president has unlimited constitutional power to deploy the armed forces abroad. Velvel, *supra* note 2, at 471-72.

⁵⁸ Note, *supra* note 2, at 1797.

⁵⁹ M. Pusey, note 2, at 174. Professor Velvel seems concerned only with massive involvements. E.g., Velvel, *supra* note 2, at 468.

⁶⁰ For various views on the degree of institutional competence held by these two branches see notes 33 & 35 *supra* and authorities cited therein.

⁶¹ Velvel, *supra* note 2, at 461-62.

in our foreign relations⁶² and internally.⁶³ But if congress can authorize presidential action without such a declaration,⁶⁴ what is the textual basis of that power? And at what frequency or under what conditions must congressional approval be re-obtained?

Moreover, has congress approved presidential action in Vietnam, either in the sweeping Gulf of Tonkin resolution or by implication in its monetary authorization bills?⁶⁵ If not, what further kind of congressional action is needed?⁶⁶ In any event, can it fairly be denied that, at least until recently, congress has in fact overwhelmingly supported presidential policy in Vietnam? If such an informal consensus existed, is that sufficient "authorization"? In this regard it will not do to say that congress has not approved presidential policy in Vietnam because its "choice" has been restricted by a presidential *fait accompli*. In view of the president's operational responsibility for foreign affairs and its own lack of institutional competence to play a sustained affirmative role, congress necessarily must always act after the fact. Accordingly, congress' function is essentially to check and disapprove presidential policy.⁶⁷ In Vietnam, United States involvement has been by way of slow, steady escalation in commitment; any *fait accompli* has occurred only over a considerable period of time. Congress has had considerable time to reverse the direction of presidential policy; until the Cambodian incident, it has made no serious effort to do so.

Second. In varying degrees the commentators present us with visibly

⁶² Since the end of World War II there have been no formal declarations of war by a nation. See *Indochina: The Constitutional Crisis*, 116 Cong. Rec. 7117, 7121 n.55 (daily ed. May 13, 1970). This memorandum was prepared by Yale Law School students and signed by Professor Bickel and others.

⁶³ A formal declaration of war would of course increase the reservoir of internal regulatory power possessed by the national government (if it can be increased over what is already possessed). For a list of legislation that becomes effective on the basis of a formal declaration of war see 116 Cong. Rec. 5122-23 (daily ed. June 3, 1970).

⁶⁴ See Note, *supra* note 2, at 1798: "An excessively wooden concept of what constitutes congressional exercise of its power to declare war would have the effect, not of preserving congressional authority, but of transferring more and more decisions to the more flexible executive branch."

⁶⁵ Not surprisingly, those opposed to the war find these actions insufficient. E.g., Malawer, *supra* note 2, at 227-31; Velvel, *supra* note 2, at 465-66, 472-79. Indeed, Professor Wormuth finds the Gulf of Tonkin resolution "unconstitutional." F. Wormuth, *supra* note 2, at 43-53.

⁶⁶ Note, *supra* note 2, at 1798-803 carefully considers this problem.

⁶⁷ This seems to me to dispose of arguments of the following character:

It has been argued that congressional inaction and failure to repeal the Tonkin Gulf Resolution give implicit authorization to the Indochinese War. The logical outcome of such an argument is that the President can do whatever he wishes and the Congress has the affirmative duty to try to stop him. This shifts the presumption of the Framers in favor of congressional control over war-making and gives the initial and continued upper hand to the executive.

Indochina: The Constitutional Crisis, *supra* note 62, at 7119 (footnote omitted). The "presumption" of which these writers talk, if it ever existed, has no modern basis. Significantly, these writers make no effort to relate the alleged presumption to the present allocation of responsibility between congress and the president in the conduct of foreign affairs.

strained efforts to minimize the long and ever-accumulating practice of presidential "war-making," if one prefers that term. For better or worse that practice seems to me clearly established, as I have indicated. To my mind, this historical development of our institutions has settled the legitimacy of "inherent" presidential power to commit the armed forces to hostilities. A practice so deeply embedded in our governmental structure should be treated as decisive of the constitutional issue. History and practice are not here being appealed to in order to freeze forever the scope of a constitutional guarantee framed in terms of individual liberty;⁶⁸ rather, this issue deals with the distribution of political power between the legislative and executive branches. Matters of this character are, in the words of Chief Justice Marshall, best left "to the practice of government."⁶⁹

Third. The writers who advocate constitutionally based restraints on presidential war-making expend little effort on developing any comprehensive, realistic theory of the contemporary meaning of separation of powers. Much of their discussion seems to me premised on an eighteenth century model of the relationship between the legislative and executive branches. Not surprisingly, therefore, they do not come to grips with the evolution of our governmental practice, particularly the essentially fluid nature of the division between legislative and executive power in the area of foreign affairs, and the fact that, over time, the military machine has simply become an instrument for achieving presidential foreign policy objectives. Moreover, the danger of any all-out conflict between the executive and legislative branches is measurably reduced by the fact that the political parties cut across both institutions. Accordingly, as head of his party, the president can generally find strong support for his prerogatives inside congress itself.⁷⁰ In sum, therefore, these commentators' conception of separation of powers does not and cannot describe existing political reality.

Like federalism,⁷¹ the doctrine of separation of powers should, at least

⁶⁸ Compare *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669-70 (1966).

⁶⁹ In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall expressly recognized the importance of the historical practice of the political organs of the government in assessing the meaning of constitutional guarantees not involving guarantees of personal freedom. In sustaining congressional legislation creating a national bank, he wrote:

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived, that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

Id. at 401.

⁷⁰ I do not think the views expressed by Professor Burns in his book *Presidential Government* (1965) are inconsistent with this statement.

⁷¹ Recent decisions of the supreme court indicate to me that there are no federalism-derived constitutional limits on congressional legislative power. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Katzenbach v. McClung*, 379 U.S. 294 (1964); and *Heart of*

in the area of foreign affairs, be viewed as essentially a political, not a legal, construct. The precise balance of power between congress and the president will reflect the dominant political realities of the times. So understanding the doctrine of separation of powers, I am not persuaded that recognition of presidential power to commit the armed forces to hostilities in order to achieve foreign policy objectives is constitutionally inconsistent with the existence of congressional power to declare war, or with any of the other congressional grants over foreign affairs.⁷² Such tensions as may exist between the two branches of government occur because of overlapping power, and they must be resolved on the political, not the legal, level.

To my mind, therefore, any attempt to circumscribe on constitutional grounds the president's power to use the armed forces abroad confuses political with constitutional issues.⁷³ This seems to me all the more apparent when it is recognized that any president can engage in a wide range of conduct (such as severance of diplomatic relations, expulsion of ambassadors, treaty denunciation, etc.), which might easily force this country into war. Those who seek constitutional checks on the president place their trust in false gods. As Professor Burns has observed, the checks inherent in separation of powers do

not operate in the making of war or even in the making of foreign policies that could precipitate war—for example, Franklin Roosevelt's instructions to the Navy Department in the months before Pearl Harbor. Yet these are almost irreversible decisions; if the President makes a colossal mistake, there is no institutional safeguard against its consequences. The President is actually checked by Congress only in making those decisions that could indeed be reversed if they turned out badly—for example, in social or economic policy. Thus the President might make a decision on taxes as irresponsible or daft as a decision for a showdown with a foreign power—but on the former matter there would always be a majority of the voters at the next election to repudiate his action. A presidential course set for war cannot be reversed.

Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), which demonstrate that the court will sustain an exercise of congressional power that is "rationally" related to any of the enumerated congressional grants. Professor Wechsler long ago reminded us that the actual structure of federalism is and should be governed by the dictates of political process, not by artificial legal doctrines. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543 (1954).

⁷² It is worth observing that "Congressional power 'to declare war' . . . does not, even semantically, exclude armed hostilities without such a formal declaration." 116 *Cong. Rec.* 8405 (daily ed. June 4, 1970) (letter of Professors Rostow, Winter and Bock to Senator Allot).

⁷³ The writers who seek constitutionally based restrictions are, of course, committed to the familiar—and psychologically comfortable—lawyer's task of "drawing lines." That mentality makes difficult the recognition of areas not governed (at least in form) by legal rules. Thus while one writer accurately frames "the real issues,"

how is the President's authority as Chief Executive and Commander in Chief to be reconciled with Congress' power to declare war?,
his approach is an attempt to draw a line so as to create an exclusive congressional preserve, which the president may not trespass with permissiveness. Note, *supra* note 2, at 1771.

A nuclear holocaust would wipe out all the checks and balances—including the voters. In short, the whole concept of restraints in this area is topsy-turvy—a fact I sometimes reflect on dourly as I sit each fall teaching freshmen about the traditional checks and balances.

Still, the power of the President to make a catastrophic blunder while fatigued or under great stress is not the price we pay for the Presidency. It is the price we pay for living in the kind of world that we do. The only protection possible is the one the White House already affords: a group of men closely related to the President who can restrain him if need be. If power and decision making in the White House are collective, prudence is collective too.⁷⁴

Absent a fundamental re-structuring of our governmental institutions, it seems to me impossible to characterize the president's conduct in Vietnam as unconstitutional, however unwise it may be. The Vietnam war is an instrument of presidential foreign policy. Those opposed to that policy can call upon congress to repudiate it, and congress has ample power to do so. There may be disagreement over the precise action that congress could take. But it seems difficult to deny that congress has the power to refuse to appropriate funds for carrying on the conflict.⁷⁵ Whether in that event the president could "requisition" other funds to continue the war need not be considered. No president could survive politically if he is seen acting in lawless defiance of a congressional command to end the war, even if he could escape impeachment. Accordingly, so far as Vietnam is concerned, if congress repudiates the war, it will come to an end.

I should perhaps conclude this summary discussion with a word about the role of the courts. Since the precise relationship between the executive and the legislative branches is a matter for the political process, I can of course see no role for the courts to play. A contention that the president of the United States must defend his decision to commit troops to combat before a federal district judge in Boston, Milwaukee or Seattle strikes me as wholly untenable.⁷⁶ I find it impossible to believe that the article III grant of "judicial power" to decide "cases or controversies" includes the power to resolve issues of this magnitude.⁷⁷

⁷⁴ J. Burns, *supra* note 10, at 298.

⁷⁵ See *Indochina: The Constitutional Crisis*, *supra* note 62, at 7119. Even Professor Rostow, et al., *supra* note 72, fall short of challenging this power.

⁷⁶ See C. Rossiter, *The Supreme Court and the Commander in Chief* 131 (1951): "As in the past, so in the future, President and Congress will fight our wars with little or no thought about a reckoning with the Supreme Court."

⁷⁷ See *Mora v. McNamara*, 389 U.S. 934 (1967). The sole limit of the courts' powers is, in my judgment, to announce that the matter must be resolved by the political branches of government. *Contra*, Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 *Tex. L. Rev.* 1033, 1053 (1968); Velvel, *supra* note 2, at 479-503. Professor Velvel has had no success in convincing the courts. *Velvel v. Nixon*, 415 F.2d 236 (10th Cir. 1969), cert. denied, 396 U.S. 1042 (1970).

I recognize, of course, that not all presidential action is beyond judicial scrutiny. For a list of instances in which the supreme court has invalidated presidential action on constitutional ground see G. Schubert, *supra* note 27, at 361-65 (1957).