

# Congressional Authority to Regulate the Use of Nuclear Weapons

By ALLAN IDES\*

“The constitution supposes, what the history of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.”— James Madison<sup>1</sup>

## Introduction

The image of the presidential finger gripping the nuclear trigger is perhaps somewhat simplistic; but it does reflect, more accurately than not, a fatalistic national concession that the ultimate decision on nuclear war rests on the shoulders of one somewhat isolated human being and his or her small coterie of chosen advisors. This human being, prior to the moment of consecration, will likely have had little or no experience in and may possess only the most superficial knowledge of nuclear weaponry, strategy, tactics, and the ultimate consequences of a nuclear strike. Whether good or bad, we do not elect Presidents because of their special expertise in this delicate realm. The vagaries of presidential politics select the finger; we supply the trigger and our prayers. A more sensible approach is plainly needed.

Dr. Jeremy J. Stone, a mathematician and director of the Federation of American Scientists, has introduced a proposal that challenges long held assumptions regarding both the scope of presidential prerogative over the nuclear arsenal and the role of Congress in regulating the use of that arsenal. In his article, “Presidential First Use is Unlawful,” Dr. Stone proposes the creation of a special committee of Congress that

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1. Letter from James Madison to Thomas Jefferson (April 2, 1798), *reprinted in* VI MADISON, WRITINGS 312 (G. Hunt ed. 1906).

would, to some degree, regulate the "first use" of nuclear weapons.<sup>2</sup> By definition the proposal does not apply to situations in which the nation has been attacked by nuclear forces, nor does it prevent a preemptive nuclear strike ordered by the President if in his judgment a nuclear attack has been launched against the United States.<sup>3</sup> But even without directly challenging presidential authority over the use of nuclear weapons under all circumstances, the proposal would inject Congress into what has been assumed to be a sacrosanct presidential sphere; and in so doing, it could tread upon the conventional wisdom about presidential war-making powers.

Dr Stone's proposal is as follows:

In any given conflict or crisis whatsoever, and notwithstanding any other authority, so long as no nuclear weapons have been used by others, the President shall not use nuclear weapons without consulting with, and securing the assent of a majority of, a committee [composed of the speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and the chairman and ranking member of the Senate and House committees on armed services, the Senate Committee on Foreign Relations, the House Committee on International Relations, and the Joint Committee on Atomic Energy. Moreover,] nothing herein shall preclude the President from using nuclear weapons first if Congress adopts a declaration of war that explicitly suspends the authority granted in this act.<sup>4</sup>

In essence, the proposal bans the first use of nuclear weapons and at the same time empowers a committee of Congress to rescind that ban. The proposal is both creative and controversial. Not the least of the controversies centers upon its constitutionality. Indeed, not only does the proposal raise constitutional issues specific to itself, it raises more far-reaching constitutional questions regarding the relative roles of Congress and the President in the realm of nuclear war-making.

In assessing these constitutional issues, the primary question is not whether presidential first use is unlawful, but whether Congress has the constitutional authority to regulate the use of nuclear weapons and, if so, whether the Stone proposal is a constitutional exercise of that authority. Importantly, the task is not to determine whether this proposal is *the* appropriate constitutional response to nuclear weapons technology or whether the proposal is somehow necessary to establish the primacy of

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2. Stone, *Presidential First Use is Unlawful*, 56 FOREIGN POL'Y 94 (1984).

3. Under such circumstances, in Dr. Stone's view, the President would have the constitutional and statutory authority to order the immediate use of nuclear weapons. *Id.* at 96; see also F.A.S. Public Interest Report, at 10 (Sept. 1984).

4. Stone, *supra* note 2, at 107.

Congress over the President. Rather, the inquiry is whether Congress, as the lawmaking branch of the national government, may take a more active role in the regulation of nuclear weapons use and, more specifically, whether this proposal or some reasonable variation of it is within our constitutional framework. Once the threshold of constitutional plausibility is crossed, the decision to adopt such a proposal is classically political: the choice is within the discretion vested in the political branches, and particularly, in Congress.<sup>5</sup>

This Article first examines the basic structure of separation of powers, with particular emphasis on the legislative authority of Congress and the derivative authority of the President to execute the policies adopted by Congress. Consideration is given to Madison's aphorism that in our government the legislative authority "predominates." Next, the relationship between the separation of powers principles and the division of authority in the war-making context is considered. The Article concludes that the basic structure of separation of powers is fully applicable in the war-making context as a matter of constitutional principle, text, and history. This being the case, Congress appears to possess ample legislative authority to regulate the use of nuclear weapons, including a complete ban on their use. In adopting such a ban, Congress would not violate any constitutional prerogative of the executive branch. Finally, objections to the seemingly more modest device of committee approval of first use are considered in terms of potential violations of presidential prerogative and excessive delegations of legislative authority to a committee.

## I. Allocations of Constitutional Authority

### A. The Basic Structure

This inquiry begins with what may seem to be fairly simple propositions regarding the nature of congressional authority. These propositions, however, form the necessary predicate for consideration of more complicated questions of congressional power raised by Dr. Stone's proposal. The central theme of what follows is that Congress was designed to be the primary and predominant policy-making institution of the national government. The bases for that theme are the text and history of the Constitution and judicial construction of its separation of powers doctrine.

The legislative authority conferred by the Constitution is reposed in

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5. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

Congress.<sup>6</sup> That authority, which is in essence the power to make law, may be exercised over all matters enumerated in Article I, section 8 of the Constitution, including the powers to create and support a military establishment and the power to declare war. Congressional legislative authority over these matters is plenary. For example, Article I, section 8 gives Congress the power to regulate interstate commerce; thus, there is no aspect of interstate commerce over which Congress may not legislate. Congress may choose to regulate or not to regulate; Congress may promote or ban; it may move incrementally or precipitously. Similarly, with respect to the powers over military affairs, Congress may create an army or decline to do so; it may fund a weapons system or ban basic research on that system; Congress may declare war or refuse to so declare. Moreover, Congress may select any means it deems appropriate to accomplish the ends it desires so long as those ends are consistent with the vast array of powers and procedures granted to the national government.<sup>7</sup> Congress has only three limitations on its pervasive and predominant law-making authority with respect to the enumerated national powers. First, Congress may not transgress negative restraints on governmental power, such as those enumerated in the Bill of Rights or in Article I, section 9. Second, Congress may not invade the domain of either the executive or the judiciary by assuming for itself roles specifically assigned to those branches.<sup>8</sup> For example, the Constitution grants to the executive branch the power to administer and enforce the laws enacted by Congress<sup>9</sup> and to the judicial branch the power to adjudicate matters arising under those laws and the Constitution.<sup>10</sup> Neither the executive nor the judiciary is vested with independent lawmaking authority. Finally, Congress must, in general, proceed consistently with the procedural limitations imposed by the Constitution upon the legislative process.<sup>11</sup>

The duties and responsibilities vested in the national government were not dispersed among the three branches haphazardly. The placement of authority in a particular branch was done consonant with the

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6. U.S. CONST. art. I, § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

7. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); U.S. CONST. art. I, § 8, cl. 18 (providing Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

8. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Myers v. United States*, 272 U.S. 52 (1926); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

9. U.S. CONST. art. II, § 1.

10. U.S. CONST. art. III, § 2.

11. U.S. CONST. art. I, § 7; *INS v. Chadha*, 462 U.S. 919 (1983).

republican philosophy that animated the framers of the Constitution. As an abstract proposition, that observation seems obvious; nonetheless it signifies an essential aspect of our constitutional system: at the very heart of republican philosophy is the concept of self-governance. As stated in the Virginia Bill of Rights, “[A]ll power is vested in, and consequently derived from, the people, [and the] magistrates are their trustees and servants, and at all times amenable to them.”<sup>12</sup> Consistent with this philosophy, the Framers of the Constitution adopted a form of government in which the most representative branch, Congress, would be empowered to create the laws and policies to be advanced by the nation.

The history of the British Constitution was in general a movement away from monarchy and autocracy toward representative government.<sup>13</sup> The Framers saw the government they designed as a further step in that progression, a grand experiment in representative democracy.<sup>14</sup> To place the lawmaking authority in either of the other branches would have been anathema to republicanism and a clear step backwards.<sup>15</sup> This philosophical perspective explains Madison’s observation that “[i]n republican government, the legislative authority necessarily predominates.”<sup>16</sup> As one commentator has observed, “[N]o one doubted that the legislature was the most important part of any government.”<sup>17</sup>

This is not to deny or disparage the power of the presidency. As a practical reality that power is enormous. The source of presidential power, however, is not an amorphous construct of constitutional law. Rather, the wellspring of presidential power—aside from pure political clout—is positive law enacted by Congress which defines the scope of national policy and delegates appropriate authority to the President. Indeed, over the past one hundred and ninety-eight years much has been delegated. In addition, as discussed below, the President derives practical power from the acquiescence of Congress in unilateral presidential initiative. This acquiescence adds a gloss to express delegations and implies congressional consent to a presidential action. In other words, the source of presidential power is the accumulated action and inaction of Congress, not abstract constitutional authorization. The President has

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12. VA. CONST. art. I, § 2.

13. See generally D. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN: 1485-1951* (8th ed. 1966); W. STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* (1979); E. WADE & A. BRADLEY, *CONSTITUTIONAL LAW* (7th ed. 1965).

14. See A. KOCH, *POWER, MORALS, AND THE FOUNDING FATHERS: ESSAYS IN THE INTERPRETATION OF THE AMERICAN ENLIGHTENMENT* 103-21 (1961).

15. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 150-73 (1969).

16. *THE FEDERALIST* No. 51, at 356 (J. Madison) (J. Cooke ed. 1961).

17. G. WOOD, *supra* note 15, at 162.

no independent power to tax, spend, regulate, impose embargoes, or create a military establishment.<sup>18</sup> The President's seemingly unilateral authority over these matters, in fact, results from broad delegations, both express and implied, by Congress. For example, while the recent embargo imposed upon trade with Nicaragua was instigated by the executive branch, the legitimacy of the embargo derives from specific statutory delegations of authority.<sup>19</sup> The delegations may be stretched and contorted in any particular case, but such efforts to conform prior delegations to present action do not disparage the underlying principle. Indeed, the contortions are designed to pay obeisance to it.

## B. Judicial Affirmation of the Basic Structure

*Youngstown Sheet & Tube Co. v. Sawyer*,<sup>20</sup> which involved an attempted exercise of presidential war powers,<sup>21</sup> provides a judicial affirma-

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18. The Constitution does vest the President with a few narrowly drawn independent powers. Article II, section 2 grants the President the authority to "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 the "Power to grant Reprieves and Pardons." The former involves the internal operations of the executive branch; the latter was considered at the time of the adoption of the Constitution to be a quintessential executive prerogative. *Schick v. Reed*, 419 U.S. 256, 260-61 (1974), *reh'g denied*, 420 U.S. 939 (1975); Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 55 (1963). Article II, section 3 imposes the duty upon the President to receive Ambassadors and other public Ministers. This ministerial function has been suggested as an independent authority to recognize foreign sovereigns, see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 41 & n.\* (1972), but neither the language of the Constitution nor the ratification debates support that conclusion. See THE FEDERALIST NO. 69, at 468 (A. Hamilton) (J. Cooke ed. 1961). Moreover, the Supreme Court has never resolved a conflict between Congress and the President on this issue. Cf. *Goldwater v. Carter*, 444 U.S. 996 (1979) (issue of whether the President may terminate a treaty without Congressional review); *United States v. Pink*, 315 U.S. 203 (1942) (the President is allowed to determine national policy toward Soviet nationalization without Senate approval); *United States v. Belmont*, 301 U.S. 324 (1937) (the President could recognize and establish diplomatic relations with the Soviet Union without the consent or advice of the Senate). Finally, the President has the power to remove officers of the executive branch. *Myers v. United States*, 272 U.S. 52 (1926). *But see Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (no power to remove officer of independent regulatory agency).

19. Exec. Order No. 12,513, 21 WEEKLY COMP. PRES. DOC. 566 (May 1, 1985).

20. 343 U.S. 579 (1952).

21. A number of commentators have assumed that *Youngstown* is a domestic separation of powers case, implying that some other structure of separation may apply in the foreign policy context. However, the Supreme Court expressly relied upon *Youngstown* in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), which plainly involved separation of powers in the field of foreign affairs. In addition, nothing in the text of the Constitution indicates that the separation of powers would take on a different meaning in the foreign policy context. Article I, section 8 grants Congress the power to regulate interstate commerce as well as the power to regulate commerce with foreign nations. The President's independent powers over foreign commerce are no more extensive than the President's independent powers over interstate commerce. Both derive from the President's power to administer the laws passed by Congress.

tion of these basic structural principles. The facts are well known. Just prior to the commencement of a nationwide steel strike in 1952, President Truman ordered the Secretary of Commerce to seize the nation's steel mills. Truman believed that the strike would seriously jeopardize the war effort in Korea. The mill owners immediately sought an injunction. They argued "that the President's order amounts to lawmaking, a legislative function which the Constitution has expressly confided to the Congress and not to the President."<sup>22</sup> In fact, the government did not claim that the President's order was authorized by any legislation. Rather, the government argued that the President's "action was necessary to avert a national catastrophe which would inevitably result from a stoppage of steel production, and that in meeting this grave emergency the President was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States."<sup>23</sup>

The Court's opinion, authored by Justice Black, focused on the government's concession that no act of Congress had authorized the action taken by the President. In light of that, the sole question was whether the Constitution authorized the seizure. Justice Black rejected outright the government's reliance on inherent powers of the Commander in Chief. The decision of whether to permit such a taking of private property was a "job for the Nation's lawmakers, not for its military authorities."<sup>24</sup> At a later point in his opinion, Justice Black made it clear that Congress would have had ample authority to permit the seizure.<sup>25</sup> In so doing, he underscored the constitutional demarcations of authority. If Congress had authorized the seizure, the President could have acted upon that authorization. In the absence of Congressional authorization, the President simply lacked the power.

Justice Black also rejected the government's argument that the vesting of "the executive power" in the President supported the seizure:

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.<sup>26</sup>

That the President had overstepped those bounds by the seizure was evident. As Justice Black observed:

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22. *Youngstown*, 343 U.S. at 582.

23. *Id.*

24. *Id.* at 587.

25. *Id.* at 588.

26. *Id.* at 587.

The preamble of the order itself, like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and needed to carry that policy into execution.<sup>27</sup>

The Court held that this lawmaking role assumed by the President was one to be performed by "Congress alone in both good and bad times."<sup>28</sup> An emergency did not alter the scheme of separation of powers.

Justice Black's opinion can be criticized for not taking into account certain practical realities,<sup>29</sup> despite the fact that it closely followed the basic constitutional structure of our government. Justice Jackson, in a concurring opinion, did address those realities. Justice Jackson proposed a three-tiered model of presidential authority. First, when the President acts with the express or implied authorization of Congress, his authority is at its apex.<sup>30</sup> Second, when the President acts in the absence of either a congressional grant or denial of authority, he acts within a zone of twilight in which authority is uncertain.<sup>31</sup> Third, when the President acts in contravention of the implied or express will of Congress, his authority is at its nadir.<sup>32</sup>

Justice Jackson's first and third categories are essentially identical to Justice Black's model. In the first category, when Congress has authorized presidential action, the question is not one of separation of powers, but of national power. Accordingly, the inquiry focuses on the enumeration of substantive powers, not on the roles of the two branches. An affirmative grant of authority from Congress gives the President the power to act. In the third category, the President is free to act contrary to the will of Congress only when the act is pursuant to the exclusive executive powers.<sup>33</sup> In all other circumstances, to sustain presidential action contrary to legislation would unite the lawmaking and law enforcement powers in one person, a situation quite at odds with the most fundamental constitutional principles.

Writing in the Federalist Papers, James Madison stated:

The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and

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27. *Id.* at 588.

28. *Id.* at 589.

29. *See, e.g.,* Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 472 (1979).

30. *Youngstown*, 343 U.S. at 635-36 (Jackson, J., concurring).

31. *Id.* at 637.

32. *Id.* at 637-38.

33. *See supra* note 18.



whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.

. . . The reasons on which Montesquieu grounds his maxim [on separation of powers] are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body" says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should enact tyrannical laws to *execute* them in a tyrannical manner." (Emphasis in original.)<sup>34</sup>

Similarly, Justice Jackson made it clear that he was quite reluctant ever to uphold such sweeping presidential prerogative: "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."<sup>35</sup> The equilibrium to which Justice Jackson alludes is, of course, the demarcation between legislative and executive authority.<sup>36</sup>

The main difference between the majority and concurring opinions is Justice Jackson's recognition of a "zone of twilight," which would permit the Executive to take action when Congress has not expressly forbidden the action. One must be careful, however, to understand the extent of this seeming permissiveness. Justice Jackson explained the second tier as a practical reality, not as a constitutional doctrine: "[C]ongressional inertia, indifference or quiescence may sometimes, *at least as a practical matter*, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."<sup>37</sup> In other words, even though the Constitution may impose the responsibility upon Congress, a failure to exercise that responsibility will invite the executive to assume the dormant power. Justice Jackson further observed:

But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that

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34. THE FEDERALIST NO. 47, at 324, 326 (J. Madison) (J. Cooke ed. 1961).

35. 343 U.S. at 638 (Jackson, J., concurring).

36. In an analogous context, the Fourth Circuit Court of Appeals has held an executive agreement inconsistent with an act of Congress void. *United States v. Guy W. Capps*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). Although Professor Louis Henkin disagrees with some of the broader assertions in the *Capps* opinion, he appears to concede that a contemporaneous or subsequent act of Congress would supersede a contrary executive agreement. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 180, 184-87 (1972).

37. 343 U.S. at 637 (emphasis added).

power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.<sup>38</sup>

Justice Jackson's observations regarding the practical consequences of a congressional failure to exercise authority ring true. It is a fact of modern politics that the executive is the focal point of national attention on political matters: when a problem of national dimension arises, the nation instinctively turns to the President. If the problem is an emergency calling for an immediate response and if Congress has provided no express authority to act, Justice Jackson correctly observed that the President is invited, if not pulled, into the breach. But even under these circumstances, every effort should be made to find or create at least tacit congressional approval. Usually some remnant of delegation can be discovered.

*Dames & Moore v. Regan*<sup>39</sup> is an excellent example of this phenomenon. The case involved a challenge to the agreement negotiated by the Carter administration for the release of the American hostages held by Iran. The Supreme Court engaged in a masterful exercise of statutory construction to find congressional support for the President's action. Some components of the agreement were well within the letter of the law; others were not. Particularly suspect was the provision for the suspension of claims against Iran pending in American courts. The Court found that although neither the International Emergency Economic Powers Act nor the Hostage Act provided "specific authorization" for the suspension of those claims,<sup>40</sup> these acts were not irrelevant in that they generally indicated "congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."<sup>41</sup> This implied congressional acquiescence, coupled with a long history of congressional support for the presidential settlement of private claims against foreign powers and the absence of any specific prohibition, indicated congressional affirmation of presidential authority under the circumstances.<sup>42</sup>

In terms of raw constitutional power, the Court was careful to emphasize the narrowness of its decision:

We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . But where, as here, the settlement of claims has been determined to

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38. *Id.* at 654.

39. 453 U.S. 654 (1981).

40. *Id.* at 675-76.

41. *Id.* at 677.

42. *Id.* at 686.

be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.<sup>43</sup>

In other words, the President's power to enter this specific agreement found its source in a combination of congressional action and passivity underscored by the absence of any express or implied rejection of the methods adopted by the President.<sup>44</sup> In the words of the Court, "Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of the claim settlement by executive agreement."<sup>45</sup>

The Court's careful effort in *Dames & Moore* to find a congressional source for the President's action without establishing independent presidential authority to settle claims underscores the view that primary responsibility for exercising national power rests in Congress. The zone of twilight exists only beyond the rim of congressional action and even then the extent of the zone is defined by the tacit position of Congress articulated in marginally relevant statutes and patterns of acquiescence.

*Youngstown* thus provides an important structural model for two reasons. First, both the opinion of the Court and the concurrence of Justice Jackson recognized that it is Congress and not the President that is vested with lawmaking authority; this ordering of responsibility requires the President to take his cues from Congress. Justice Jackson seemed to accept the theoretical possibility of affirming presidential action taken contrary to the legislated will of Congress, but he conceded the difficulty and rarity of such theoretical possibilities and gave no examples.<sup>46</sup> This first aspect of *Youngstown* depicts a model of congressional superiority based upon the lawmaking function of Congress.

Second, Justice Jackson alone recognized that as a practical matter, congressional failure to exercise its legislative responsibility may invite presidential intrusions onto congressional turf. He emphasized the responsibility of Congress to legislate with respect to emergencies in order

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43. *Id.* at 688.

44. In *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Supreme Court adopted a similar approach in upholding an executive order that withdrew certain public lands from private oil exploration. The Court explained that the executive action was of a type in which Congress had long acquiesced and that Congress had not specifically prohibited the action taken. *Id.* at 474, 479. There was, according to the Court, an implied grant of authority. *Id.* at 474-75.

45. *Dames & Moore*, 453 U.S. at 680.

46. Both the power to pardon and the power to remove executive officers have been defined as exclusively presidential. *Myers v. United States*, 272 U.S. 52 (1926) (power to remove); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) (power to pardon). *See supra* note 18. Thus, Congress may not legislatively limit the exercise of those powers.

to ensure the President has the legal authority to act within those emergencies. Again, the Constitution places primary responsibility in the hands of Congress; the questions are whether Congress will exercise that responsibility and whether its failure to do so risks a loss of the authority. *Dames & Moore v. Regan* is consistent with the Jackson thesis.

### C. Basic Structure and the Power to Make War

The basic structural framework described above is fully applicable to the war-making context. Article I, section 8 of the Constitution places considerable emphasis upon the war-making capacity of the national government. That article provides:

Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . ; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and] To provide for organizing arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States. . . .<sup>47</sup>

Of course, this language cannot be construed as granting Congress all governmental authority over these matters. The power is vested in the national government as a whole. Congress is given the legislative authority over these enumerated substantive matters. And as indicated, that legislative authority is quite significant in our republican form of government. Congress defines the policy that the executive branch will execute. Without action by Congress, there is no independent presidential war-making power.

These clauses vest in Congress extensive practical power and responsibility to create and regulate armed forces. Hence, under its powers to raise, govern, and regulate, Congress must make the initial determination of whether—or the extent to which—we should have armed forces, the character of those forces and, it would seem, the general uses to which those forces may be applied. The President may participate in this determination through the executive branch's substantial power of persuasion and through the exercise of the veto. In other respects, the executive power arises only upon affirmative action taken by Congress.<sup>48</sup> If

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47. U.S. CONST. art. I, § 8, cls. 12-16.

48. See *supra* text accompanying note 37. Of course, once the troops are armed, serious consideration must be given to the executive's potential and proclivity to exercise practical power. Here, as Justice Jackson recognized in *Youngstown*, congressional passivity may lead to de facto accumulations of presidential power. See also *United States v. Midwest Oil Co.*, 236 U.S. 459, 474-75 (1915) (implied grant of authority).

Congress fails to provide a particular weapons system, the President lacks the constitutional power to procure that system. He also lacks the general authority to use authorized forces or weapons in a manner inconsistent with specific congressional determinations. To conclude otherwise would be to permit the President to assume a lawmaking authority the Constitution plainly delegates to Congress. Of course, once the armed forces are created and the arsenal is stockpiled, serious consideration must be given to Justice Jackson's zone of twilight. To the extent that Congress provides little or no guidance on the disposition of troops or on the uses of weapons, the President will assume the power to dispose of those troops and weapons as he deems appropriate.<sup>49</sup> Patterns of congressional acquiescence in presidential action will further bolster practical executive power. This acquired power is not, however, irretrievable, since nothing in Justice Jackson's theory or in the Constitution prevents Congress from recapturing lost turf.<sup>50</sup>

## II. Allocations of the Power to Make War as Perceived by the Framers and Through the Looking Glass of History

### A. The Power to Raise Armies

The predominant authority of Congress was a recurring theme in the Federalist Papers. This was particularly true with respect to the war-making powers. In the Federalist Nos. 24 and 26, Alexander Hamilton responded to charges that the Constitution was deficient in that it permitted the national government to keep troops in time of peace and vested the executive with plenary power to levy troops. Hamilton refuted the first charge on policy grounds—the practical need for some military establishment—and refuted the second by demonstrating that the Consti-

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49. For a discussion of this phenomenon, see Ides, *Congress, Constitutional Responsibility and the War Power*, 17 LOY. L.A.L. REV. 599, 616-42 (1984) [hereinafter cited as *Constitutional Responsibility*].

50. See *Powell v. McCormack*, 395 U.S. 486 (1969). *Powell* involved a challenge to the exclusion of a member of Congress. In determining that this member's right to be seated had been violated, the Supreme Court refused to give constitutional credence to prior exclusions that had been based on similar factors. "The relevancy of prior exclusion cases is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787." *Id.* at 547. In a similar vein, the Court stated, "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date." *Id.* at 546-47. The Court has also strongly suggested that although a presidential pattern of practice had been acquiesced to long enough to give rise to an implied grant of authority, *United States v. Midwest Oil Co.*, 236 U.S. 459, 474-75 (1915), an express rejection or "disaffirmance" of that authority by Congress would rescind the implied grant. *Id.* at 471, 479-83. See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

tution vested no such authority in the executive. Hamilton explained that the Constitution lodged the power to raise armies with the legislative branch, a branch whose composition would be controlled by the electorate. Moreover, even that branch would have significant restraints placed upon it. He wrote:

[T]hat the whole power of raising armies was lodged in the *legislature*, not in the *executive*; that this legislature was to be a popular body, consisting of the representatives of the people, periodically elected; and that . . . there was to be found . . . an important qualification even of the legislative discretion, in that clause which forbids the appropriation of money for the support of an army for any longer period than two years: a precaution, which, upon a nearer view of it, will appear to be a great and real security against the keeping up of troops without evident necessity. (Emphasis in original.)<sup>51</sup>

The requirement that no appropriation for the army be for a period of more than two years was, according to Hamilton, designed to obligate Congress to actively oversee the armed forces and to determine at regular intervals "the propriety of keeping a military force on foot."<sup>52</sup>

Today the appropriations limitation does not operate in the precise fashion anticipated by Hamilton and the framers of the Constitution. As a practical matter, a peacetime armed force equipped with a massive arsenal of nuclear weapons will be with us for the foreseeable future, regardless of whether the appropriations for those forces are for two years or for some other duration. However, the spirit of the appropriations restraint and the role it was intended to play in the structure of authority over military affairs is no less significant today than it was in 1787. It indicates a strong constitutional directive that Congress is to retain primary jurisdiction over the armed forces and is to maintain a constant vigil as the regulator of military activity.

For Hamilton, the proposed Constitution embodied the wisdom and necessity of popular control over the military establishment as a reflection of historical experience.<sup>53</sup> The only valid objection to a standing

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51. THE FEDERALIST NO. 24, at 153 (A. Hamilton) (J. Cooke ed. 1961).

52. In THE FEDERALIST NO. 26, Hamilton stated:

The Legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not *at liberty* to vest in the executive department permanent funds for the support of an army; if they were even incautious enough to be willing to repose in it so improper a confidence.

*Id.* at 168 (emphasis in original).

53. Using as an example the Revolution of 1688, Hamilton described the important transition from autocratic control over the military to the placement of that control in the legislative branch:

army arose in the context of autocratic control over the military establishment. Our Constitution, Hamilton explained, reflected the lessons of history and was specifically designed to prevent such a dangerous accumulation of power in any individual. Certainly our executive branch would not be vested with such authority. In fact, the Constitution was specifically designed to ensure that control over the military would be retained by the representative branch and thus ultimately by the people.<sup>54</sup>

In a passage fraught with irony for contemporary readers, Hamilton disparaged the notion that the elected representatives of the people could successfully undermine this carefully structured system of constitutional authority and obligation.

Schemes to subvert the liberties of a great community *require time* to mature them for execution. An army so large as seriously to menace those liberties could only be formed by progressive augmentations; which would suppose, not merely a temporary combination between the legislature and executive, but a continued conspiracy for a series of time. Is it probable that such a combination would exist at all? Is it probable that it would be persevered in and transmitted along, through all the successive variations in the representative body, which biennial elections would naturally produce in both houses? Is it presumable, that every man, the instant he took his seat in the national senate, or house of representatives, would commence a traitor to his constituents and to his country? Can it be supposed, that there would not be found one man, discerning enough to detect so atrocious a conspiracy, or bold or honest enough to apprise his constituents of their danger?<sup>55</sup>

These observations indicate a firm constitutional sense of the responsibilities of Congress. Control over the uses to which a war machine may be put is at the heart of congressional duty. In Hamilton's view, only a traitor to our republican system of government would tolerate an abdica-

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The patriots, who effected that memorable revolution, were too temperate and too well informed, to think of any restraint in the legislative discretion. They were aware that a certain number of troops for guards and garrisons were indispensable, that no precise bounds could be set to the national exigencies; that a power equal to every possible contingency must exist somewhere in the government; and that when they referred the exercise of that power to the judgment of the legislature, they had arrived at the ultimate point of precaution, which was reconcilable with the safety of the community.

THE FEDERALIST NO. 26, at 166 (A. Hamilton) (J. Cooke ed. 1961).

54. See Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 132 (1972) (The framers "authorized Congress to 'raise and support Armies,' and then tried to ensure that the exclusive power of Congress would be jealously guarded, by providing that no appropriation of money to raise and support armies 'shall be for a longer Term than two Years.'").

55. THE FEDERALIST NO. 26, at 169 (A. Hamilton) (J. Cooke ed. 1961).

tion of that responsibility by handing that control to the President. In the twentieth century, with our massive arsenals of destruction, Hamilton's observations take on a more frightening dimension. The Constitution compels Congress to actively exercise its delegated responsibilities over the use and deployment of our military capabilities.

#### B. The Power to Declare War and the Power of the Commander-in-Chief

During the Revolutionary War, the entire war-making power was vested in the Continental Congress. The Articles of Confederation provided that "the sole and exclusive right and power of determining on peace and war" was the prerogative of Congress.<sup>56</sup> The Commander-in-Chief of the Continental Army was appointed by the Congress and fully answerable to it. The perception of the Framers, among them former Commander-in-Chief George Washington, was that Congress as a deliberative body had proved itself ill-suited to the task of conducting war.<sup>57</sup> As a consequence of this perception, the Framers lodged the power to conduct war in the President as Commander-in-Chief.<sup>58</sup> In the words of Hamilton:

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 an usual and essential part in the definition of the executive authority.<sup>59</sup>

This power to direct the war effort did not, however, vest the President with the constitutional authority to override the more pervasive authorities of Congress, including the power of Congress to declare war. "The President's power as Commander-in-Chief . . . was simply the power to issue orders to the armed forces within a framework established by Congress."<sup>60</sup>

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56. Articles of Confederation art. IX.

57. See J.T. FLEXNER, *GEORGE WASHINGTON, IN THE AMERICAN REVOLUTION* 547-48 (1967); 1 J. MARSHALL, *MARSHALL'S LIFE OF WASHINGTON* 214 (2d ed. 1832); L. HENKIN, *supra* note 36, at 33.

58. U.S. CONST. art. II, § 2 provides: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . ."

59. *THE FEDERALIST* NO. 74, at 500 (A. Hamilton) (J. Cooke ed. 1961).

60. A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 6 (1973). See also L. HENKIN, *supra* note 36, at 50 ("There is little evidence that the Framers intended more than to establish in the President civilian command of the forces for wars declared by Congress (or when the United States was attacked). . . .").



Hamilton distinguished the powers of the President as Commander-in-Chief of the army and navy of the United States from similar powers of the king of Great Britain. Although the President's authority would be nominally the same as that of the king of Great Britain, in substance it is much inferior to it. The President's power, he wrote,

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. (Emphasis in original.)<sup>61</sup>

It would seem that in Hamilton's view, the friction between the power of Congress to declare war and the power of the President to direct the war effort once declared is negligible, no more severe than the potential tension between the legislative and executive powers generally. Congress makes policy by declaring war; it shapes that policy through the breadth of the declaration and through the design of the military apparatus it has created. The President, as Commander-in-Chief, executes the policy within the framework created by Congress. To each branch is granted the function most appropriate to the composition and general purpose of that branch.

The President as Commander-in-Chief has some limited authority to act unilaterally in emergency situations. Initial drafts of the Constitution, which gave Congress the power to "make war," were altered on the motion of James Madison and Elbridge Gerry to give Congress the power to "declare war." The purpose, according to Madison's notes, was to make clear that the President, in his capacity as Commander-in-Chief, would have the authority "to repel sudden attacks."<sup>62</sup> The published records of the Federal Convention of 1787 indicate that the adopted language was not meant to dilute congressional policymaking power, but rather was a recognition of a special instance of executive competence to represent the interests of the nation in directing the military.<sup>63</sup> Just as a deliberative body cannot effectively conduct a war, neither can it be expected to make tactical decisions designed to fend off sudden attacks or

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61. THE FEDERALIST NO. 69, at 465 (A. Hamilton) (J. Cooke ed. 1961).

62. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318 (1966) ("Mr. M[adison] and Mr. Gerry moved to insert '*declare*,' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks.") (notes of J. Madison) (emphasis in original).

63. 5 J. ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 438-39 (1845).

to respond quickly to equivalent emergency situations.<sup>64</sup> This recognition of a limited authority to repel sudden attacks was not meant to permit the executive to engage in full-scale war in the absence of congressional participation in that decision. Certainly, nothing in the historical debates suggests this. Rather, the purpose was to permit the President to take immediate action in defense of the nation, leaving to Congress the authority to consider the appropriate long-term response.

President Thomas Jefferson recognized this distinction in authority when he declined to permit the Navy to do anything other than disarm an attacking vessel of Bey of Tripoli, who had declared war on the United States. In reporting to Congress on the altercation, Jefferson stated:

Unauthorized by the 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.<sup>65</sup>

Seen in this light, the power to repel sudden attacks is not an exception to the overall separation of powers framework, but a responsible recognition of the relative functions of each branch.<sup>66</sup> Indeed, the power would likely have been implied even in the absence of Madison's notes and even if the "make war" language had been retained.

In fact, the Madison and Gerry motion to alter the "make war" language was made partly as a response to a suggestion by Pierce Butler

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64. One must be careful not to impose a rigid, legalistic interpretation on the phrase "repel sudden attacks." A rigid interpretation of the phrase is inconsistent with the intent of the framers to grant the President some flexibility in emergency situations when Congress is unavailable to consider the appropriate military response. As has been observed, the President, unlike Congress, is always in session and necessity dictates this accommodation to the unexpected. But this limited power was not designed to divest Congress of its predominant authority over the military establishment and its uses. To conclude otherwise would be inconsistent with the basic structure of the Constitution, as well as with the general republican philosophy that animated the framers. Nonetheless, when Congress is both silent and unavailable as a practical matter, the Constitution recognizes that the President has the power to take limited initiatives within a framework designed by Congress, but leaves to Congress the ultimate decision on war.

The phrase "repel sudden attacks" is instructive in that it underscores the limited scope of both the power and the appropriate presidential response as perceived by one of the most respected and influential members of the Convention. It must be remembered, however, that the wording is Madison's, not the Convention's. It expresses his sense, apparently shared by others, that the President would be free to take some limited emergency military action in the absence of specific authorization by Congress.

65. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 327 (1897).

66. See Bickel, *supra* note 54, at 132.

that the entire power to make war be vested in the President.<sup>67</sup> Speaking to this suggestion, Gerry observed that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”<sup>68</sup> Similarly, George Mason stated that he “was against giving the power of war to the Executive, because [he was] not [safely] to be trusted with it; or to the Senate, because [it was] not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace.”<sup>69</sup> There is no record of any support for the Butler position. In adopting the Madison and Gerry motion, the Framers plainly rejected Butler’s suggestion of broad executive war-making authority. They recognized instead the President’s power to order short-term military action to preserve the status quo and thereby to protect Congress’ ability to exercise its constitutional authority to make a policy decision about the appropriate long-term response. But nothing in this reasonable deference to executive competence indicates an intent to alter the basic roles of the legislative and executive branches.<sup>70</sup>

Addressing this issue from the congressional perspective, the power to declare war is plainly a legislative function. It is listed among the enumerated legislative powers in Article I, section 8 and its exercise involves precisely the type of policy judgment that is the prerogative of the representative branch. This power has been the focal point of considerable debate. The issues have ranged from whether a particular conflict is a war within the technical meaning of the clause and whether a particular congressional action amounts to the required declaration, to the larger question of whether declarations of war are outmoded in the modern world.<sup>71</sup> Although such inquiries are not without their validity, they do not address the fundamental structural question now at issue: whether

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67. M. FARRAND, *supra* note 62, at 318.

68. *Id.*

69. *Id.* at 319. *See also id.* (statement of Mr. Ellsworth) (“It shd. [sic] be more easy to get out of war than into it.”).

70. *See also* A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 3-6 (1973); Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672, 675-77 (1972).

71. *See, e.g.,* Wallace, *The War-Making Powers: A Constitutional Flaw?*, 57 *CORNELL L. REV.* 719, 741-44 (1972). *See generally* *Mora v. McNamara*, 389 U.S. 934 (1967) (Stewart, J., dissenting from a denial of certiorari); E. KEYNES, *UNDECLARED WAR* 34-40 (1982); King & Leavens, *Curbing the Dog of War: The War Powers Resolution*, 18 *HARV. INT’L L.J.* 55 (1977); Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672 (1972); Monaghan, *Presidential War-Making*, 55 *B.U.L. REV.* 19 (Special Issue 1970); Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 *TEX. L. REV.* 833 (1972); Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 *U. PA. L. REV.* 1 (1972); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 *HARV. L. REV.* 1771 (1968).

the grant to Congress of the power to declare war alters or affirms the basic principle of separation of powers, a principle which gives Congress the predominant lawmaking role in our government. When viewed along with a proper understanding of the Commander-in-Chief's constitutional powers, giving Congress the power to declare war plainly affirms that principle. Indeed, it underscores the proposition that Congress has the initial authority to define the nation's military establishment and to determine the immediate execution of military policy.<sup>72</sup>

### C. A Modern Gloss

From the perspective of the Framers, the office of Commander-in-Chief, although created by the Constitution, derived the bulk of its power from congressional action. Without Congress, the President would have neither the forces with which to operate—assuming forces had been supplied—nor the authorization to use those forces other than to repel sudden attacks. Yet, one cannot ignore the common perception that the modern presidency is a repository of war-making authority.<sup>73</sup> To the extent that this perception is an observation of political reality, it cannot be denied; to the extent that it assumes an alteration in constitutional structure, it is demonstrably wrong.

The distinction between power conferred by the Constitution and power conferred by Congress through the constitutional process must be kept in mind. The former involves allocations of primary authority that can be changed only through the amendment process; thus, Congress will retain the constitutional power to dominate the nation's war-making policy so long as the Constitution is not altered through that process. The latter involves power conferred by Congress through the exercise of those allocated authorities; such power can be delegated to the President either expressly through legislation or impliedly through a combination of general grants of authority and acquiescence in patterns of presidential initiative. *Dames & Moore* demonstrates that in the foreign affairs context, of which war-making is a species, implied grants derived from patterns of presidential initiative and congressional passivity are common. Indeed, in the twin fields of war and foreign policy, Congress no doubt

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72. A declaration of war provides notice to the international community of an official state of belligerency. Notice, however, is only one of the functions of a declaration of war. The Framers clearly used the phrase in a more all-encompassing manner. As the statements of James Madison, Elbridge Gerry, and George Mason indicate, the power to declare war included the authority to determine whether the nation should engage in armed belligerency. See *supra* notes 67-70 and accompanying text. This is consistent with the republican notion that such a momentous decision should rest in the representative branch.

73. See *Constitutional Responsibility*, *supra* note 49, at 616-20.

has allowed considerable delegated power to accumulate in the executive branch. Given political realities, reassertion of congressional authority may prove no easy matter; however, nothing in the Constitution itself prevents the effort.<sup>74</sup>

It has been argued that instances of presidential war-making have in some way altered the basic constitutional structure or have put a "gloss" on presidential power.<sup>75</sup> To a large extent this theory concedes to the President unilateral military authority that would not have been recognized by the Framers. It is ostensibly based on a conception of a "living constitution" adapting to the needs of a modern nation; but, in fact, the opposite is the case. Considering the extreme rarity of Article V amendments, this theory of constitutional prerogative through practice calcifies the Constitution to permit only those patterns of practice consistent with the perceived historical pattern. If the Constitution is truly meant to survive for future generations and to be applied to new and unforeseen circumstances, this theory, which has no textual referent in the Constitution or in the ratifying debates, is unacceptable. Although it supplies a rationalizing principle for past practices, it provides almost no flexibility for future contingencies.

On the other hand, the explanation of presidential power that recognizes the scope of implied and express delegations both rationalizes past practice and permits latitude for future contingencies. Moreover, it does so in a manner consistent with constitutional structure. Specifically, this theory permits Congress and the President the needed flexibility, within a broad but definable framework, to alter patterns of practice that may become unsuited or unacceptable to modern contingencies. There is no need for constitutional amendment; the process of alteration occurs through reasonable accommodations between the branches.

In this regard, the circumstances of many presidential military excursions—most of which have involved a relatively minor presidential intrusion upon congressional prerogative—indicate a congressional acceptance and endorsement of the precise presidential initiative undertaken. For example, each time a President orders the military rescue of American citizens residing in a foreign country, Congress' failure to object contributes to the perception that Congress, having conferred a military force upon the President, has implicitly consented to or even endorsed such uses of that force.<sup>76</sup> Future presidents can be expected to act upon that implied consent. Thus, absent specific legislation address-

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74. See *supra* note 50; *cf.* *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969).

75. *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

76. See *Dames & Moore*, 453 U.S. at 686.

ing the point, presidential practices not objected to by Congress may alter the political allocation of power by creating a presumed consent to take limited initiatives in the military context.<sup>77</sup> Moreover, a practice long endured may require a specific repudiation before the consent will be deemed withdrawn. But regardless of the difficulty of rescinding such an implied grant of authority, its rescission is not dependent upon a constitutional amendment.

With respect to larger military conflicts, the independent presidential war is more myth than reality. As stated by Professor Louis Henkin:

[I]t is increasingly difficult to make an authentic case that the President has taken the country into war without Congressional authorization in advance or ratification soon after. Presidents cannot use the armed forces for long in substantial operations without Congressional cooperation; surely any action that can properly be called war depends on Congressional appropriations and other forms of approval, expressed or implied. Presidents who fought these wars inevitably sought Congressional approval and invariably obtained it.<sup>78</sup>

Thus, although President Polk may have ordered troops to cross the Rio Grande in advance of congressional approval, Congress expressly endorsed the President's action and declared war on Mexico.<sup>79</sup> More recently, in the Korean War, although Congress did not expressly declare war, it plainly supported the war effort by appropriating substantial funds toward accomplishment of the articulated goals.<sup>80</sup> This willingness to defer to executive initiative has certainly bolstered the practical and political power of the President. It has not, however, altered the constitutional structure. The executive branch gains no constitutional power superior to Congress by taking action with which Congress explicitly or

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77. See *supra* note 62.

78. L. HENKIN, *supra* note 36, at 100-01.

79. See Act of May 13, 1846, ch. 16, 9 Stat. 9 (An Act Providing for the Prosecution of the Existing War Between the United States and the Republic of Mexico); Act of June 18, 1846, ch. 24, 9 Stat. 17 (Supplemental Act). Indeed, a member of Congress who took President Polk at his word may easily have concluded that U.S. troops had been subjected to unjustified aggression by the Mexican military forces. See H.S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 310-11 (1963) (Polk's Message on War with Mexico, May 11, 1846).

80. See, e.g., Mutual Security Act of 1954, Pub. L. No. 83-665, § 132 (1954); Mutual Security Act of 1953, Pub. L. No. 83-118, 67 Stat. 152 (1953); Department of Defense Appropriation Act of 1953, Pub. L. No. 82-488, 66 Stat. 517 (1952); Mutual Security Act of 1951, Pub. L. No. 82-165, § 301, 65 Stat. 373 (1951); Department of Defense Appropriation Act of 1952, Pub. L. No. 82-179, 65 Stat. 423 (1951); General Appropriation Act of 1951, Pub. L. No. 81-759, Ch. X, 64 Stat. 595 (1950). See also L. HENKIN, *supra* note 36, at 89-123, 107 n. 43; *Constitutional Responsibility*, *supra* note 49, at 624-31.

implicitly agrees.<sup>81</sup> Willingness to support the President's policy objectives does not necessarily indicate support for a broad interpretation of the Commander-in-Chief's constitutional powers. And, of course, Congress is free to rescind or alter its delegations to the President.<sup>82</sup>

The United States' military involvement in Vietnam, perceived by many as the quintessential presidential war, is instructive. Far from being a unilateral presidential military excursion, the war in Vietnam was fully supported by Congress, both initially through the Gulf of Tonkin Resolution, and in the long-term through the enormous military appropriations that Congress plainly intended for use in that war. While American involvement in the Vietnam War may have been the result of presidential initiative, that initiative was fully supported, although perhaps not fully appreciated, by Congress.<sup>83</sup> In adopting the Gulf of Tonkin Resolution, Congress may have acted precipitously and even irresponsibly; these factors certainly contributed to the perception that this was President Johnson's war. Although that perception may have been correct politically, constitutionally the war was the nation's, sanctioned by Congress and conducted by the President. Had Congress refused to adopt the Gulf of Tonkin Resolution or had Congress specifically forbidden an invasion of Vietnam, the President would not have been free to proceed contrary to the will of Congress.<sup>84</sup> Far from supporting an independent presidential war-making power, Vietnam underscores the danger of a broad delegation of war-making authority to the President.

Even if one assumes that the presidential initiatives described above, including Vietnam, were undertaken in direct contravention of congressional will, at most this indicates a violation of constitutional principles. Certainly, constitutional violations cannot be considered an acceptable form of constitutional amendment. Such usurpations of congressional prerogative would indicate a need for a resurgence of congressional oversight, not a further abdication of responsibility.<sup>85</sup>

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81. *See Dames & Moore v. Regan*, 453 U.S. 654, 680-82 (1981); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474-75 (1915).

82. *See supra* text accompanying notes 38-46; *United States v. Midwest Oil Co.*, 236 U.S. 459, 471 (1915).

83. L. HENKIN, *supra* note 36, at 101-02.

84. *Id.* at 101.

85. An analogous situation arose with respect to the Speech and Press Clause of the First Amendment. From the Alien and Sedition Acts, adopted shortly after the formation of our government, Alien Act, ch. 58, 1 Stat. 570 (1798) (Expired); Sedition Act, ch. 74, 1 Stat. 596 (1798) (Expired), through the prosecutions under the Espionage Act during World War I, *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919), to many of the Smith Act prosecutions during the 1950s, *Dennis v. United States*, 341 U.S. 494

Despite the modern tendency to rely on the Commander-in-Chief as a repository of independent war and policy-making authority, this has no basis whatsoever in the Constitution or in the ratification debates. Nor has any relevant historical practice irretrievably placed that power in the President. A presidential power to make war may exist, but that power is dependent upon a combination of the action and acquiescence of Congress as well as the absence of specific statutory restraints.<sup>86</sup>

In discussing the constitutionality of the War Powers Resolution, Professor Louis Henkin observed:

Congress can surely prescribe for future uses of force in situations amounting to war. As regards hostilities "short of war," it may be that, although the President can use force if Congress is silent, Congress can forbid or regulate even such uses of force, if only on the ground that they might lead to war.<sup>87</sup>

The longstanding silence of Congress in the face of presidential military initiative gives the President leeway to act under similar circumstances in the future. However, that silence does not preclude Congress from altering the course of power by taking specific action to limit seemingly independent presidential initiative in the military context.

Regardless of whether one accepts the theory that independent presidential action derives its legitimacy from implied delegations by Congress or the theory espoused by Justice Frankfurter that "executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power,'"<sup>88</sup> the Stone proposal involves a practice that has not been "usurped" by the President. Indeed, the proposal touches on a practice consistently exercised by Congress each year as part of the legislative process—namely, the determination of the shape, size and fighting potential of the military establishment.<sup>89</sup> At most, presidential initiative has established an in-

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(1951), the ideals of the First Amendment were honored only in the breach. *See generally* Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941). These practices, most of which have been historically and judicially repudiated, did not mandate adherence to a system of government in which repression of free speech was the standard. Rather, these unfortunate examples of practices once upheld as constitutional serve as signposts in the development of constitutional doctrine toward their eventual repudiation. *See* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

86. The War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548 (1973) is an example of such a restraint; whether it is an effective one is a separate question. *See Constitutional Responsibility*, *supra* note 49, at 631-52.

87. L. HENKIN, *supra* note 36, at 103.

88. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

89. For example, the Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, §§ 101-13, 201-07, 98 Stat. 2492, 2498-2510 (1984), places limitations on the procure-



dependent authority to use the military in circumstances short of all out war. By contrast, the power to define the profile of the military establishment, from its size and configuration to its weaponry, has remained firmly lodged in Congress.<sup>90</sup> The annual budget battles over defense appropriations and authorizations are a constant reminder of this very important and unrelinquished power of Congress.<sup>91</sup>

### III. The Regulation of Nuclear Weapons

Extrapolating from the general principles discussed above, it is clear that Congress, as the nation's lawmaking institution, possesses considerable authority over our nuclear arsenal. A consideration of that authority begins with the obvious proposition that if it were not for Congress, there would be no nuclear arsenal.<sup>92</sup> Regardless of the need for nuclear weapons in the modern world and regardless of presidential support for such weapons, the United States would possess no such arsenal were it not for the accumulated actions of many congresses approving weapons systems and appropriating money for those systems. If Congress had chosen to

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ment, research, development, testing, and evaluation of weapons and weapon systems. One specific limitation is found in section 110, which limits the number of operational MX missiles that may be purchased by the executive branch. Another is found in section 111, which states, "None of the funds appropriated pursuant to authorizations of appropriations in this title may be used for procurement of binary chemical munitions, including advanced procurement of long-lead components or for the establishment of a production base for such munitions." Still another occurs in section 205, which defines the policy governing the testing of anti-satellite warheads.

The Department of Defense Authorization Act of 1984, Pub. L. No. 98-94, 97 Stat. 614 (1983), is similarly limiting. Section 110 of that Act specifies the location of deployment for the MX missiles and requires the Secretary of the Air Force to prepare "a full draft and final environmental impact statement" on the deployment. Section 206 prohibits the expenditure of funds for "research, development, test, or evaluation" of a small mobile missile. Section 208 places a funding limit on mobile ballistic missile defense research. *See also* The Department of Defense Appropriations Act of 1984, Pub. L. No. 98-212, § 799H, 97 Stat. 1421, 1457-58 (1983) ("[N]o funds appropriated by this Act shall be expended for the research, development, test, evaluation or procurement for integration of a nuclear warhead into the Joint Tactical Missile System."); Department of Defense Continuing Appropriations Act of 1985, Pub. L. No. 98-441, § 106(c), 98 Stat. 1699, 1700-01 (1984) (prohibits the executive branch from supporting, "directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual").

90. *See, e.g.*, 10 U.S.C. § 138 (1982) (detailing the role of Congress in authorizing weapons procurement and troop strength); 10 U.S.C. §§ 141-143 (creating the Joint Chiefs of Staff); 10 U.S.C. §§ 501-520a (regulating enlistments); 10 U.S.C. §§ 521-526 (officer strength and distribution); 10 U.S.C. §§ 2301-2316 (procurement); 10 U.S.C. §§ 2352-2361 (research and development).

91. *See, e.g.*, 39 CONG. Q. WEEKLY REP. 2241-46 (1981); 40 CONG. Q. WEEKLY REP. 1155-59, 3107-10 (1982); 41 CONG. Q. WEEKLY REP. 2513-16 (1983); 42 CONG. Q. WEEKLY REP. 2361-65, 2441-45, 2733-36, 3145 (1984); 43 CONG. Q. WEEKLY REP. 1798-99 (1985).

92. *See supra* notes 87-89.

reject development of nuclear weapons technology, there is nothing in the Constitution that would have permitted the President to override that decision. Nor, as indicated above, is there any history of a presidential practice that would indicate to the contrary. It is, accordingly, beyond cavil that Congress may refuse a presidential request for a weapons system.

Similarly, nothing in the Constitution, other than the practical effect of a veto, would prevent Congress from eliminating or drastically reducing the present nuclear arsenal. The Constitution does not require that the President, as Commander-in-Chief, be armed with the best weapons; indeed, it does not require that he be armed with any weapons at all. Although it is not probable that Congress would ever disarm the President, from a constitutional perspective Congress has that authority. Congress defines the scope of the nation's military defense. It may do so intelligently or foolishly; it may even do so inconsistently.<sup>93</sup>

This greater power to determine whether to arm the President includes the lesser power to legislate selectively and incrementally with respect to particular types of armaments.<sup>94</sup> Thus, Congress may refuse to fund a particular weapon system, but at the same time provide a sufficient appropriation to permit basic research on the efficacy of that system. And, consistent with the Constitution, Congress could prohibit or limit certain avenues of research or testing.<sup>95</sup> The President is not free to purchase the system merely because research had been funded, nor is he free to extend the research to specific avenues forbidden by Congress. Moreover, once a system is adopted, Congress need not give the President complete discretion over the use of that system. Congress could stockpile a certain weapon on the express condition that the weapon not be used until Congress authorized its use through legislation. Similarly, Congress could go a step further and give the President the discretion to use a weapon, but only upon the occurrence of a particular event.

An example of congressional regulation of a weapon system is found in Chapter 32 of title 50 of the United States Code, entitled "Chemical

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93. *See, e.g., Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1978) (judiciary will not appraise wisdom of course selected by Congress).

94. *Cf. United States v. Midwest Oil Co.*, 236 U.S. 459, 476 (1915) ("It is only necessary to point out that, as the greater includes the lesser, the power to make permanent reservations includes power to make temporary withdrawals.").

95. *See, e.g., 50 U.S.C. § 1520* (1982) (limits use of human subjects for testing of chemical or biological agents by the Department of Defense); Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, § 205, 98 Stat. 2492, 2509-10 (1984) (limitation on testing of anti-satellite warheads); Department of Defense Authorization Act of 1984, Pub. L. No. 98-94, § 206, 97 Stat. 614, 624 (1983) (limitation on research and development of small mobile missile).

and Biological Warfare Program.”<sup>96</sup> The pertinent sections of the code limit the testing, transportation, deployment, storage and disposal of chemical and biological weapons. Similarly, section 111 of the Department of Defense Authorization Act, 1985,<sup>97</sup> provides: “None of the funds appropriated pursuant to authorizations of appropriations in this title may be used for procurement of binary chemical munitions, including advanced procurement of long-lead components or for the establishment of a production base for such munitions.” This type of modified or limited delegation presents no legitimate constitutional concern.<sup>98</sup> Congress can give all, nothing at all, or something in between.<sup>99</sup>

An analogous grant of seemingly limited constitutional authority is found in the statute creating the Central Intelligence Agency.<sup>100</sup> The CIA, like a weapons system, is a tool provided by Congress to assist the President in protecting the national security. Congress did not, however, grant the President plenary power to determine all circumstances under which the agency may be used. In fact, the enabling statute specifically precludes the CIA from engaging in certain types of activities: “[T]he Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions . . . .”<sup>101</sup> Regardless of any policy arguments for expanding the operations of the CIA, nothing in the Constitution prevents Congress from limiting those operations, and nothing in the Constitution gives the President the authority to ignore the limitations.

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96. 50 U.S.C. §§ 1511-1520 (1982).

97. Pub. L. No. 98-525, 98 Stat. 2492, 2507 (1984).

98. *See also supra* notes 87-88, 91; 50 U.S.C. § 82 (1982) (procurement of ships and materials during war); 50 U.S.C. §§ 501-504 (guided missiles); 50 U.S.C. §§ 511-515 (wind tunnels).

99. It has been suggested that Congress' power to regulate the use of chemical weapons may be more extensive than its power to regulate the use of nuclear weapons. The theory is that because chemical weapons are made unlawful by treaty, Congress may enforce the treaty by appropriate legislation. Comments of Professor John Norton Moore, delivered at a Symposium sponsored by the Federation of American Scientists and the Lawyers Alliance for Nuclear Arms Control: “First Use of Nuclear Weapons: Under the Constitution, Who Decides?” (November 15-17, 1985). According to the argument, because there is no treaty counterpart for nuclear weapons, Congress is not free to regulate their use. However, if this argument against the regulation of nuclear weapons is based upon a perceived invasion of the President's constitutional prerogative, Professor Moore's theory must be wrong. There is no doctrine of alteration of constitutional structure by treaty. *Cf. Reid v. Covert*, 354 U.S. 1 (1957). Certainly a pure act of legislation which derives from specific grants of authority in Article I, section 8 deserves the same constitutional respect afforded legislation enforcing a treaty. If Congress may regulate and limit the procurement and use of chemical weapons, it may do the same with respect to nuclear weapons regardless of whether that legislation is attached to a treaty.

100. 50 U.S.C. § 403 (1982).

101. *Id.* at § 403(d)(3).

*Youngstown* provides direct authority for this proposition.<sup>102</sup> Of course, these limitations do not eliminate the potential for presidential circumventions or evasions that may be occasioned by a lack of congressional oversight. But evasions do not define the scope of constitutional power; at most, they indicate areas in which Congress must reassess its grants of authority. Moreover, as the Court observed in *Immigration and Naturalization Service v. Chadha*,<sup>103</sup> "The courts . . . can always 'ascertain whether the will of Congress has been obeyed,' . . . and can enforce adherence to statutory standards."

A second analogy of limited grants of authority derives from the vast administrative law apparatus created by Congress and administered by the executive branch. Through the creation of agencies such as the Department of Transportation, the Environmental Protection Agency, and the Department of Health and Human Services, Congress has granted the executive branch broad authority to regulate diverse matters of public interest. The discretion granted is not, however, unbounded. Each agency has limits upon the scope of its authority as well as upon the methods through which it may regulate.

*Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*<sup>104</sup> is a recent affirmation of this principle. There, the Supreme Court held that the National Highway Traffic Safety Administration, an agency of the Department of Transportation, had exceeded its statutory authority when it revoked a motor vehicle safety requirement involving passive restraints. The Court found that the agency's decision had been arbitrary and capricious.<sup>105</sup> In arriving at this conclusion, the Court explained that, among other things, an agency rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider. . . ."<sup>106</sup> In short, Congress defines the scope of executive branch authority. Consistent with this structure, the Judicial Review Act,<sup>107</sup> which applies to most administrative rulemaking, provides that agency action may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>108</sup> Although the executive branch may attempt to circumvent the limits imposed upon the action of these agencies, a party injured by

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102. 343 U.S. at 588-89.

103. 462 U.S. 919, 953 n.16 (1983) (quoting *Yakus v. United States*, 321 U.S. 414, 425 (1944)).

104. 463 U.S. 29 (1983).

105. *Id.* at 46.

106. *Id.* at 43.

107. 5 U.S.C. §§ 701-706 (1982).

108. *Id.* at § 706(2)(A) (emphasis added).

such a circumvention can successfully challenge the action before the judiciary.<sup>109</sup>

Applying the above principles to the issue of nuclear weapons, it seems that Congress possesses the constitutional authority to do any of the following:

- (1) Create a nuclear weapons arsenal (or expand the current one);
- (2) refuse to create a nuclear weapons arsenal;
- (3) eliminate the current nuclear stockpile;
- (4) limit the nuclear arsenal to particular types of weapons (*e.g.*, defensive only or offensive only);
- (5) purchase a weapons system, but refuse to provide the practical means for its use;
- (6) purchase the system and the practical means to use it, but absolutely forbid use of the system in the absence of implementing legislation; or
- (7) purchase the system and the practical means to use it, but permit use only upon the occurrence of specific events.

Without regard to the wisdom of any of the above alternatives, the implementation of any one of them seemingly falls squarely within Congress' constitutional authority to make basic policy determinations concerning the nation's nuclear weapons system.

If the above seven possibilities are within the power of Congress to implement, what can be said of Dr. Stone's proposal, which appears to take a middle course between giving the President total control over the nuclear arsenal and denying the President any such control? It appears that the overall desuetude of the nondelegation doctrine, coupled with the deference accorded the political branches in matters involving foreign relations, would permit Congress to grant the President unfettered discretion to use nuclear weapons in the exercise of his powers as Commander-in-Chief.<sup>110</sup> Similarly, as explained above, nothing in the Constitution or in any historical gloss on the Constitution requires Congress to grant the President the authority to use such weapons. Because either extreme is constitutional, it might seem that a middle ground would be equally acceptable. But this intuition is not without its difficulties. Even though Congress may regulate the use of nuclear weapons, it must be careful to avoid methods that invade the province of the executive branch or that otherwise violate certain structural limitations found

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109. The fact that the issues with which we now deal may involve political questions or may be otherwise nonjusticiable does not diminish the constitutional inquiry. Indeed, the need for Congress to protect with vigilance its legislative prerogative is intensified because that prerogative may not be protectible through the judicial process.

110. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

in the Constitution. A middle ground approach, such as the Stone proposal, must be carefully defined to avoid these pitfalls.

The Stone proposal may foster the objection that it invades the province of the Commander-in-Chief by impinging on his authority to conduct war. Clearly, the Commander-in-Chief possesses the specific authority to conduct war once declared by Congress and to conduct military operations in any emergency amounting to a sudden attack. Indeed, the precise reason for creating this power was to avoid the difficulties experienced during the Revolutionary War when a committee of Congress attempted to oversee day-to-day military operations.<sup>111</sup> The Constitution plainly reposes that authority in the President as Commander-in-Chief.<sup>112</sup>

As demonstrated above, a blanket congressional prohibition on the first use of nuclear weapons is constitutionally unobjectionable. Although the prohibition affects the President's ability as Commander-in-Chief to engage in military activities by refusing to grant him plenary power over a particular weapon system, it does not invade the President's constitutional prerogative to conduct war within the confines of the military apparatus created by Congress. This prohibition is no more intrusive upon that domain than are limitations on the number of troops, restrictions on the size of the Navy, or refusals to approve a new line of jet fighters, all of which are decisions squarely within the congressional policy-making prerogative.<sup>113</sup> Constitutionally, the prohibition on first use stands on the same footing as the foregoing examples of congressional prerogative. The line between impermissible and permissible use of weapons is clear and, most importantly, is based not upon day-to-day tactics, but upon a congressional strategy or policy.

On the other hand, one can conceive of instances when congressional regulation of the use of weapons, both nuclear and non-nuclear, would transgress the Commander-in-Chief's constitutional authority to conduct war. The distinction between what is permissible and what is not lies in the difference between the creation of policy and the actual execution of that policy. While there may be examples in which the dis-

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111. See *supra* notes 56-59 and accompanying text.

112. Despite this allocation of authority, Congress has on at least one major occasion injected itself into the conduction of operations. During the Civil War, the Committee on the Conduct of the War was both a constant watchdog of the Union military campaign and an intermittent meddler in the actual supervision of the war effort. Pierson, *The Committee on the Conduct of the Civil War*, 23 AM. HIST. REV. 550 (1918). While this instance of congressional interference with the Commander-in-Chief would not amend the Constitution, it does indicate a degree of flexibility in defining the relative roles of the two branches.

113. See *supra* notes 89-91 and accompanying text.

tion is amorphous, some guidance can be gleaned from more obvious cases. For example, Congress would overstep the boundaries that separate the legislative from the executive were it to require the Commander-in-Chief to seek congressional or committee approval of daily war plans, or more particularly, of daily weapons usage.<sup>114</sup> The Commander-in-Chief Clause was designed to prevent precisely this type of situation. Congress in the above example is not defining policy but is administering the operations that implement policy. The President would be correct in challenging such an invasion.

The question now presented, therefore, is where Dr. Stone's proposal lies on the spectrum between defining the scope of our nation's military policy and excessive interference with the Commander-in-Chief's authority to control the day-to-day operations of war. The answer depends upon the nature of the proposed committee's authority. If that authority includes a power to review or approve tactics in the context of ongoing military operations, it treads upon the executive prerogative to conduct the operations of war. On the other hand, if the role of the committee would be to act as a surrogate of Congress in the determination of nuclear weapons policy, the likelihood of interference with the President's constitutional prerogatives is diminished, if not eliminated completely. If that policy decision were to permit a first strike, the President, as Commander-in-Chief, could then determine whether such a use is an appropriate military response. In other words, the committee would grant the President the flexibility to exercise the option of first use.

Based on this understanding of the committee's function, to require committee approval of first use would not violate the separation of powers. Just as Congress is free to ban the first use of nuclear weapons, Congress could pass legislation rescinding such a ban. The committee would do no more. It would exercise a plainly legislative function in rescinding a ban on first use. From the perspective of the President's constitutional authority to conduct war, whether the committee or Congress as a whole exercises the approval function is a constitutional irrelevancy.<sup>115</sup> Neither case invades the province of the executive branch.

This characterization of the committee's authority should insulate the proposal from a separation of powers challenge. It does, however, give rise to another potential objection.<sup>116</sup> By permitting a committee to

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114. *But see supra* note 112.

115. From a policy perspective, placing the approval power in a committee actually would enhance presidential flexibility and power since the committee could meet in secret and vest the President with first use capability without announcing the new policy to the enemy.

116. An additional constitutional objection to the proposal derives from the characterization of committee approval as a legislative veto. Under a mechanical reading of *INS v.*

exercise the authority to rescind a ban on first use, Congress may be improperly delegating its institutional responsibility to legislate in the war-making context. Certainly, the committee would be given the authority to determine the nation's policy with respect to the first use of nuclear weapons, which is usually a job for Congress. Moreover, a presidential request for first use would likely arise only under circumstances of an imminent or ongoing military conflict. Considering the strategic effect of using even a tactical nuclear weapon, approval of a request for first use might be tantamount to a declaration of war.<sup>117</sup> As a consequence, this excessive delegation objection is not frivolous.<sup>118</sup>

The power to declare war was carefully vested in Congress as a whole. Certainly the remarks made during the Federal Convention of 1787 and the arguments presented in the Federalist Papers indicate a strong sense that Congress alone, acting as a body, is to exercise the authority to declare war and otherwise to define the nation's military posture. The war power is, after all, the most dangerous of all powers vested

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Chadha, 462 U.S. 919, 955-59 (1983), anything that can be characterized as a legislative veto is immediately void. Whether that interpretation of *Chadha* is correct does not concern this discussion, for in fact, no legislative veto would be exercised by this committee. By its very nature, a legislative veto supposes that Congress has granted the executive branch the authority to take certain action, but has, in addition, retained the power to prevent the exercise of that authority. A "veto" is a condition subsequent that divests power. The Stone proposal is quite different. It would impose a ban on first use except on the precondition of committee approval. Any first use requires an affirmative action by the committee. Committee approval is a condition precedent, which would rescind the ban and confer power.

This distinction is more than semantic. The difference between a condition subsequent and a condition precedent has a time-honored status in jurisprudence: The former divests; the latter confers. Moreover, the distinction has direct significance in the context of separation of powers. The Supreme Court in *Chadha* recognized that a legislative veto had the potential of treading upon the domain of the executive branch by injecting Congress into the daily administrative process: "Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a Congressional veto." 462 U.S. at 953 n.16. While this concern may have been legitimate under the circumstances presented in *Chadha*, it has no bearing on the questions now presented since the committee would play no role in the daily affairs of the executive branch or hinder executive action. The committee would either grant authority or refuse to do so and thus would determine policy which, as demonstrated above, is a congressional prerogative. Once the approval is granted, the committee could not "veto" the President's administrative response. Thus, although a veto such as that at issue in *Chadha* could tread upon the executive domain, an approval, like any other piece of affirmative legislation, would not.

117. Stone, *supra* note 2, at 101, 103-04, 106.

118. Of course, as a technical matter the nondelegation doctrine involves excessive or standardless delegations to the executive branch. See *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420-30 (1935). By analogy, however, it is conceivable that Congress could excessively delegate its legislative authority to a committee. Cf. *Constitutional Responsibility*, *supra* note 49, at 620-26.



in the national government and should be unleashed only after a thorough consideration by both houses of the representative branch. Moreover, the requirement of full consideration of proposed legislation by both houses of Congress was not an empty formalism. As James Wilson observed at the Federal Convention:

Despotism comes on mankind in different shapes. sometimes [sic] in an Executive, sometimes in a military, one. Is there danger of a Legislative despotism? Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.<sup>119</sup>

The argument that the entire Congress must participate in the creation of policy is not easily refuted.<sup>120</sup> In exercising its powers, Congress should be bound by the letter of the Constitution. However, when the power to declare war is considered in the context of modern technology and a potentially instantaneous nuclear exchange, the opportunity to proceed in the traditional manner is evanescent at best. Split-second timing and secrecy may be of the essence. Because of these factors, the President, at the grace of Congress, now has the practical authority to use nuclear weapons in any manner he deems consistent with his power as Commander-in-Chief. Although this state of affairs may satisfy the very limited legalistic norms of nondelegation in the foreign affairs context, it severely strains congressional responsibility over the war powers. Certainly, it does nothing to advance the constitutional virtue of full consideration by both houses of Congress on the question of war. Thus it would seem to make good constitutional sense that Congress should be free to create an option that falls somewhere between this current negation of responsibility and an unrealistic insistence that Congress as a whole answer the first use question in the context of an ongoing conflict. Dr. Stone's proposal may present that option.

Finally, the Necessary and Proper Clause suggests that Dr. Stone's proposal is well within the bounds of constitutional reason and structure. The Necessary and Proper Clause provides: "The Congress shall have power . . . To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers. . . ."<sup>121</sup> One of those "foregoing powers" is the power to declare war. If the development of nuclear

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119. 1 M. FARRAND, *supra* note 62, at 254 (remarks of James Wilson). *See also* THE FEDERALIST NOS. 22 & 51.

120. *See, e.g.,* INS v. Chadha, 462 U.S. 919, 944-59 (1983).

121. U.S. CONST. art. I, § 8, cl. 18.

technology has so transformed the power to declare war that Congress cannot effectively exercise it in the traditional fashion, the Necessary and Proper Clause would seem to provide ample authority to support Congress' creation of some reasonable method for exercising that power. Such flexibility has long been an accepted part of constitutional jurisprudence.

In *McCulloch v. Maryland*,<sup>122</sup> Chief Justice John Marshall observed:

[A] government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.<sup>123</sup>

In explaining and applying this principle, Chief Justice Marshall stated that Congress was free to "exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government," and to "avail itself of experience, to exercise its reason, and to accomodate its legislation to circumstances."<sup>124</sup> In other words, the Necessary and Proper Clause presumes that the framers could not anticipate every possible problem that would challenge subsequent generations.<sup>125</sup> Those generations would have ample latitude to solve the unique dilemmas that confronted them. Of course, the solutions must be consistent with the general structure and limitations of the Constitution. But the structure of the Constitution need not be interpreted as a straitjacket.

With this interpretation of the Necessary and Proper Clause in mind, the committee proposal appears to be well within constitutional bounds. It provides a limited but workable method through which Congress may exercise its constitutional responsibility over potential nuclear war, while not completely disarming the nation in the face of unforeseen circumstances. The Framers adopted a structure of government based on the premise that Congress would retain authority over war-making decisions; legislation adopted by Congress that tends to advance that aim, especially when perfect realization of the Framers' goal is impossi-

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122. 17 U.S. (4 Wheat.) 316 (1819).

123. *Id.* at 408.

124. *Id.* at 420, 415-16.

125. In this sense, the Necessary and Proper Clause is a lesson in humility. The Framers did not presume to be political soothsayers; similarly, in construing the scope of the Necessary and Proper Clause, we should not presume to know exactly how the Framers would have solved modern problems, of which they had little ken.

ble, can hardly be said to be beyond the scope of the Necessary and Proper Clause.

I would add the following polish to the proposal. The committee should not be empowered to approve first use unless it finds that Congress as a whole is unavailable to decide the first use question, either because of the short notice on which the decision must be made or because an immediate military crisis creates an overriding need for absolute secrecy. This additional condition would limit the authority of the committee to the narrow purpose for which it was created—to act as a surrogate for Congress under circumstances in which the national security prevents Congress from addressing a question requiring an immediate response.

Seen in this light, the proposal does not generally rearrange the legislative procedures of Congress, nor does it create a precedent for a radical change in the legislative process. Rather, it creates a limited exception to the general rule that on matters of military policy the primary responsibility belongs to Congress as a whole. It should also be made clear that the role of the committee would extend beyond the approval or denial of the first use option. The committee would exercise an oversight function on matters that could affect the potential use of nuclear weapons. Fulfillment of this function would further preserve the congressional prerogative by informing Congress of the need to adopt specific measures to ensure that the nation retains effective military options other than the nuclear one. Thus, while the proposal creates a narrow exception to the traditional legislative process, it also reaffirms the importance of that process.<sup>126</sup>

Undeniably, the proposed committee would alter the normal requirement of full congressional participation in decisions affecting military policy. This alteration is not to be taken lightly. Certainly, the Necessary and Proper Clause should not serve as a basis for the whole-

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126. Although not a perfect analogy, the Select Committee on Intelligence of the United States Senate operates in a similar fashion. *See* S. Res. 400, 94th Cong., 2d Sess. (1976). Among other things, the purpose of that committee is “to provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States.” *Id.* However, although the President is required to keep both the Senate Select Committee on Intelligence and the Permanent Select Committee on Intelligence of the House “fully and currently informed” on new and ongoing intelligence activities, 50 U.S.C. § 413(a)(1) (1982), fulfillment of this duty is not a condition precedent to the initiation of intelligence activity. *Id.* By contrast, the device of committee approval proposed by Dr. Stone would operate as a condition precedent to presidential action. *See supra* note 116. This distinction is justifiable, since upon notification of an intention to use nuclear weapons the committee would not likely have the luxury of reporting to Congress on the need for an appropriate legislative response.

sale reordering of constitutional structure. In *Immigration and Naturalization Service v. Chadha*,<sup>127</sup> the majority correctly observed that convenience or efficiency were not, in themselves, sufficient to overcome the limitations implicit in specific constitutional provisions. According to the majority in *Chadha*, that the legislative veto at issue there was a “useful ‘political invention’ ” was a constitutional irrelevancy.<sup>128</sup> Here, by contrast, the device of committee approval is more than convenient, efficient or useful. It is created to ensure that constitutional structure is honored to the fullest extent possible. Rather than rearranging the relative roles of each branch, it seeks to preserve the constitutionally mandated roles.<sup>129</sup> Without the committee, the congressional responsibility goes to the President by default.

In *McCulloch v. Maryland*, Chief Justice Marshall found that the power to adopt appropriate means to attain the broad ends of the national government was implicit in our constitutional structure. He also construed the Necessary and Proper Clause consistently with this structural conclusion. “To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.”<sup>130</sup> Importantly, the “degree of its necessity” is to be determined by Congress.<sup>131</sup> If Congress deems creation of this committee vital to the exercise of one of its most important functions, nothing in the Constitution prevents its implementation. An otherwise legitimate objection to alterations based on convenience should not be used to prevent a narrow modification based on stark necessity. In addition, if Congress can, consistent with the Constitution, conclude that the decision on first use should be delegated to the President, there is no constitutional basis for claiming that a similar delegation to a committee is somehow excessive. Certainly, the delegation to the President undermines the bicameralism requirement to a greater extent than would committee approval. In any event, the Necessary and Proper Clause gives Congress the authority to choose between these two constitutional alternatives.

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127. 462 U.S. 919 (1983).

128. *Id.* at 945, 959.

129. *See id.* at 953-54 n.16.

130. 17 U.S. (4 Wheat.) at 413-14.

131. *Id.* at 423.

### Conclusion

Dr. Stone's proposal creates a limited exception to the general rule that Congress as a whole should make determinations on matters of military policy. The exception arises out of necessity, not out of convenience. Since the role of the proposed committee is clearly legislative—to create military policy with regard to the first use of nuclear weapons—the exercise of committee power would not invade the constitutional province of the President as Commander-in-Chief. Moreover, given the flexibility provided by the Necessary and Proper Clause and assuming that the committee would respect the limits of its authority, exercise of this power by the committee would not undermine the constitutional prerogatives of Congress. In fact, the proposal, in both purpose and effect, serves to place the constitutional responsibility for the nation's nuclear weapons policy as close as possible to its structural home.