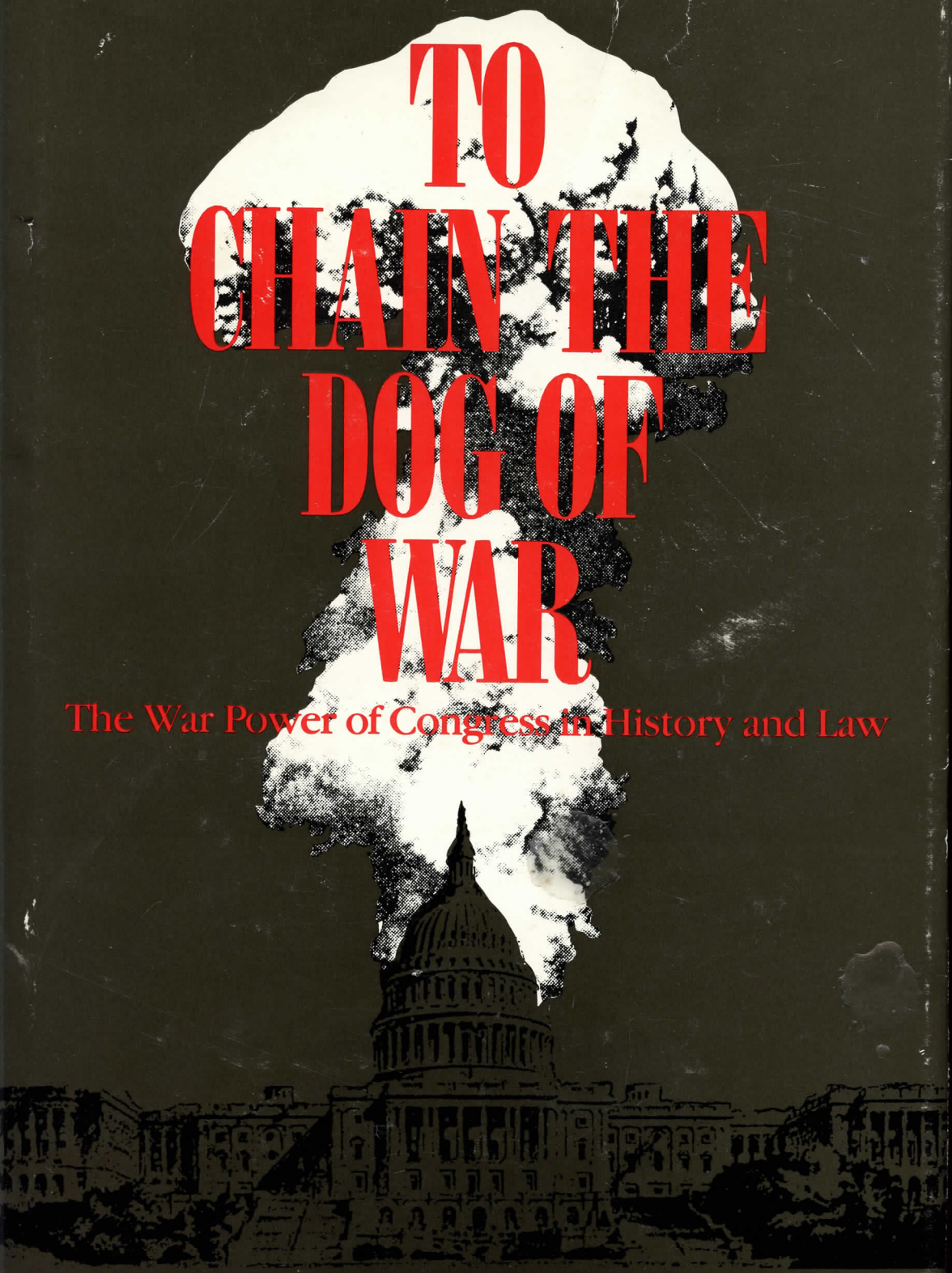
# TO CHAIN THE DOG OF WAR

The War Power of Congress in History and Law



By Francis D. Wormuth and Edwin B. Firmage

# Preface

Ordinarily, the term *war power* denotes the power to initiate and prosecute a war and includes all the implied powers considered necessary and proper for the conduct of the war, such as allocation of raw materials, price-fixing, and payment of pensions. Here the term is used in a much narrower sense; this book examines the power to initiate war in American constitutional law and the history of the uses of that power. Other, broader meanings of the term are discussed only as they pertain to this issue.

The Constitution assigns the power to initiate war solely to the Congress, one of the wisest of the many checks and balances built into our political system; but, throughout our history, Presidents have committed acts of war without congressional authorization. The question of where to assign the power to initiate and conduct war was thoroughly debated during the writing of the Constitution, and the outcome of that debate was a document that clearly did not give the President unlimited war power but in fact separated the power to conduct war from the power to initiate it.

Acts of war, acts of reprisal, acts of self-defense—all have been taken by past Presidents, but seldom without consideration of the legal implications of their actions. The records of executive debate on the limitations of war power are extensive. Often, as we shall see, a President has refused to act on the grounds that he could not act within the legal boundaries of the Constitution. At a time of national crisis, notably during the Civil War, the President has acted illegally and depended upon Congress to ratify his action after the fact. In the latter half of the twentieth century, however, a major change in the concept of the war power began to be promulgated. Beginning with the Korean War, Presidents, congressmen, and publicists claimed for the executive the power to initiate war without the consent of Congress. The war in Korea, the Indochina war embracing Vietnam, Laos, Thailand, and Cambodia, and many lesser actions required justification, and so the Department of State, the Department of Justice, the Library of Congress, several members of Congress, lawyers, law professors, and historians have attempted to revise the understanding of the Constitution, changing its meaning as universally held during the first one hundred and sixty years of our history.

Significant congressional reaction to the erosion of congressional power and to the corresponding arrangement of presidential power resulted in the Fulbright proviso and the War Powers Resolution of 1973. In this broader perspective of presidential and congressional power, the Watergate crisis and its aftermath—impeachment proceedings, presidential resignation, attempts to bring the intelligence community more tightly under the rule of law—all reinforce the growing perception that Whiggish understandings of power and the necessity of its containment are as relevant and wise in the twentieth as in the eighteenth century.

Since Vietnam and Watergate, and the reaction against overwhelming presidential power, the pendulum of reaction has swung again. Presidents continue to use the armed forces without congressional approval in the Middle East and in Latin America; the presidential and congressional interpretation of the War Powers Resolution is unnecessarily narrow, threatening to render it meaningless; the legal restraints upon the intelligence community have been relaxed; and public opinion, forgetting Vietnam and Watergate, approves and applauds.

It has been argued that the technology of the nuclear era makes impossible the policy of congressional deliberation as reflected in the original understanding of the war powers. Missiles from one side of the earth may reach the other side in minutes. The advantage of surprise first strike with nuclear weaponry would be enormous, perhaps decisive. In this book, we will respond that the element of modern technology cuts the other way, in awesome proportion. The consequence of nuclear war is likely to be devastation beyond experience, beyond belief or comprehension, beyond the capacity of our civilization to respond and repair. Such technology demands more restraint, not less, on the way we go to war.

This book examines our nation's experience with the initiation of war from the beginning of the Republic through that most costly and most tragic violation of our Constitution, the Vietnam War, which from its obscure beginning to its inglorious conclusion was carried on by the executive without proper congressional sanction. By analyzing the President's powers as commander in chief of the armed forces—through a careful study of the political and legal meaning of war in a national and international context, distinguishing between declared and undeclared, de facto war—we will find a pattern of intent and interpretation, supported by numerous statements of the founding fathers, past Presidents, and supreme courts. By examining acts of self-defense in our military dealings with piracy, threats to United States citizens on foreign soil, and Indian raids, we will see that the many modern lists of the wars supposedly initiated by the executive—lists official and unofficial, originating from the military, from historians, and from executive and congressional studies—are misleading because they include many actions that were in fact authorized by Congress, such as the naval landings described in Chapter 10.

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other assistance to Frank Plym
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There have been cases of executive action without approval prior to 1950. There have been Presidents who have acted autonomously with military force, convinced of their rectitude, sometimes convinced as well of their anointment as leaders and saviors of America and the world: Theodore Roosevelt, Andrew Jackson, and others, particularly since the beginning of World War II. Some, Congress has reprimanded, some not. Congress has been willing to endorse and ratify some illegal actions in retrospect and has pronounced a most ambiguous benediction on others by appropriating funds to continue the action illegally begun.

This book examines the legal questions of ratification by appropriation, delegation of the power to make war, the nature of "conditional war," and separation of powers in foreign relations. It begins by examining the nature of the presidency historically and concludes by portraying the presidency as an ideal. Such an examination can lead us only to praise the wisdom of the framers of the Constitution in their decision to sever the power to initiate war from the power to conduct it. When those powers rest in the same single pair of hands, legally or de facto through congressional abrogation of duty, the nation and the world should be uneasy.

While over ninety percent of the contents of this volume have never before been published, Chapter 15, "The Doctrine of Political Questions," is based largely upon an article by Edwin Firmage published in the *University of Colorado Law Review* and is published here with permission. Chapter 18, "The Presidency as an Ideal Type" was taken from an article by Francis Wormuth originally published by *Fortuna*. It is reprinted here with the kindly permission of the editor, Fulvio Fenucci. Small portions of the argument of this volume are taken from earlier publications by Francis D. Wormuth and Edwin B. Firmage. These are scattered throughout parts of the argument and cannot be conveniently identified. Professor Wormuth's materials are used here with the permission of the copyright holders: The Center for the Study of Democratic Institutions, which published *The Vietnam War: The President versus the Constitution* (1968); and the *California Law Review*, which published "The Nixon Theory of the War Power: A Critique" (1972). The Fred B. Rothman Co. obligingly concurred in the consent of the *California Law Review*. The Princeton University Press kindly agreed to the publication of passages from Professor Firmage's article, "Law and the Indochina War: A Retrospective View," published in Richard Falk, ed., *The Vietnam War and International Law*, Vol. 4 (1976).

We would like to thank Francis Butler, who contributed Chapter 9, "Lists of Wars." This chapter adds so substantially to our volume that we thought it only fair that Colonel Butler's name be on this volume as a contributing author. Special thanks are also due Stephen C. Clark for his help on Chapters 16 and 17. We make grateful acknowledgment for contributions of data and other assistance to Frank Plymale Butler, Richard Goldberger, William C. Barnhart, Thomas B. McAffee, Oscar Kraines, Morris D. Forkosch, and

Harvey Wheeler. Mick McAllister and D. Teddy Diggs provided invaluable editorial assistance. Lora Lee Petersen and Elizabeth Kirschen deserve special thanks for typing so many drafts of so many chapters so very cheerfully and well.

A word of explanation on our footnoting will be helpful. References are treated three ways. Material that required footnoting will be found at the bottom of the page. Simple page references, however, are keyed to the Bibliography with parenthetical references in the text—the item number in italic, followed by Roman numeral volume reference if applicable, and then the page number ([item] *181*, [vol.] IV, [page] 36, is Richardson's *Messages*). References to cases, statutes, and various common government documents, such as *Congressional Record*, are collected separately and are indicated in the text with an asterisk.

FRANCIS D. WORMUTH
EDWIN B. FIRMAGE

*Professor Francis D. Wormuth (1909–1980)*

Francis Wormuth died as this volume neared completion. I am deeply grateful to have been able to work with Professor Wormuth since the mid-1970s on these chapters, and I completed the final revision of the entire manuscript, including the addition of Chapters 16 and 17, during the past years without him but, I hope, in harmony with his beliefs.

He was born at Port Leyden, New York, on May 23, 1909, and he received his formal education at Cornell University, where he earned his bachelor's master's, and doctoral degrees.

Francis's brilliance was recognized early; he received as many honors as the academic world can bestow upon its very best. While a student at Cornell, he was awarded the Messenger Memorial Prize for his essay, "The History of English Thought"; the Guilford Prize for "Macaulay"; and the Sherman-Bennett Prize in Government for his paper, "The Constitutional Theory of Sir Edward Coke."

Francis was a Boldt Fellow at Cornell, a Sterling Fellow at Yale, a Guggenheim Fellow, a Ford Fellow at Yale Law School, and a Fulbright Lecturer at Johns Hopkins University, Bologna Italy Center.

At the University of Utah, Professor Wormuth was named Distinguished Research Professor for 1971-72; he served from 1975 until his death as Distinguished Professor.

Among Francis Wormuth's scores of books and monographs, perhaps his most notable were *The Origins of Modern Constitutionalism*, published in 1948;

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include the Rights of war & peace &c. but the powers should confined and defined—if large we shall have the Evils of elective Monarchies. . . ." (*53*, I, 70) Randolph did not defend his resolution but directed his advocacy to a plural executive. "A unity of the Executive he observed would savor too much of a monarchy." (*53*, I, 74) The resolution was not brought to a vote. Nevertheless the interchange seems to show a consensus that "determining on war"—which can only mean a decision to initiate war—was a legislative power.

Accordingly, the Committee of Detail distributed a printed draft constitution on August 6 providing, "The legislature of the United States shall have the power . . . To make war. . . ." When this clause came up for debate on August 17, Pinckney opposed vesting the power in Congress; proceedings would be too slow. "The Senate would be the best depositary, being more acquainted with foreign affairs, and most capable of proper resolutions." Pierce Butler said that "he was for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." This drew from Elbridge Gerry the rejoinder that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." (*53*, II, 318) Butler's motion received no second.

Butler was the only member of the Convention ever to suggest that the President should be given the power to initiate war. But Madison and Gerry were not quite satisfied with the proposal of the Committee of Detail that the legislature be given the power to make war. They moved to substitute *declare* for *make*, "leaving to the Executive the power to repel sudden attacks." The meaning of the motion was clear. The power to initiate war was left to Congress, with the reservation that the President need not await authorization from Congress to repel a sudden attack on the United States. The reservation on sudden attacks met with general approbation, but there was a difference of opinion as to whether the change of language effected the desired result. Roger Sherman of Connecticut opined: "The Executive shd. be able to repel and not to commence war. 'Make' much better than 'declare' the latter narrowing the power [of the Legislature] too much." (*53*, II, 318) The records of the Convention noted that George Mason of Virginia "was agst giving the power of war to the Executive, because not [safely] to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but he was for facilitating peace. He preferred '*declare*' to '*make*.' " Madison's motion was carried by a vote of seven states to two. Then King observed that the verb *make* might be interpreted as authorizing Congress not only to initiate but also to conduct war, and Connecticut changed its vote, so that the verb *declare* was adopted by a vote of eight to one. (*53*, II, 319n)

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and water," and on September 5 it was given the power to "grant letters of marque and reprisal." This completed the war clause.

The declaration of war in 1812 said, "That war be and the same is declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories. . . ."* The same form was followed in all subsequent declarations of general war.

Emerich de Vattel, the most influential writer on the law of nations—which we call international law—at the time of the adoption of the Constitution, called such a declaration a "declaration of war pure and simple." (*43*, 254) It was desirable because it gave notice to the adversary, to neutral nations, and to the subjects of the sovereign initiating the war. It ought properly to be preceded by a "conditional declaration of war"—an ultimatum demanding the satisfaction of grievances—which would first offer an alternative to war. (*43*, 254–57) But it was possible to enter into the state of war without making either a conditional declaration or a declaration pure and simple. The state under attack was automatically at war. And by omitting the declaration, the attacking state gained the advantage of surprise.

The Dutch jurist Cornelius Van Bynkershoek, writing in 1737, said:

> Writers on the law of nations have laid down various elements that are essential in a lawful war, and among these is the requirement that a war should be openly declared either by a special proclamation or by sending a herald; and this opinion accords with the practices of the modern nations of Europe. (*227*, 18)

But compliance with this practice, he said, was "not demanded by any exigency of reason." "War may begin by a declaration, but it may also begin by mutual hostilities." (*227*, 19) In 1779, in the case of the *Maria Magdalena*, the British High Court of Admiralty held that the fact of hostilities made war.

> Where is the difference, whether a war is proclaimed by a Herald at the Royal Exchange, with his trumpets, and on the Pont Neuf at Paris, and by reading and affixing a printed paper on public buildings; or whether war is announced by royal ships, and whole fleets, at the mouths of cannon? . . . If learned authorities are to be quoted, Bynkershoek has a whole chapter to prove, from the history of Europe, that a lawful and perfect state of war may exist without proclamation.[1]

[1]Hay & M. 247, 252–53, 165 Eng. Repr. 57, 58. Great Britain and the United States, 36 Stat. 2259, 2271 (1910), with thirty-six other countries, have ratified or adhered to the Third Convention of the Second Hague Conference. Article I reads, "The Contracting Powers recognize that hostilities between them must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."

It has always been possible at British and American law to enter into war without a formal proclamation or the services of a herald. (*187*, 642; *47*, 19) In the case of the United States, however, war cannot lawfully be initiated by the military or its commander but only by Congress. Consequently, although a formal declaration is unnecessary, there must be some legislative act directing the cannons to speak. One of the most respected jurists of the early days of the nation, Chancellor James Kent of New York, said:

> But, though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact. . . . As war cannot lawfully be commenced on the part of the United States without an act of Congress, such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration. (*96*, 55)

Chancellor Kent was following established usage when he interpreted *declare* to mean *commence*. The verb *declare* had much earlier acquired this secondary meaning. It did not cease to describe a formal public proclamation of hostilities, but it was used also to mean simply the initiation of hostilities, whether or not a formal proclamation was made. In 1552 Huloet's dictionary gave the definition: "Declare warres. *Arma canere, Bellum indicere.*" There are two meanings here: to summon to arms; to announce war.

In almost every monarchical state, the power to initiate war resided in the sovereign. In discussions of constitutional arrangements at municipal law, the terms *to declare war* and *to make war* came to be used interchangeably. And while a formal declaration should be made—on the basis of obligation, according to Vattel's interpretation of the law of nations, or on the premise of generosity and justice, according to Bynkershoek's—whether or not such a formal proclamation was made had no significance for the question of the residence of power to make war at municipal law.

*Comyns' Digest*, an authoritative work on English law first published in 1744, said, "To the king alone it belongs to make peace and war," and also, "the king has the sole authority to declare war and peace." (*31*, V, 292 & VII, 46) In 1799 in the High Court of Admiralty, Sir William Scott said, "By the law and constitution of this country, the sovereign alone has the power of declaring war and peace."* It will be recalled that in the debate in the Constitutional Convention quoted above, Gerry rephrased Butler's proposal that the President be given the power to "make war" as a motion "to empower the Executive alone to declare war." (*53*, II, 318) Hamilton spoke of Congress as "that department which is to declare *or make war*." (*71*, X, 281–82) Henry Clay said that "the power of declaring war" did not reside with the executive but with the legislature, which was therefore "the war-making branch."



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Contemporary usage makes it clear that the language "Congress shall have the power . . . to declare war" gave to Congress the exclusive right to initiate war. The debates and the vote show that most of the framers believed that the language also permitted the President to respond defensively to the initiation of a war through the sudden attack of a foreign enemy.

In 1806, in *United States v. Smith*, Associate Justice William Paterson of the Supreme Court, who had been a member of the Constitutional Convention, described the rationale for presidential power to meet a sudden attack.

> If, indeed, a foreign nation should invade the territories of the United States, it would I apprehend, be not only lawful for the president to resist such invasion, but also to carry hostilities into the enemy's own country; and for this plain reason, that a state of complete and absolute war exists between the two nations. In the case of invasive hostilities, there cannot be war on the one side and peace on the other. . . . There is a manifest distinction between our going to war with a nation at peace, and a war being made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of congress to change a state of peace into a state of war.*

So Justice Paterson equated sudden attack with invasion with hostile intent. This instituted a general war in which the President was free to respond with offensive action. But we must distinguish between war and acts of war. An act of war is a violation of sovereignty or another hostile action that may legitimately be treated as a provocation to war at the option of the injured party.[2] But it is not usual to respond to acts of war with a declaration of war; ordinarily states have recourse to diplomacy. If the United States had gone to war on every occasion on which it suffered from an act of war, we would have several hundred more wars in our history. In 1807 the British warship *Leopard* attacked the American ship of war *Chesapeake* on the high seas, subdued her, and took off four men. The United States did not go to war but demanded reparations; an agreement was not reached until 1811. Even a succession of acts of war does not constitute a state of war, as does a hostile invasion. Accordingly, it is for the war-making power, Congress, to determine whether the injury suffered from acts of war warrants the initiation of a state of war. On June 1, 1812, President James Madison complained to Congress that for years the British had seized seamen from American ships, had seized American ships for violating what was in fact an illegal blockade, and had incited Indian tribes to attack the United States.

> We behold, in fine, on the side of Great Britain a state of war against the United States, and on the side of the United States a state of peace toward Great Britain.

[2]See Chapter 3.

Whether the United States shall remain passive under these progressive usurpations and these accumulating wrongs, or, opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty Disposer of Events, avoiding all connections which might entangle it in the contest or views of other powers, and preserving a constant readiness to concur in an honorable reestablishment of peace and friendship, is a solemn question which the Constitution wisely confides to the legislative department of the Government. In recommending it to their early deliberations I am happy in the assurance that the decision will be worthy the enlightened and patriotic councils of a virtuous, a free, and a powerful nation.[3]

The acts of war—impressment of seamen and seizure of vessels—of which Madison complained would justify a declaration of war but did not in themselves amount to a generalized institution of hostilities, like the invasion that Justice Paterson had postulated. In the case of both war and acts of war, the American forces involved have the right at international law to defend themselves. But only in a state of war, whether initiated by hostile invasion or by congressional declaration, does the President have the right to go beyond self-defense and initiate offensive action.[4] There is reason for the distinction. In the case of individual acts of war, such as the seizure of a seaman or a ship, nothing is lost by resorting to diplomacy and delaying

[3] *1812*, I, 489–90. The joint resolution declaring war against Germany in 1917, 40 Stat. 1, reads:

> Whereas the Imperial German Government has committed repeated acts of war against the Government and the people of the United States of America: Therefore, be it
>
> *Resolved* . . . That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States to carry on war against the Imperial German Government. . . .

[4] In the War Powers Resolution, 87 Stat. 555 (1973), Congress confused wars with acts of war. The resolution declares that the President has constitutional authority to introduce the armed forces into hostilities only pursuant to a declaration of war or specific statutory authorization or when there exists "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." If the third contingency contemplates only a "sudden attack" that launches a general war, as the expression "national emergency" implies, then the President is forbidden to resist a limited military stroke, an act of war, like the attack of the *Leopard* on the *Chesapeake*. But it is well settled that he may practice self-defense in such a case. On the other hand, if the rubric "national emergency" in the resolution includes both an act of war and invasion or a similar event that launches a general war, the President not only may repel an attack that is a mere act of war but also may respond with offensive war. But the Constitution does not permit him to initiate offensive war in response to an act of war without congressional authorization. Congress may not take away the President's constitutional power. Nor may it delegate its own constitutional power to the President by such a resolution; see Chapter 13.



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a military response until Congress has acted. But when an enemy has launched a general war, as by invasion, it may be necessary to meet this danger by immediate recourse to all the practices of war that international law and municipal law permit. This does not mean that there is no role for Congress to play in such a case. The President's power to respond to a sudden attack with offensive war amounting to general war is an emergency power which exists only by virtue of the suddenness of the attack, and it is for Congress to take over the direction of policy as soon as possible. This distinction between an act of war and an invasion that institutes general war is illustrated by two events in American history.

During the first administration of Thomas Jefferson, the pasha of Tripoli made demands for tribute from the United States, and after various acts of harassment he declared war on May 14, 1801. On May 21, 1801, before he learned of this, President Jefferson had written the pasha that he was sending a "squadron of observation" to the Mediterranean "to superintendent the safety of our commerce, and to exercise our seamen in martial duties"; "we mean to rest the safety of our commerce on the resources of our own strength and bravery in every sea." (*222*, 135) The ships were instructed not to initiate hostilities, but two Tripolitan ships were blockaded in Gibraltar.[5] Attacked by a Tripolitan vessel, Captain Sterrett of the *Enterprise* reduced the Tripolitan ship to a shambles; then he disarmed and released it. In his first annual message to Congress on December 8, 1801, Jefferson observed:

> To this state of general peace with which we have been blessed, only one exception exists. Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean, with assurances to that power of our sincere desire to remain in peace, but with orders to protect our commerce salutary. The Bey had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the Tripolitan cruisers having fallen in with and engaged the small schooner *Enterprise* . . . was captured, after a heavy slaughter of her men, without the loss of a single

[5]Although the ships were instructed not to "initiate" hostilities, they were given authority to determine if the situation warranted offensive responses to Tripoli's "declaring war or committing hostilities." If Commodore Richard Dale discovered that Tripoli and the other Barbary powers had declared war on the United States, he was instructed to "chastise their insolence—by sinking, burning, or destroying their ships and vessels wherever you shall find them." *Naval Documents Related to the United States War with the Barbary Powers*, quoted in Sofaer, *201*, 210. Sofaer concludes that "the orders to Dale seem to permit the squadron to capture and destroy ships that attacked American commerce even if war had not been declared, and the statement in the orders that prisoners be put ashore suggests that the capture and destruction of vessels were contemplated."

one on our part. . . . 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. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.[6]

Alexander Hamilton made a violent attack on Jefferson's legal theory. He focused his argument on the release of the Tripolitan ship.

> It will readily be allowed, that the constitution of a particular country may limit the organ charged with the direction of the public force, in the use or application of that force, even in time of actual war; but nothing short of the strongest negative words, of the most express prohibitions, can be admitted to restrain that organ from so employing it, as to deprive the fruits of actual victory, by making prisoners of the persons and detaining the property of a vanquished enemy. Our Constitution, happily, is not chargeable with so great an absurdity. The framers of it would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and convenience. That instrument has only provided affirmatively, that, "the Congress shall have power to declare war"; the plain meaning of which is, that it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only, *to go to war*. But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary. . . .
>
> Till the Congress should assemble and declare war, which would require time, our ships might, according to the hypothesis of the message, be sent by the President to fight those of the enemy as often as they should be attacked, but not to capture and detain them; if beaten, both vessels and crews would be lost to the United States; if successful, they could only disarm those they had overcome, and must suffer them to return to the place of common rendezvous, there to equip anew, for the purpose

[6] *181*, IV, 314–15. Jefferson's account to Congress was less than candid. Captain Sterrett had been instructed by Commodore Dale to capture any vessel he engaged on his return trip from Malta to the squadron's station off Tripoli. He had been warned, however, that on the way to Malta he should avoid actions that would deplete the ship's meager water supply. Despite his receipt of a full report from Sterrett and Dale, Jefferson did not make available to Congress materials that would have indicated that Sterrett had been authorized to take offensive measures and that the release of the Tripolitan vessel was a purely tactical decision. See Sofaer, *201*, 211–13.



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Hamilton's complaint seems to have been a partisan effort to score at the President's expense. By 1798 he himself had adopted the Jeffersonian position. American shipping had repeatedly been seized by the French. On April 27, 1798, Congress had provided for enlarging the navy, and apparently Secretary of War James McHenry, who was eager for war with France, had asked Hamilton whether this action would justify the President in undertaking naval hostilities. On May 17 Hamilton had replied:

> Not having seen the law which provides the *naval armament*, I cannot tell whether it gives any new power to the President; that is, any power whatever with regard to the employment of the ships. If not, and he is left at the foot of the Constitution, as I understand to be the case, I am not ready to say that he has any other power than merely to employ the ships as convoys, with authority to *repel* force by *force* (but not to capture) and to repress hostilities within our waters, including a marine league from our coasts. Anything beyond this must fall under the idea of *reprisals*, and required the sanctions of that department which is to declare *or make war*. (*71*, X, 281–82)

Jefferson's position seems to have been correct. The Tripolitan attack ended with the defeat of the vessel, which did not raise a continuing threat, as a sudden invasion would have done. Consequently it was constitutionally mandatory for the President in 1801, as in 1798, to refer the question of whether a past event should be made the occasion for war to "that department which is to declare *or make war*."

The question of the President's power in the case of a sudden attack that precipitated general war came before the Supreme Court for the first time in *The Prize Cases* in 1863.* On February 8, 1861, the Confederate States of America was established. On April 12 Fort Sumter was attacked. On April 15 President Lincoln called out militia under his statutory authority. On April 17 the Confederate States began the issuance of letters of marque; on the same day President Lincoln proclaimed a blockade of the seven states that had seceded. On April 30 he extended the blockade to Virginia and North Carolina, which had seceded in the meantime.

*The Prize Cases* were proceedings for the condemnation of a British vessel, the *Hiawatha*, and a Mexican vessel, the *Brilliante*, seized as neutral ships for violation of a blockade before the congressional authorization of the blockade on July 13, and of two Virginia vessels, the *Crenshaw* and the *Army Warwick*, seized as enemy property under the same circumstances. Justice Grier wrote the opinion of the Court upholding the blockade. He said:

> By the Constitution, Congress alone has the power to declare a national or foreign war. . . .
>
> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force, by force. He does not initiate

> the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral.*"*

Justice Rensselaer Nelson wrote a dissenting opinion in the case of the *Hiawatha*, the argument of which covered all the seizures.

> . . . I am compelled to the conclusion that no civil war existed between this Government and the States in insurrection till recognized by the act of Congress 13th July, 1861; that the President does not possess the power under the Constitution to declare war or to recognize its existence within the meaning of the law of nations, which carries with it belligerent rights, and thus change the country and all its citizens from a state of peace to a state of war; that his power belongs exclusively to the Congress of the United States and, consequently, that the President of the United States had no power to set on foot a blockade under the law of nations, and the capture of the vessel and cargo in this case, and in all the cases before us in which the capture occurred before the 13th July, 1861, for breach of blockade, or as enemy property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored.*

Until the act of July 13,* which not merely authorized a blockade but in effect declared that the seceding states were in a state of insurrection, there was for Nelson no civil war, for the President could not establish this legal status. There was a "personal war" against "the individuals engaged in resisting the authority of the government." In carrying on this war under the act of 1795,* which authorized him to use the militia, and the act of 1807,* which authorized him to use the land and naval forces to suppress insurrection, the President had acted properly in executing municipal law, but his actions had no effect at the law of nations. The act of Congress of July 13, however, converted the war against persons into a territorial war and also explicitly legitimized the blockade.

Chief Justice Roger B. Taney and Justices Nelson, John Catron, and Nathan Clifford dissented without opinion in the case of the *Brilliante*. This is perplexing. Although we have no record of votes to confirm it, we are entitled to conclude that all three accepted Nelson's opinion in the case of the *Hiawatha*, holding the seizure both of foreign vessels and of vessels owned by Virginians not shown to be disloyal illegal because Congress had not instituted a state of war. Justice Catron wrote on behalf of all four dissenters to James M. Carlisle on the day after his argument for the libellee in the case of the *Brilliante,* asking for a copy of this concluding speech to be included in the report of the case and expressing his own views.

> It is idle to disguise the fact that the claim set up to forfeit these ships and cargoes, *by the force of a proclimation* [*sic*], is not founded on constitutional power, but on a power assumed to be *created* by Military



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[7] *Legal Historian*, 1 (1958), pp.

> necessity. *Necessity* is an old plea—old as the reign of Tibereas [*sic*]; its limits should be looked for in Tacitus. It is the commander's will. The End, we are told is to crush out the Rebellion; that the whole means are at the Presdt's discretion and that he is the sole Judge in the selection of the means to accomplish the End. This is a rejection of the Constitution with its limitations.[7]

This seems unrealistic. A large part of the territory of the United States had been occupied by a political organization which claimed sovereignty over this area and was attempting to expel the United States from it. The consequences were identical with those of a hostile invasion by a foreign power. The minority argued that until Congress had an opportunity to act, the President must allow this enemy access to the sea and must permit it to supply itself and to establish foreign credits for the prosecution of the war. In fact, rebellion had created a continuing emergency when Congress was not in session. When Congress convened, President Lincoln very properly referred the whole issue to Congress, which ratified and adopted his policies. The situation was not at all like the Tripolitan attack upon the American *Enterprise*, which raised a danger that disappeared at the end of the engagement.

The United States may enter into the state of war in only two ways: by a joint resolution or act of Congress, and by the declaration or invasion of an enemy. The President has no legal authority to initiate war. This was decided by a circuit court as early as 1806 in *United States v. Smith*. Colonel William S. Smith was alleged to have assisted a General Miranda to outfit an expedition in New York against the Spanish province of Caracas and was indicted under a statute that forbade setting on foot a military expedition against a nation with which the United States was at peace. Smith subpoenaed the secretary of state, the secretary of the navy, and two other officers. They refused to appear on the ground that the President had specifically told them that he could not dispense with their services at that time. Smith moved for an attachment to compel them to attend, making affidavit that he hoped to prove by the testimony of these witnesses that the expedition "was begun, prepared, and set on foot with the knowledge and approbation of the president of the United States, and with the knowledge and approbation of the secretary of state of the United States." Justice Paterson, sitting on circuit in New York, ruled for himself and District Judge Matthias B. Tallmadge that the trial should proceed without these witnesses because the testimony sought would be irrelevant.

> Supposing then that every syllable of the affidavit is true, of what avail can it be to the defendant on the present occasion? . . . Does it speak by way of justification? The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize

[7] *Legal Historian*, 1 (1958), pp. 51–52.

a person to do what the law forbids. . . . Does he possess the power of making war? That power is exclusively vested in Congress. . . .

US v. SMITH

> There is a manifest distinction between our going to war with a nation at peace, and a war made against us by an actual invasion, or a formal declaration. In the former case, it is the exclusive province of Congress to change a state of peace into a state of war.[8]

Until 1950, no judge, no President, no legislator, no commentator ever suggested that the President had legal authority to initiate war. The controversialists who have introduced the novel theory supporting such authority have been obliged to revise the war clause. Several reinterpretations have been attempted.

In defending President Harry Truman's unauthorized entry into the Korean War, Senator Paul Douglas argued that large wars must be declared by Congress but that the President may initiate small wars.

> There is indeed good reason, besides the need for speed, why the President should have been permitted to use force in these cases without a formal declaration of war by Congress. That is because international situations frequently call for the retail use of force in localized situations which are not sufficiently serious to justify the wholesale and widespread use of force which a formal declaration of war would require.
>
> In other words, it may be desirable to create a situation which is half-way between complete peace, or the absence of all force, and outright war marked by the exercise of tremendous force on a wholesale scale. This is most notably the case when big powers deal with small countries, and in situations where only a relatively temporary application of force is needed to restore order and to remove the threat of aggression. It would be below the dignity of the United States to declare war on a

[8]United States v. Smith, 1196–97. Smith was acquitted by the jury, United States v. Smith, 27 F. Cas. 1233, 1245 (C.D.N.Y. 1806). On October 4, 1809, in a letter to the new Spanish minister, ex-President Jefferson said:

> Your predecessor, soured on a question of etiquette against the administration of this country, wished to impute wrong to them in all their actions, even where he did not believe it himself. In this spirit, he wished it to be believed that we were in unjustifiable co-operation in Miranda's expedition. I solemnly, and on my personal truth and honor, declare to you that this was without foundation, and that there was neither co-operation, nor connivance on our part. He informed us that he was about to attempt the liberation of his native country from bondage, and intimated a hope of our aid, or connivance at least. He was at once informed, that although we had great cause of complaint against Spain, and even of war, yet whenever we should think proper to act as her enemy, it should be openly and above board, and that our hostility should never be exercised by such petty means. We had no suspicion that he expected to engage men here, but merely military stores. Against this there was not law, nor consequently any authority for us to interpose obstacles. On the other hand, we deemed it improper to betray his voluntary communication to Spain. (*89*, XII, 167)



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Similarly, Secretary of State William P. Rogers has suggested that unauthorized executive coercion of small countries might be validated by their defenselessness as, "there being no risk of major war, one could argue that there was no violation of Congress' power to declare war." (*185*, 1200) On this principle, the President might on his own initiative destroy the state of Israel with nuclear rockets because it has no powerful friends to resent the action.

Professor John Norton Moore suggested that "as a dividing line for presidential authority in the use of force abroad, one test might be to require congressional authorization in all cases where regular combat units are committed to sustained hostilities." (*121*, II, 814) Perhaps he wishes to permit the President to wage war with special forces, saboteurs, and mercenaries. But the existence of war does not depend on the table of organization of the armed forces. Moore may be thinking of episodic adventures as opposed to sustained combat, acts of war as opposed to war. Yet even acts of war may not be undertaken by the President without congressional authorization.

In defending President Lyndon Johnson's entry into war in Vietnam in a memorandum published in 1966, Leonard Meeker, the legal adviser of the State Department, argued that the President had a constitutional power to repel a sudden attack by North Vietnam on South Vietnam.

> In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO Treaty, for example, it is formally declared that an armed attack against Vietnam would endanger the peace and safety of the United States. (*113*, 484)

It is not probable, but certain, that the sudden attack which Madison and Gerry would permit the President to repel was an attack upon the United States. When they attributed this power to him, they did not impute to him the right to intervene in any foreign war in which one state had attacked another. They did not give him the right to choose between war and peace, or the right to make a judgment concerning the security of the United States. They instead recognized that foreign countries are able to institute a state of war and provided for the President to act in the defense of the country until Congress could assemble and act under its constitutional war power.

Senator Barry Goldwater may have the most original interpretation of the war clause. He believes that when the Convention struck from the draft constitution the authorization of Congress to *make* war, "the Framers intended to leave the 'making of war' with the President."* If it wishes, Congress may declare (that is, announce) the war. Thus, the President is a sovereign, and Congress acts as herald to proclaim his action. This, of course,

reverses the customary procedure by which Congress declares war, and the President then proclaims the existence of a state of war.

There are better authorities than these on the meaning of the war clause. After the Constitutional Convention had substituted the words *declare war* for *make war*, Butler "moved to give the Legislature power of peace, as they were to have that of war." (*53*, II, 319) Gerry seconded the motion, but it failed, undoubtedly because it would have curtailed the treaty power of the Senate. Butler described to the South Carolina legislature the Convention's rejection of Pinckney's motion to give "the sole power of making war and peace" to the Senate and then the rejection of his own motion to vest it in the President. "Some gentlemen were inclined to give this power to the President, but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction." (*53*, III, 250)

In 1787 Wilson, a member of the Constitutional Convention and one of the ablest lawyers of his day, assured the Pennsylvania ratifying convention:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war. (*49*, II, 528)

In 1793 President Washington concluded that the treaty of alliance of 1778 with France did not bind the United States to defend French territory in America from Great Britain in the current war; he declared the United States neutral. Alexander Hamilton justified the neutrality proclamation in these terms:

> If the Legislature have a right to make war on the one hand—it is on the other the duty of the Executive to preserve Peace till war is declared; and in fulfilling that duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the Country impose on the Government; and when in pursuance of that right it has concluded that there is nothing in them inconsistent with a *state* of neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the Nation. (*70*, XV, 40)

In reply James Madison argued that by construing a treaty dealing with war the President usurped the war power of Congress. This is rather captious, but it is noteworthy that both these delegates to the Convention agreed that it was for Congress alone to initiate war. Madison said:

> Every just view that can be taken of this subject admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war,



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> including the power of judging of the causes of war, is *fully* and *exclusively* vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite or proper; and that for such, more than for any other contingency, this right was specially given to the executive. (*111*, II, 642–43)

In 1803 Morris, who had helped give the Constitution its final shape, described the superior position of the Senate. "One important point, however, that of making war, was divided between the Senate and the House of Representatives." (*53*, III, 405)

William Paterson was a delegate to the Convention from New Jersey and was subsequently an associate justice of the Supreme Court. As we have seen, in the latter capacity he ruled in *United States v. Smith* in 1806 that "it is the exclusive province of congress to change a state of peace into a state of war." No delegate to the Convention, and no delegate to any state ratifying convention, gave a different interpretation to the war clause. These authorities, rather than modern theorists, should determine the proper constitutional interpretation of that clause.