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CONGRESS, THE PRESIDENT AND THE POWER TO WAGE WAR

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WHEN the Constitutional Convention was debating allocation of the war power within the federal government George Mason of Virginia said that he "was against giving the power of war to the Executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace." Oliver Ellsworth of Connecticut, later the third Chief Justice of the United States, expressed the same thought. "It should be more easy to get out of war," said Ellsworth, "than into it."¹

We have managed, over the years, to reverse the proper order of things. We have managed to clog peace and facilitate war.

The Founding Fathers were no visionaries. They did not believe that in terms of formulating and executing the policy of a great nation, it is in fact easier to make peace than to make war. It is in fact, as Ellsworth was careful to say, harder to make peace and simpler to make war. But the Framers of the Constitution intended that our nation's institutions and processes should be so arranged as to make it harder to

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¹ See Madison, *Notes of the Debates in the Federal Convention of 1787*, at 475-76 (Ohio Univ. Press ed. 1966).

do the easy thing, and easier to achieve the difficult. For this reason, they insisted that the declaration of war not be an executive prerogative, as it had been under the British Crown. They insisted also that it not be left to the Senate, a single, less numerous chamber which they viewed as capable of more expeditious action than the House or than Congress as a whole. Rather they provided that Congress, acting through both Houses, should have the power to declare war.

The Convention earlier had thought of using another, more comprehensive word, and empowering Congress to *make* war. But this term seemed to vest in the Congress the function of conducting a war once it had started, and also possibly to deny the power of the Commander-in-Chief to repel attacks against the United States. Hence the Framers said, "declare," not "make." The President was to be Commander-in-Chief, exercise independent tactical control over the armed forces, and see to their safety. Congress, as the Framers knew and as Congress itself has on occasion discovered—for example during the Civil War—cannot well exercise command, and should not attempt to do so. The President was to have power also to repel attacks, and we must say in modern times, to respond to the threat of attacks against the United States or against our forces, when instant action is of the essence.

Yet the Framers were extraordinarily wary of standing armies and of their use by the Executive. They 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." Moreover, Congress was given the overall, comprehensive "necessary-and-proper" power.

The "necessary-and-proper" clause of article I of the Constitution authorizes Congress to make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ." The reference is to the previously enumerated powers of Congress. But there is another portion of the necessary-and-proper clause, not so often cited, which is of the greatest consequence. The clause also charges Congress to make all laws which shall be necessary and proper for carrying into execution "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"—a phrase that includes the President! The implied powers of the federal government, most of the unstated powers that inhere in

nationhood, most everything that went without saying or that is residual—all that belongs to Congress.

Against this roster of congressional functions stand the summary provisions of article II of the Constitution, vesting the executive power in the President, declaring that he shall be Commander-in-Chief, and authorizing him, with the advice and consent of the Senate, to make treaties and appoint ambassadors.

The text of the Constitution and its history thus plainly limit the President. Yet the law of the Constitution under our system is not only defined by the text, but influenced by usage long indulged. The earliest practice conformed to the division of war-making powers intended by the Framers. Later practice, however, in this century, and on occasion in the nineteenth, has tended to enlarge the scope of independent presidential initiatives.

I shan't rehearse in any detail a lengthy series of episodes, many of them bearing exotic names, and few to be counted among the glories of American history. There is General Jackson's pursuit of the Seminole Indians into Spanish Florida on President Monroe's authorization in 1818; President Polk's move to the Rio Grande, where the Mexicans not unnaturally—since they claimed the territory—attacked his forces, thus beginning the Mexican War, which Congress subsequently could not help but declare; President McKinley's intervention in China as part of the Boxer Expedition; interventions in the Caribbean by Theodore Roosevelt, Wilson, and Coolidge; President Wilson's bombardment of Vera Cruz and pursuit of Pancho Villa into Mexican territory; Korea; and the dispatch of troops by President Eisenhower into Lebanon, and by President Lyndon Johnson into the Dominican Republic.² (I have omitted mention in this list of President Lincoln's actions at the start of the Civil War, or lesser instances of the domestic use of troops, as by Presidents Eisenhower and Kennedy, because whatever questions might be raised about Lincoln's authority, the issue is different. The President is charged to take care that the laws be faithfully executed, meaning that the authority and integrity of the government is maintained, and he must act on his own, at least so long as Congress has not by statute prescribed the means he may or may not use.)³

² See Hearings before the Committee on Foreign Relations, United States Senate, on S. Res. 151, 90th Cong., 1st Sess. (1967).

³ See *The Prize Cases*, 2 Black 635 (1863).

The point is that even against the background of presidential foreign ventures which I have sketched in, the decisions made in the first half of 1965, and executed thereafter, to commit the nation to full-scale war in Vietnam mark the farthest extension of presidential power. Certainly the power of the President in matters of war and peace has grown steadily for over a century, since before the Civil War. The decisions of 1965 may have differed only in degree from earlier stages in this process of growth. But there comes a point when a difference of degree achieves the magnitude of a difference in kind. The decisions of 1965 amounted to an all but explicit transfer of the power to declare war from Congress, where the Constitution lodged it, to the President, on whom the Framers refused to confer it.

Prior presidential initiatives have been fitted—at least the variously plausible attempt was made to fit them—into theories that fall short of complete repudiation of the constitutional division of war-making power between Congress and the President. Essentially the President's power has been justified as necessitated by, and arising in, emergencies. The President has been viewed as entrusted with a reactive, not a self-starting function; as possessing the power to respond to an emergency, not the affirmative, ultimate power to commit the material and moral resources of the nation to full-scale war.

The decisions and actions of 1965 outran such theories. There was no sudden attack aimed at or endangering forces of the United States of the sort that can be deemed to require instant response and thus to make resort to Congress impossible if effective action is to be taken. Nor were we in any sense, as in some of our Latin American ventures, interposing our forces in a foreign country to protect American citizens and property, while remaining neutral with respect to conflicts there.

The Korean action, no doubt, stretched presidential emergency power to a prior extreme. But the invasion of South Korea from the North was sudden, and it did threaten to succeed quite rapidly and irrevocably, thus affecting the position of our own forces in neighboring Japan. I am not maintaining that President Truman's independent action in Korea should necessarily be viewed as falling within the President's legitimate power. I am not attempting to adjudicate the Korean case. I merely emphasize the sudden nature of the emergency to which Pres-

ident Truman responded, and consequently the measure of plausibility, however faint, with which his action can be made to fit the established sudden-attack theory of presidential power. Again, there is a measure of plausibility in the attempt to fit the dispatch of troops to Lebanon by President Eisenhower before 1965, as well as President Johnson's intervention in the Dominican Republic later, into the neutral-interposition theory. But no such fits are possible for the round-the-clock bombing of North Vietnam, which began in February, 1965, or for the sending of 50,000 troops to fight in South Vietnam, by a single decision that President Johnson announced on July 28, 1965, commenting, "this is really war."⁴

It was really war. It raised the American troop level to over 100,000, soon of course to be multiplied five times over, and it committed, as President Johnson had said some two weeks earlier, on July 9, "our power and our national honor"⁵—by a deliberate decision, considered over an extended period of time, not forced by sudden events; a decision functionally and in every other way amounting to an initiative for war. If this decision was not for Congress under the Constitution, then no decision of any consequence in matters of war and peace is left to Congress. This time, no justifications drawn from sophisticated theories would do. The constitutional division of powers had been repudiated in the sincere, but I believe grievously misguided, conviction that it no longer suited modern conditions.

I may add that if the exercise of presidential power in 1965 was valid, then of course so were the march into Cambodia in April, 1970, and the use of American air power in Laos in 1971. Indeed, taken in isolation, and assuming that American forces are lawfully in Vietnam and that no act of Congress at the time forbade the incursions into Cambodia and Laos, these actions, I would say, fall within the ordinary powers of the Commander-in-Chief, like the decisions to invade North Africa in 1942, Europe in 1944, or North Korea in 1951. But in truth these episodes were the culminating moves in a series of presidential initiatives which, if we continue to accept them, will have totally stripped Congress of any power to choose between war and peace. Let us not forget, the Indochina war is no maneuver on our own border,

⁴ See *New York Times*, July 29, 1965, at 12, col. 1.

⁵ See *New York Times*, July 10, 1965, at 6, col. 1.

as when President Polk prodded the Mexicans into war. Nor did it all begin, as in Korea, with a response by the Commander-in-Chief to an attack that had to be stemmed, if at all, within a matter of days. Deliberately, following an extended decision-making process behind closed doors, President Johnson committed, as he said, "our power and our national honor" to full-scale war thousands of miles away—entirely on his own authority.

It is said that President Johnson acted in fulfillment of an obligation we undertook under the Southeast Asia treaty.⁶ Whatever else the obligation we incurred may or may not be, it was in terms of the treaty itself no more than a commitment to "act to meet the common danger in accordance with [our] constitutional processes." Language as precise as this was missing in the draft of the earlier North Atlantic Treaty as it came to the Senate for ratification, and that treaty was not ratified until assurances were given by the Secretary of State that it placed the United States under no obligation to go to war automatically, otherwise than by following the processes required by our domestic law.⁷ (Of course, under our law, the powers of the President are considerable in case of sudden attack.) In order to avoid this point of contention, the Southeast Asia treaty included the specific language I have quoted, providing that each signatory would act in accordance with its constitutional processes. Whether or not the treaty imposed any sort of obligation on us in Vietnam, it did not authorize the President to discharge such an obligation on his independent initiative. Rather the treaty relegates us to the division of powers provided for in the Constitution. The treaty confers no power on the President that the Constitution does not give him. And it is, in any event, most improbable that any treaty could override the Constitution of the United States so as to change the allocation of powers between branches of the federal government.

President Johnson relied heavily on the Tonkin Gulf resolution of August, 1964, as a source of authority, although the Nixon Administration abandoned it, and Congress repealed it in December, 1970.⁸ The language of that resolution is so extraordinarily broad that it can

⁶ 6 U.S. Treaties 81 (1955).

⁷ See North Atlantic Treaty, Report of the Committee on Foreign Relations, United States Senate 8, 81st Cong., 1st Sess. (1949); A Decade of American Foreign Policy, Basic Documents 1941-49, at 1337, Doc. No. 123, Senate Foreign Relations Committee, 81st Cong., 1st Sess. (1950).

⁸ 78 Stat. 384 (1964); 84 Stat. 2053 (1970).

be read to have given away anything and everything. Although the text does express the intention to make the resolution "consonant with the Constitution of the United States" as well as with the Southeast Asia treaty and although portions of the brief debate that attended passage of the resolution support this intention, other passages in the debate do sound as if Congress had indeed given away anything and everything. Yet the first wisdom in the construction of statutes is that the intent of the legislature is to be understood against the background of facts and circumstances existing at the time of enactment, to which the legislature was addressing itself. Congress addressed itself immediately to the relatively trivial Tonkin Gulf incident. One would presume, therefore, that Congress intended to approve presidential reactions commensurate with that incident and with incidents of that sort, and not necessarily an undertaking of the magnitude of the Vietnam ground and air war.

If the resolution is read to have done more, the question arises whether it is within the power of Congress to give prospective approval to actions that would not, without such approval, conform to the Constitution. If without the Tonkin Gulf resolution the President had no constitutional authority to commit the nation to war in circumstances then undefined and unforeseen, could Congress prospectively, by blank check, give him that authority? In other contexts, the Supreme Court has held that Congress has no power to give away its power by delegating it to the President without standards for use in the future in indefinite circumstances. The relevant, well-known cases—not in the least shaken or rendered obsolete—are *Schechter Poultry Corp. v. United States*,⁹ *Panama Refining Co. v. Ryan*,¹⁰ and more recent and most relevant, *Kent v. Dulles*.¹¹ The doctrine that delegation without standards is unconstitutional, which was decisive of these cases, is no mere technical teaching. It is concerned, as I have argued elsewhere,¹² with the sources of policy, with the crucial joinder between power and broadly based democratic responsibility, bestowed and discharged after the fashion of representative government. Delegation without standards short-circuits the lines of responsibility that make the political process meaningful.

⁹ 295 U.S. 495 (1935).

¹⁰ 293 U.S. 388 (1935).

¹¹ 357 U.S. 116 (1958).

¹² See Bickel, *The Least Dangerous Branch* (1962).

*United States v. Curtiss-Wright Corp.*¹³ is often cited as indicating a modern development of independent presidential power, which cuts across, it is said, what would otherwise be the requirements of the doctrine of delegation. The case is a rather eloquent, if not grandiloquent, opinion by a Justice (Sutherland) whose eloquence was usually reserved for decisions constricting rather than enlarging the power of the federal government. The opinion has, therefore, the impact of the unexpected. But it is really quite a limited holding. Congress had, by joint resolution, authorized the President to prohibit sales of arms and munitions to countries then engaged in a specific armed conflict in the Chaco, whenever the President found that such a prohibition would contribute to the reestablishment of peace between those countries. The President used this authority, and the joint resolution was attacked as void for excessive delegation. The Court assumed without deciding that the delegation would have been excessive if applicable to internal affairs. But this assumption was probably not valid even at that time. Little more was delegated to the President than the power to establish a necessary factual condition precedent. The joint resolution closely defined what the President was to do, and where he was to do it—a far cry from the Tonkin Gulf resolution. This was hardly delegation running riot.¹⁴

Having assumed *arguendo*, without deciding, that as applied to domestic affairs the delegation would be unconstitutional, the Court declared that “within the international field [Congress] must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.” Hence the delegation was held valid. There followed some eloquent assertions of independent presidential power in the “vast external realm,” which were largely *dicta*, and were restricted to statements that the President alone can “speak or listen as a representative of the nation;” that he alone negotiates treaties and that the Senate cannot intrude, although it must give advice and consent; that the President has “plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations,” which in context must be taken as a restatement of his role as sole spokesman and listener, especially since the Court added that presidential powers

¹³ 299 U.S. 304 (1936).

¹⁴ *Cf. Schechter Poultry Corp. v. United States*, *supra* n.9.

“must be exercised in subordination to the applicable provisions of the Constitution;” and that the President, and not Congress, has the better opportunity of knowing conditions in foreign countries, because the President has his agents, and is better able to maintain secrecy. That was all. Nothing about powers to go to war or to use the armed forces without restriction. So far as broad delegation without standards of legislative power to the President is concerned, *Kent v. Dulles*,¹⁵ decided a generation later, has made clear that it will no more be tolerated in the “vast external realm” than domestically. Not that *United States v. Curtiss-Wright Corp.*,¹⁶ on its facts, ever held to the contrary.

The Tonkin Gulf Resolution declared itself to be “consonant with the Constitution.” The sum of it is that, consonant with the Constitution, there was no need to come to Congress for authority the President has, as for example, to fire back when attacked. And it was no use coming to Congress for authority the Congress cannot constitutionally confer at large, for prospective use in indefinite circumstances. It is claimed further that Congress ratified the executive action by appropriating monies to support and steadily enlarge it. Congress assuredly did so, and assuredly it did so partly under a misapprehension that it was in principle obliged to extend general support, even if free to make its own judgments on questions of detail, and that in any event it was assuming no general responsibility by extending support. This is precisely the misapprehension it is necessary now to dispel.

It is asserted also in defense of independent presidential action that Congress is authorized by the Constitution only to declare war; and in modern circumstances, that is, after all, often not what is wanted. It is too much, and since too much is all that Congress has authority to do, it must be for the President to do anything somewhat less, which in present world conditions is generally what is required. The argument is altogether fallacious. There may actually be some sort of difference between the war we have waged in Vietnam and a war that Congress might have declared, although the difference, if any, is metaphysical. But there is utterly no reason to think that Congress has only the megapower to declare war in the exact terms of the constitutional clause that authorizes declarations of war and no mini- or intermediate power

¹⁵ *Supra*, n.11.

¹⁶ *Supra*, n.13.

to commit the country to something less than a declared war. Congress, as I have emphasized, has the necessary-and-proper power, the power to do anything that is necessary and proper to carry out the functions conferred upon it and upon any other department or officer of the government. If in the conditions of our day it is necessary to carry out the power to declare war by taking measures short of a declaration of war, everything in the scheme of government set up by the Constitution indicates that Congress has the needed authority.¹⁷

The strongest and most searching argument that is made in support of the constitutional power of the President to do what President Johnson did in 1965 relies on the practice which has steadily eroded the original constitutional scheme and on assessments of modern conditions which, it is contended, require a revised conception of presidential power. Granted that President Johnson carried the practice of a century forward, granted even that he extended it by some additional degrees, but usage, gradual changes by successive degrees to a point where a change in kind may be perceived—these, it is said, have been the life of the American Constitution. “Our Constitution,” Justice Brandeis once wrote, “is not a strait-jacket. It is a living organism. As such it is capable of growth—of expansion and of adaptation to new conditions.”¹⁸

Now, Brandeis was talking about the growth of the great open-ended provisions of the Constitution—chiefly the Bill of Rights and the fourteenth amendment—which were intentionally framed in general terms, precisely so as to leave open the possibility of their evolution over time in light of new conditions. Constitutionalism also implies, however, the stability of certain structural arrangements, the stability and binding nature of the rules of the game, so to speak, which may be changed only by express amendment. We would not think, for example, that we could change the length of the President’s term, as fixed in the Constitution, or abolish the electoral college, otherwise than by reaching a new consensus through the difficult amendment process and writing new provisions into the Constitution. Moreover, if the Constitution is a living organism, it grows and adapts itself without losing its essential shape. It does not undergo radical mutations, except by

¹⁷ For a treatment of the issues discussed so far in this paper which reaches conclusions similar to the ones here stated, see, e.g., Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771 (1968).

¹⁸ Quoted in Bickel, *The Least Dangerous Branch* 107 (1962).

the process of amendment. There is a considerable difference, therefore, between extending the President's war-making power by another degree and leaping over the brink to a change in kind, to an explicit, notorious, inexpiable alteration in the shape of the original structure.

Be that as it may, it is useful to ask, as the argument about growth in the constitutional organism bids us ask, putting aside the constitutional text and its history, whether the change in the division of war-making power between President and Congress, resulting in what is at the least a marked imbalance in favor of the President, has been an element of beneficial growth in the Constitution, a necessary consequence of changes in the world about us, and justified by them. If this is the question, it makes a difference, obviously, whether one thinks that the Indochina war has been a noble effort on our part in the service of peace and freedom, which we will rue not carrying to a successful conclusion, or a moral and practical disaster. It is no accident that the constitutional issue has drawn so much lively interest these past couple of years. Nothing so enlightens us on the rights and wrongs of institutional arrangements as the wrong practical and moral results of an institutional arrangement.

For myself, I formed the opinion some years ago that the war has been a moral and practical disaster, and I believe further that we might have avoided it, or might at least avoid its repetition, if our institutional arrangements were such as to foreclose presidential wars. Many of us who hold this opinion are prone to join to it attitudes which I consider deplorably sentimental, or self-righteous, or both; and I digress for a moment on this point.

The country was awash with sentimentality just a few months ago as it contemplated the conviction of Lieutenant Calley. There was sentimentality to the left and sentimentality to the right. One should, of course, have compassion for the man, but he is, on the evidence, guilty of a vicious deed, and there is no basis for identifying most of his fellow soldiers with him, or all his superiors in the Army and the government, or all of us as Americans. "I do not know the method," said Burke, "of drawing up an indictment against an whole people." We might remember that. (He said it about us, incidentally.) It is sheer sentimentality, in my view, to hesitate about punishing the perpetrator of a vicious crime because some others may have committed

similar crimes and gone unpunished and, beyond that, because of some vague feeling, not grounded in evidence, that none of us is fit to throw the first stone at anyone. The retribution visited by the criminal law is never perfect, and need not be. It is just nonetheless, and fulfills its function of vindicating the moral order. As for the vague feeling of common guilt—there is common guilt, no doubt, but for what and in what degree? Even indiscriminate air-bombardment, wrong as it may be, is not the same, after all, as the wild and willful shooting, face to face, of harmless women and children.

On the other hand, it is self-righteousness and moral arrogance, I think, to condemn as criminal policies that were wrong, that constituted, indeed, moral error, but whose intent and origin were those of our Indochina policy. What propelled us into this war, in my judgment, was a corruption of the generous, idealistic impulse which, together with a sense of legitimate self-interest, informed and sustained this country's foreign policy through the Second World War and in the years after. I use the word corruption not to connote evil, but merely decay. Our self-interest began to be invoked mechanically rather than realistically, and the altruistic impulse decayed into self-assurance and self-righteousness; it became, as generosity and idealism assuredly can, oppressive and in the end cruel. All sorts of ideologies, humanitarian and generous at the source, have a way of decaying in this fashion, as do religious ideas. Of course, they often draw to themselves authoritarian, sadistic and otherwise morally deficient personalities. But the seeds of decay are in the ideologies themselves, in their pretensions to universality, in their over-confident assaults on the variety and unruliness of the human condition, and in the intellectual and emotional imperialism of concepts such as freedom, equality, and, yes, even peace.

Well, though begun and continued by men with a normal moral endowment, the war has been a grievous error, in my opinion. It has been wrong too, I believe, for another reason, which is of particular interest from an institutional point of view. A democracy cannot well—compare the War of 1812 and the Mexican War—and should not, wage a war which a substantial and intense body of opinion—whether amounting to 35 or 45 or 51 per cent of the electorate—resolutely opposes on both political and moral grounds. Even autocracies cannot effectively wage wars in such circumstances. Of course the Constitution

provides for no special majority, two-thirds or the like, and certainly not for any kind of referendum, before the country can go to war. Congress may declare war by the narrowest of majorities, and no individual is entitled to nullify application to himself of a declaration of war because he disagrees with it, any more than he can refuse to render unto Caesar the things which are Caesar's when it comes to other disagreeable laws passed by narrow divisions. This is not a question of law. It is a question of the forbearance and continence of those who govern, without which law cannot be effective, or on some occasions just. To revert again to Burke: "It is not," he said to the King's government in the second speech on conciliation with America, "it is not what a lawyer tells me I *may* do; but what humanity, reason, and justice, tell me I ought to do." Making war is not the same as enacting many another law, and it cannot be done effectively by a narrow majority, and should not be.

Now, I suggest that the double error of this terrible war is a product in good part of the imbalance we have permitted in the division of war-making power between the President and the Congress. To this sort of double error, the President as an institution is all too prone. I make bold to suggest even that something of this sort is what the Framers of our Constitution—conscious, of course, of George III's error, which Burke pointed out—had in mind when they built as they did, not as Lyndon Johnson, extending the blueprints of other Presidents, rearranged the architecture. Something of this sort is what George Mason had in mind when he urged that we should clog war and facilitate peace.

The President represents a distinct constituency, of course, and ought properly, therefore, to speak with an independent voice and to have considerable leverage. But the President is a single official, in many ways a distant and regal personage. The discipline of the democratic process plays on him only grossly, at wholesale. He commands attention and he communicates with greater impact than any other institution of government, but he is not equally communicated with. His policy-making process is necessarily private, almost like that of a court. The large results become known, and on these he can be judged and held to account. But the process by which he reaches them is seldom open to much scrutiny and, consequently, little open to influence.

Congress, on the other hand, is institutionalized communication, access. Congress reflects in its very membership varieties of views and represents most groupings of opinion, to each of which it parcels out a share of power, at least negative power. It is subject, therefore, to being disabled by a minority of its membership from deciding too much, too soon, or even at all. Congress, in short, is the institution where we do not merely hold our government to account, but take part in it. It isn't always, but it can be. The Presidency by its nature rarely is.

The Presidency can speak for an existing broad consensus, and its genius is action. But its antennae are blunt, and it can mistake silence for consensus. Its errors are active ones, like the Indochina war—sins of commission. The genius of Congress lies precisely in its antennae, in its differentiated sensitivity. Its errors generally are those of irresolution, sins of omission; and we have learned, I trust, that these are, by and large, the less grave sins—in government, at any rate. The Tonkin Gulf resolution and the congressional war hawks of 1812 to the contrary notwithstanding, I do not believe the Congress, if it had been conscious of its own responsibility, would have plunged us into the Indochina war, or let it run as it has.

If, as I believe, we have permitted a serious imbalance to arise between President and Congress, which is bad for the country and reduces the capability of our government to devise and to implement effectively, policies that serve the national interest—if so, then what is to be done? The imbalance is not only bad in practice and wrong in theory. It runs counter to the constitutional text and to its history. Does it not follow that the Supreme Court, which has more than once been asked to declare the Indochina war unconstitutional, should do so?

For my part, I think the Court has been wise to exercise its discretion so as to avoid passing on the constitutionality of the war¹⁹—even assuming, which we do not know, that if it did take jurisdiction, the Court would, indeed, declare the war unconstitutional. If the Court were to hold the war unconstitutional, the effect would not be to cause Congress to spring into action. The effect would be to make it less likely than otherwise that Congress will assume its responsibility, now and in

¹⁹ See *Mora v. McNamara*, 389 U.S. 934 (1967); *Holmes v. United States*, 391 U.S. 936 (1968); *Hart v. United States*, 391 U.S. 956 (1968); *McArthur v. Clifford*, 393 U.S. 1002 (1968); *Massachusetts v. Laird*, 400 U.S. 886 (1970); *Orlando v. Laird*, — U.S. — (1971).

the future. There would be sighs of relief on Capitol Hill to have had the responsibility taken off Congress' shoulders; and in the future, likely as not, Congress would continue to tolerate presidential initiatives and wait for the Supreme Court to hold them unconstitutional.

This is speculative and infected no doubt by a general bias in favor of political rather than judicial government. But there is another aspect of the problem. The Court cannot declare the war unconstitutional and then do nothing about it. That would deny its nature as a court of law, sitting to decide cases and see controversies to their resolution. And it is on its nature as such an institution of law that the Court's whole claim to authority rests. The Court cannot well forbid—as it has been asked to do—the sending of some soldiers to Vietnam, but allow those already there to remain indefinitely. It cannot well declare the war unconstitutional and then fail to respond to a further suit asking it to direct the President's agents to stop the war. The Court, rather, would inevitably be drawn into directing and supervising the conclusion of the war, just as it has directed and supervised the desegregation of the public schools in the South and the reapportionment of state legislatures and of the federal House of Representatives.

I assume the President would accept the judgment that our entry into this war—his predecessor's entry—was unconstitutional, and he would obey it. But he would have to know what to obey, and the Court would have to tell him. It would have to constitute itself a committee to end the war, to manage troop withdrawals and peace negotiations. The Justices could do it, as a technical matter. They would simply retain jurisdiction, the President would report to them from time to time, and they would issue directives. There is nothing impossible about this, but it is wrong. We would match the wrong way of getting out of a war to the wrong way of having gotten into it.

No, the answer lies with Congress. Whatever aggrandizement of presidential power we have witnessed, the practice of recent decades or of a century cannot have worked a reduction of the residual legislative power of Congress, if Congress should but exercise it. The power of Congress may have lain in disuse, but it is as legitimate as the day it was conferred. From it flows the duty to act. Congress should prescribe the mission of our troops in the field in accordance with a foreign and war policy of the United States which it is for Congress to set when it

chooses to do so. And Congress should equally review and settle upon an appropriate foreign policy elsewhere than in Vietnam and reorder the deployment of our forces accordingly. It should finally, by statute, as Senator Javits has suggested, reassert its own general authority in matters of war and peace and redefine the President's.

I recognize that the United States remains a world power in a tense and nuclear world and as such must retain credible capability to act in a crisis. And while American power has, no doubt, been spread too thin, and mutual security treaties have proliferated beyond the likely limits of credibility, it does remain true that our security and the peace of the world still rest in some measure on international commitments undertaken by the United States. If we redefine presidential power, will we in effect be dismantling all that we have built in the world, by declaring that the United States could not lawfully react with the adequately speedy use of force in a crisis?

The answer, it seems to me, is that no one should ever reasonably have assumed that the United States could go to war by presidential say-so, contrary to our domestic constitutional arrangements, in pursuance of a treaty or like commitment; and our commitments, including the North Atlantic Alliance and the Southeast Asia Treaty, were not understood so to provide. All that commitments of this sort can do is affect the reaction to a crisis of the President and of Congress, each functioning as the Constitution envisions.

The President under our Constitution has power in an emergency to guard against attack or the threat of attack on the United States, or on lawfully deployed forces of the United States. If, in the event of an attack on a friend or ally, there is implicit the threat of an imminent attack also on us, the President can react. The existence of a mutual security commitment will enter into his decision. If there is an attack on a nation with which we have no mutual security arrangement, it will ordinarily be quite obviously far-fetched to deduce that a threat of an attack upon ourselves has thus arisen. If, on the other hand, there is an attack on a nation with which we do have a mutual security treaty, circumstances are certainly imaginable in which the President may deduce that the attack on our ally signals the danger of an imminent attack upon ourselves. In such a case, he may react. This is the difference that a commitment can make and will continue to make. Constitution-

ally it is the only way even a treaty could ever enhance the President's independent war-making power.

Again, as has been the case all along, if an attack on a friendly nation creates an adequate consensus in the country that we should spring to the help of our friend, Congress can be persuaded to act and act fast enough. If Congress will not act, or if our friend is devoured within a day or two, then it is surely evident that we could not have helped effectively anyway. That should be quite plain to any realistic foreign head of government. De Gaulle knew it. A mutual security treaty can only make it more likely than it might otherwise be that Congress will wish to commit American forces.

The one thing we and the world have learned from the Vietnam experience is that without understanding why we fight, and without the will to fight as a nation, we cannot fight effectively. Hence if the conditions are such that the threat of an attack upon ourselves cannot be deduced, and if Congress won't take the country into war, Presidents attempting what Lyndon Johnson attempted are only heading for failure. This much friend and foe alike surely know about us by now. We do well to recognize it ourselves and redefine our domestic institutional arrangements accordingly.